



Introducing Copyright

A plain language
guide to copyright
in the 21st century

JULIEN HOFMAN

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A plain language guide to copyright in the 21st century

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Commonwealth of Learning
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The Commonwealth of Learning (COL) is an intergovernmental organisation created by Commonwealth Heads of Government to encourage the development and sharing of open learning and distance education knowledge, resources and technologies.

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Contents

Author's Note / ix

Background / xi

1 – Copyright History / 1

Copyright before the printing press / 1

Printing presses before copyright / 2

Copyright in Britain / 4

Copyright in the United States / 6

French copyright and the *droit d'auteur* / 7

International recognition of copyright:

 the Berne Convention / 8

Early patents / 9

Comments / 10

2 – International Copyright Agreements / 11

Some features of international agreements / 11

Berne Convention and Union / 13

Universal Copyright Convention / 15

International agreements on copyright-related rights / 17

TRIPS agreements / 18

TRIPS-plus agreements / 19

International copyright agreements and the United States / 20

The International Office and WIPO / 21

Comments / 23

3 – Copyright Works / 25

Which works qualify for copyright? / 25

Who has copyright in a work? / 33
Copyright protection for foreign authors and artists / 37
Copyright-related rights / 37
Database protection / 37
Rights in personal images / 38
Comments / 38

4 – Holders' Rights / 39

Six basic rights / 39
Five copyright remedies / 44
Protecting copyright with technology / 47
Protecting moral rights / 47
Transferring copyright rights / 48
Copyright-related rights / 50
Copying in education and plagiarism / 51
Comments / 54

5 – Users' Rights / 57

Term / 57
Special users' rights in copyright works / 60
Limits to holders' rights in a musical work / 68
Right of exhaustion or first sale / 68
Orphan works / 69
Users in developing countries / 69
Comments / 70

6 – Copyright Licences / 73

Individual licences / 73
General licences / 74
Blanket licence to copy / 74
Grand rights licence for dramatic works / 75
Licence to use music / 75
Master rights licence / 75
Licences for performers' rights / 76
Comments / 76

7 – Collecting Societies / 79

What are copyright collecting societies? / 79

Regulating collecting societies / 81
Controlling the cost of copying / 82
Comments / 85

8 – Open Licences / 87

Software open licences / 87
Types of software open licences / 88
Other software licences / 90
Advantages and disadvantages of open licence software / 92
Non-software open licences / 95
Creative Commons licences / 95
Licence pollution / 106
Access to knowledge and information sharing / 107
Comments / 109

9 – Digital Rights Management / 111

Digital and non-digital copying / 111
Digital rights management technology / 112
International DRM protection / 113
Domestic DRM protection / 115
Problems with DRM / 115
Alternatives to DRM / 116
Comments / 117

10 – Software Protection / 119

Software a literary work / 119
Software patents / 120
Advantages of software patents / 122
Opposition to software patents / 123
How software patents are possible / 123
Special protection for software / 125
First sale and software licensing / 125
Protection for silicon chips / 126
Comments / 127

11 – Traditional Knowledge / 129

Traditional knowledge, copyright and patent / 129
Traditional knowledge outside Western Europe / 130

National and international protection for traditional
knowledge / 131

Copyright in traditional knowledge / 132

Comments / 137

12 – Copyright Reform / 139

Copyright as a fundamental right / 139

Copyright as an incentive for creativity / 140

Alternative income for authors and artists / 140

Protecting the copyright industry / 141

Comments / 143

Index / 145

Author's Note

This book had its origins in a meeting I attended in 2005. Paul West, the Director for Knowledge Management and Information Technology at the Commonwealth of Learning, invited some of those interested in education and copyright to get together to draft a letter to Commonwealth Ministers of Education explaining how important copyright is for education.

Subsequently Paul became concerned that educators did not always understand the Creative Commons licences they were using and encouraging others to use. Out of this concern came a paper I wrote with Paul about open licences. Paul then asked me to expand the open licences paper into a book about copyright for educators.

I might not have agreed so readily had I known how difficult it would be. Deciding what to put in, what to leave out and how to say it in language that was plain without being puerile took more time than I had anticipated. I had a draft to distribute to a group interested in copyright that met at the Fifth Pan-Commonwealth Forum on Open Learning in London in July 2008. Since then I have revised the draft. I want to thank those who have contributed to this final version and, in particular, Professor Solly Leeman. His comments, as always, were detailed and helpful.

The chapter on open licences is based on the paper Paul and I wrote and was co-authored with Paul. That paper was published in *Education for a Digital World*, edited by Sandy Hirtz and co-published by BCCampus and the Commonwealth of Learning in 2008. It is available for download from the Commonwealth of Learning website.

Introducing Copyright

Quotations from the international treaties on copyright, from TRIPS and from the Cybercrime Convention are taken, with permission, from the websites of the World Intellectual Property Organization, the World Trade Organization and the Council of Europe.

Some readers may be surprised at the lack of references to other works. In the present age, an age of online library catalogues and Internet search engines, it seems unnecessary to load an introductory work with references that are soon out of date and that readers can easily find for themselves.

I wrote this book while on sabbatical leave from the University of Cape Town. During this time I was fortunate to be a visiting academic in the Faculty of Law at the University of Oxford.

Julien Hofman
Tackley, Oxfordshire
October 2008

Background

Ordinary people, often without realising it, have always produced work that copyright protects. In the past this work took the form of personal or business letters, school or college essays and artwork or photographs. To that list we must now add business reports and presentations, emails, blog entries, digital photos and personal videos. Many teachers also now produce their own teaching materials.

Most of the new forms of copyright works were made possible by computers and the Internet. But computers and the Internet have also made it possible to copy and distribute the work of others and so infringe their copyright. Some of the infringers do not realise they may be preventing others from making a living, depriving them of their right to be recognised as the authors of their work or even committing a crime. Other infringers simply do not care, or believe they are entitled to copy without permission.

It is surprising, given how many original works are created, used and abused, that most people know so little about the copyright that protects these works. This book aims to introduce such readers to copyright. I wrote it to assist educators who work in Commonwealth countries but I hope all readers will find the book easy to read. It assumes no special knowledge and avoids technical language as much as possible.

It is usually difficult to write a book that says anything useful about the law of more than 40 countries. But copyright is a special case. There is no international copyright law because each country has its own domestic copyright legislation. But there are international agreements that set standards for domestic copyright legislation.

Almost every country now subscribes to these agreements and has brought its law on copyright into line with them. So a good way to approach copyright is to start with the international agreements on copyright and then see how different countries have applied them.

The international agreements on copyright also influence how the courts interpret domestic copyright legislation. If the domestic copyright legislation of a country is not clear, a court may look at the international agreements to help it decide what the domestic legislation means.

Another common element in Commonwealth copyright is that the copyright law of Commonwealth countries has its roots in the British Colonial Copyright Act of 1847 and in the Copyright Act of 1911, which is often referred to as the Imperial Copyright Act. Although each Commonwealth country now has its own copyright law, there are still similarities in Commonwealth copyright legislation. This means the courts in Commonwealth countries find it helpful to refer to how other Commonwealth courts interpret their copyright legislation.

The United States, of course, is not a Commonwealth country. But its copyright law goes back to the British Statute of Anne of 1710, and, as a result, US copyright law is similar in some ways to Commonwealth copyright legislation. US companies and individuals are also the world's biggest holders of copyright, and decisions of US courts on copyright are widely reported. It is important for those in Commonwealth countries to know whether these decisions reflect copyright law in Commonwealth countries.

Copyright is not difficult to understand. It is much easier than the mathematics of the big bang or quantum theory. But copyright has a long history. And copyright is now having to come to terms with new technology that is changing how copyright works are made and distributed. So copyright involves a lot of detail. It also uses some unavoidable technical vocabulary. These can make the subject seem more difficult than it is.

To present copyright as simply as possible this book breaks the topic into 12 chapters. The first chapter explains how modern copyright began and why countries agreed on international copyright

protection. The second chapter describes the international agreements that apply to copyright and the organisations that administer these agreements. This is probably a good place to mention that the book also looks at rights called copyright-related rights or neighbouring rights. Although these are not strictly copyright, they are closely related. Commonwealth countries treat them as part of copyright.

Chapters 3 to 7 look at how countries have implemented international copyright agreements in their domestic legislation. There are differences in domestic copyright legislation because international agreements on copyright, for the most part, lay down only minimum standards. They leave each country free to decide how much additional protection to give copyright holders. The international agreements on copyright also do not deal with every aspect of copyright. Nothing in these agreements, for example, deals with the collecting societies that license copyright works and collect royalties for copyright holders.

Chapters 8 to 11 are different. They deal with four specialised copyright-related topics: open licences, digital rights management, software protection and protection for traditional knowledge. These topics did not exist until quite recently. They are now attracting a lot of attention, and it is important to know something about them.

The book ends with a chapter on the future of copyright. Copyright has changed a lot since the 1700s, when it began in response to the arrival of the printing press. As we have said, new technology has made it easy to create and publish copyright material, and to copy and distribute material that others have created. Copyright law is changing to take account of these changes.

Please remember this book is a map, not a guidebook. It introduces you to copyright and its important features and explains how they fit together. If you want a detailed treatment of the copyright law of a particular country, you must look for it in legal textbooks and commentaries on that country's copyright law. You should certainly not treat this book as professional legal advice. If you want advice of this sort you should approach a legal practitioner who has specialised in copyright in the country where you live or want to publish.

1

Copyright History

If you don't like history you can ignore this chapter. Everything it discusses happened in the past, and the legislation the chapter mentions has all been repealed. But some readers find history helps them understand the present and many believe it is difficult to plan for the future without knowing what happened in the past. This chapter is written for them.

Copyright before the printing press

Some societies did have ideas similar to copyright before the modern printing press. But the law of Europe – English common law and its Continental equivalent, the *ius commune* – had nothing that resembled copyright.

The debate about whether copyright existed before the printing press is not just about history. If authors did have rights in their works before the modern printing press, then it is hard to argue that these rights are only a way of managing the business economics that came with the printing press. If, on the other hand, authors had no rights in their works before the printing press, then copyright might need to change or even disappear completely if electronic publishing replaces the traditional printing press.

So the debate is really about whether copyright is a fundamental, inalienable right of an author or just a convenient way of managing a certain technology. We will return to this question in Chapter 12 when we discuss the future of copyright.

Printing presses before copyright

In Europe

Johannes Gutenberg introduced movable type to Europe around 1450. Movable type made it economically viable to print books, and the idea spread rapidly. By 1501 printing presses were operating in about 280 cities in Europe.

In Britain

William Caxton brought the printing press to London in 1476. And it was in London that events led to the modern idea of copyright.

Before the printing press arrived in Britain, people known as stationers published books. They copied out books by hand, illustrated, bound and sold them. They also sold writing materials, much like modern stationers. By the 1400s there were stationers in all the bigger cities in Britain and, in 1403, stationers in the City of London formed themselves into a guild or professional body.

Stationers quickly adopted the new printing technology. At first the British Crown regulated this new industry case by case. It would issue *litterae patentes*, letters patent or patents, giving a publisher the exclusive right or monopoly to publish a work or class of works. The patents the Oxford and Cambridge University presses have to print the Authorised Version of the Bible are examples of these patents.

In 1557 King Philip and Queen Mary gave the stationers a royal charter. The purpose of the charter was “to make due provision for the protection of their loyal subjects against divers Books, Pamphlets and BROADSHEETS which . . . have gravely endangered both the spiritual welfare of the people and the peace of this realm”. The charter did not do away with existing publishing patents, but it created a Stationers’ Company and gave it a monopoly to print in London. Stationers had to register copies of the books they published with the Stationers’ Company. Stationers were not allowed to publish works that would offend those in authority, and the Stationers’ Company had powers to seize the books and printing presses of offenders.

Under the royal charter the stationers flourished. In 1662, under Charles II, Parliament passed the Licensing Act. This Act tightened the censorship the charter of Philip and Mary had introduced. It also said that once a stationer had registered a copy of a work in the register of the Stationers' Company, no other stationer was allowed to publish that work.

It is worth noting that none of this legislation gave any rights to the authors who wrote the books. Authors had to negotiate with stationers for the best terms they could get.

The Glorious Revolution of 1688 marked a change in the style of government. The English Bill of Rights of 1698 did not recognise a right to freedom of speech (except in Parliament) but, by the end of the 1600s, the Licensing Act's censorship was becoming unpopular. People had begun to feel that publishers should be free to publish what they wanted, subject to the penalties laid down by the ordinary law.

Some writers, for example, the philosopher John Locke, complained that stationers were abusing the privileges the Licensing Act gave them and that stationers were not providing the reading public and educators with good service. It seems some stationers were selling error-filled editions of the classics and using their perpetual right to publish these works to stop other stationers from publishing more accurate editions. Whatever the exact reasons, Parliament allowed the Licensing Act to expire in 1679, and legislators could not agree on new legislation to replace it. The Stationers' Company still made bylaws for its members, but, until Parliament passed the Statute of Anne of 1710, publishing in England was, in effect, unregulated. This meant anyone could publish anything, and the only sanction was prosecution under the ordinary law. Publishing flourished and the first professional journalists and independent newspapers appeared.

Historians of this period distinguish anything from 10 to 15 unsuccessful attempts in Parliament to pass legislation to regulate publishing. There were different views about what form the legislation should take. The writer Daniel Defoe, for example, argued the law should recognise what he called an author's property in his or

her writings. Defoe, best known today as the author of *Robinson Crusoe*, was also a journalist and pamphlet writer who spent time in prison for his publications. He may also have been the first to condemn what he called the “piracy” of an author’s work. In contrast, John Locke favoured giving an author the exclusive right to publish a work but for a limited time only. This limitation suggests that Locke did not see an author’s rights as a form of property.

The stationers, of course, also wanted legislation. They complained about unemployment and hardship among their members and lobbied for a return to something similar to the arrangement that had operated under the Licensing Act.

Copyright in Britain

Statute of Anne of 1710

In 1710 copyright legislation finally came into force in the form of what is known as the Statute of Anne. The Act was a compromise. It gave authors exclusive rights in what they wrote for 14 years. These rights reverted to the author for a further 14 years if he or she was still alive at the end of the first 14 years. Stationers had no monopoly, but an author’s rights were conditional on registering a work in the register book of the Stationers’ Company.

The Statute of Anne also required the printer to deposit copies of every book printed in nine libraries: four in England and five in Scotland. The Act allowed for importing books printed overseas, provided these were in Greek or Latin or a foreign language. The Act also set out a procedure for keeping the price of books reasonable.

The Statute of Anne was not particularly well drafted. It took years for the courts and further legislation to settle the meaning of some of its provisions. In particular, it took time to convince the stationers that the Act had abolished what they called “common law copyright”.

More excusable is that the drafters of the Statute of Anne did not find a word to express what we now mean by “copyright”. The Act sometimes uses “copies” in this sense. It also speaks of “property” in a book and of “the proprietors” of the book. The first recorded

use of the word “copyright”, according to the *Oxford English Dictionary*, was in the House of Lords some years later, in 1735.

The Statute of Anne did not give back to the stationers their printing monopoly, but neither did it bring about a great change in the way the publishing industry worked. To make a success of publishing a book it was necessary to invest capital in having copies of the book printed. It was also necessary to persuade booksellers to sell it. If the book did not sell, then the capital invested in printing it would be lost. This meant, as the Statute of Anne envisaged would happen, that most authors could only get their works published by selling the copyright in their works to a publisher or a group of publishers.

The poet Alexander Pope summed up his view of what the legislation would achieve when he wrote to the playwright William Wycherley:

Certainly he ought to be esteemed a worker of miracles who is
grown rich by poetry.

What Authors lose, their Booksellers have won
So Pimps grow rich while Gallants are undone.

The Statute of Anne did, however, put authors in a stronger position when it came to bargaining with publishers. Some authors, such as Pope himself, understood the new law and used the rights the Act gave them to ensure they got a share in the rewards of their writing. Unknown or less astute authors, no doubt, would have had to settle for less favourable terms.

Copyright in artistic and other works

The Statute of Anne applied only to literary works. But when the artist William Hogarth found that printers were selling his engravings without his permission, his friends got Parliament to pass what is known as the Engravers Copyright Act of 1734. As a result copyright came to be seen as applying to “literary and artistic” works. Since then the list of works to which copyright applies has grown. It now includes buildings, films, published editions and computer

programs. But the Berne Convention and copyright legislation in many Commonwealth countries still speak of copyright as applying to “literary and artistic works”.

Copyright in the British Empire

After the Napoleonic Wars (which ended with the Battle of Waterloo in 1815), Jeremy Bentham suggested the British should codify their law as the French had done. What resulted was a compromise; Parliament did not codify the common law but it did pass comprehensive Acts of Parliament to clarify the law on important topics.

It was not easy to do this for copyright. The most important piece of copyright legislation in the 1800s was the Copyright Amendment Act of 1842. This Act is also known as the Talfourd Act, named for Thomas Talfourd, a dramatist and lawyer. He was also a friend of Charles Dickens and the Member of Parliament who introduced a number of bills that eventually resulted in the Copyright Amendment Act. There was other copyright legislation. The Colonial Copyright Act of 1847, for example, extended copyright to British colonies. Other legislation recognised copyright in works such as sculpture and photographs. Following the Berne Convention in 1886, legislation was passed to make British copyright law comply with the Convention.

Codification of copyright law came only with the Copyright Act of 1911. This Act, also known as the Imperial Copyright Act, applied in colonial territories and was the model for most of the early copyright legislation in Commonwealth countries.

Copyright in the United States

In the United States the US Constitution gave Congress the power “to promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries”. Some form of copyright protection was clearly necessary. In 1776, for example, Thomas Paine published *Common Sense*. This pamphlet challenged the authority of Parliament and the King and asked for independence. It has been described as an instant bestseller and became the foundation of the

Declaration of Independence. Paine's first publisher, however, refused to pay him for the work and tried to prevent him taking it to other publishers.

It is not surprising that, in 1790, soon after government under the Constitution had begun, Congress passed the first US Copyright Act. The Act applied to the authors of maps, charts and books. It is similar to the Statute of Anne in that it required registration and set a renewable term of 14 years from the time of registration. The legislation expressly protected only the works of citizens and residents of the United States.

French copyright and the *droit d'auteur*

French copyright developed differently from British copyright. At first royal grants regulated publishers in much the same way as the letters patents regulated British publishers. But French law attached more value to the creative contribution of the author than did English law. In 1777, for example, a decree of the king's council of state set a term to the rights a publisher had in a published work. The same decree, however, said that any rights an author had not transferred to a publisher lasted for the life of the author and for the lives of those who inherited these rights from the author.

The French Declaration of the Rights of Man and of the Citizen of 1789 did not mention the rights of authors. In 1791, Abbé Sieyès, one of the drafters of this French Declaration, produced a Declaration of the Rights of Genius. But it was only in 1793, after agitation by authors and playwrights, that the National Convention passed copyright legislation. This legislation is sometimes known as the Chénier Act after the poet and politician, Marie-Joseph Chénier, who proposed it.

The French understanding of copyright differs from the Anglo-American in distinguishing between proprietary rights and moral rights. Proprietary rights allow an author to profit from a work either by exploiting it or by selling the right to exploit it. As with copyright, proprietary rights end after a period that, in France, is now 70 years after the death of the author.

Moral rights, on the other hand, are perpetual. Moral rights are the right to be recognised as author, the right to have a work kept intact and the right not to have the work used in a way that would lessen the author's reputation. The author also has a moral right to withdraw a work from circulation on payment of compensation to those who will lose when the work is withdrawn. Moral rights cannot be waived or transferred to another but they do pass through by inheritance.

The French approach to copyright and its distinction between proprietary and moral rights spread to other countries in continental Europe during the Napoleonic Wars. The French approach is now also part of copyright in countries that were part of the French colonial empire.

International recognition of copyright: the Berne Convention

The copyright protection provided by the Statute of Anne and the US Copyright Act did not protect authors from foreign publishers who printed and sold the author's work in that foreign country. The problem first came up when Irish publishers, to whom the Statute of Anne did not apply, began to print, sell and export cheap reprints of works by English and Scottish authors.

In the 1800s the author Charles Dickens drew attention to the problem of cheap foreign editions when he objected to his works being published without his permission both in the United States and in British colonies. Later it was an American author, Mark Twain, who objected to his works being published in Canada without his permission. Countries began to deal with problems of this sort by entering into bilateral treaties. These treaties required each country to give the citizens of the other country the same copyright protection their own citizens enjoyed.

It was probably authors writing in English who suffered most from the unauthorised foreign publishing of their works. But it was a French writer and political activist, Victor Hugo, who led the movement for an international solution to protect authors. In 1878 he founded the *Association Littéraire et Artistique Internationale* (ALAI) to campaign for protection for the rights of authors and artists.

Hugo was the Association's president and, among its first members, were important international authors such as Fyodor Dostoevsky and Leo Tolstoy. Benjamin Disraeli, an author best known as the leader of the Conservative Party and twice Prime Minister of Britain, was also a member.

In 1886, largely because of the efforts of Victor Hugo and the ALAI, 10 countries met in Berne to sign the International Convention for the Protection of Literary and Artistic Works. The Berne Convention, as it is usually known, set up a union of countries that agreed to give all authors who lived in member countries the same copyright protection as their own citizens. But the Convention did more than this. It laid down minimum conditions to ensure that national copyright law did protect authors. Chapter 2 (International Copyright Agreements) will discuss the Berne Convention in more detail.

Early patents

Before we leave the history of copyright we should say something about how patent protection began. Patent and copyright have begun to overlap because some countries are using patent instead of copyright to protect computer software. We will compare these two forms of protection in Chapter 10 (Software Protection).

Patent protection for inventions is older than copyright. The earliest patents giving the exclusive right to exploit an invention were awarded in Italy in the 1400s. In England the Crown awarded patents giving inventors a monopoly to exploit their inventions in the same way it gave printers monopolies to print books.

In England, in the 1600s, the Crown began selling patents to raise revenue. Parliament, whose control over the Crown depended on being able to withhold revenue, reacted by passing the Statute of Monopolies of 1623. This statute said that monopolies “are altogether contrary to the Laws of this Realm, and so are and shall be utterly void and of none effect and in no wise to be put into use or execution”. The Statute of Monopolies went on, however, to make the following important exception:

Introducing Copyright

Provided alsoe That any Declaracion before mencioned shall not extend to any tres Patents and Graunt of Privilege for the tearme of fowerteene yeares or under, hereafter to be made of the sole working or makege of any manner of new Manufactures within this Realme, to the true and first Inventor and Inventors of such Manufactures, which others at the tyme of makege such tres Patents and Graunts shall not use, soe as alsoe they be not contrary to the Lawe nor mischievous to the State, by raisinge prices of Commodities at home, or hurt of Trade, or generallie inconvenient; the said fourteene yeares to be [accomplished] from the date of the first tres Patents or Grant of such priviledge hereafter to be made, but that the same shall be of such force as they should be if this Act had never byn made, and of none other.

This exception was the start of modern patent law in much the same way as, 70 years later, the Statute of Anne was the start of modern copyright law.

Comments

What is interesting about copyright up to the Berne Convention is the extent to which authors and independent thinkers shaped the law. Publishers clearly had a commercial interest in copyright. But it does not seem, as some commentators suggest, that copyright was a conspiracy on the part of publishers to take advantage of authors and the reading public.

In the 21st century new technology is changing the way people publish work. These changes are as significant as those the printing press introduced in the 16th century. If publishers are now dictating how copyright should deal with new technology, then it may be because authors do not have or will not voice their own views on what are reasonable rewards for their creative work. We also need to hear the voices of the members of the public who are expected to pay for using copyright works.

2

International Copyright Agreements

In the 21st century copyright and copyright-related rights are regulated by international agreements. This chapter will introduce you to these agreements. It will also look at the effect on copyright of Annexure 1C of the Marrakech Declaration of 1994 (known as TRIPS) and say something about the World Intellectual Property Organization (WIPO) and its work. But first you need to know something about how international agreements work.

Some features of international agreements

Understanding international agreements is a specialised area of study. There is even an international agreement about international agreements (the Vienna Convention on the Law of Treaties of 1969). For this chapter, however, you need only be aware of the following four features of international agreements.

First, it is countries that negotiate and agree international agreements and the agreements bind countries, not individuals. Apart from some cases that have nothing to do with copyright, an international agreement binds individuals only if the country where they live passes its own domestic legislation to give effect to the

international agreement. When this happens it is the domestic legislation, not the international agreement, that binds those living in the country.

Second, countries are free to choose whether to be party to an international agreement. The government of a country decides this. But a government can put a decision into effect only if it follows the procedures set by the country's constitution. Usually the country's legislators – Parliament in Commonwealth countries – have to approve this decision. This is called ratifying an international agreement or acceding to an international agreement. Once a country has ratified an agreement, the country is party to the agreement and is obliged to pass domestic legislation giving effect to the agreement. Signing an international agreement before the legislators have approved it does not make a country party to the agreement. It only commits the government of that country to making the country party to the agreement in the future.

Third, being party to an international agreement always has its advantages. Without advantages, a country would never join. But the international agreements on copyright also have their disadvantages. The most obvious is that they require a country to give up some of its freedom to pass its own copyright legislation. Once a country is party to the Berne Convention, for example, it is not free, even if it seems in that country's best interests, to pass domestic legislation reducing the copyright term to less than the minimum set by the Berne Convention. (Copyright term is the time that has to pass before copyright in a work expires.) It can only do this if it denounces or withdraws from the Berne Convention.

Fourth, international agreements usually have rules for settling disputes from the agreement that arise between countries that are party to the agreement. These rules can require taking a dispute to arbitration or to the International Court of Justice at The Hague. Usually, however, there is no easy way to force a country that does not want to settle a dispute to follow these rules.

Berne Convention and Union

In the 1800s, as we know from Chapter 1 (Copyright History), countries began to enter into bilateral agreements to respect the copyright of each other's authors and artists. The Berne Convention of 1886 was the first international agreement open to all countries to do this. And just as the Statute of Anne was the first piece of modern copyright legislation and influenced later legislation, so the Berne Convention set the tone for all later international agreements on copyright and related rights.

The framers of the Berne Convention saw that it might be necessary to "perfect" the Convention. So they established a permanent Union of the countries that are party to the treaty. The Convention envisaged the members of the Union meeting periodically to discuss and possibly even revise the Convention. To help them in this the Convention set up and funded an "International Office" or secretariat to do research on copyright and help the countries of the Union. This international office, as we shall see towards the end of this chapter, grew into the modern WIPO.

Article 2 of the 1886 Berne Convention summed up its approach to copyright protection as follows:

Authors who are subjects or citizens of any of the countries of the Union, or their lawful representatives, shall enjoy in the other countries for their works, whether published in one of those countries or unpublished, the rights which the respective laws do now or may hereafter grant to natives.

This approach was taken from the bilateral agreements that countries had previously used to protect each others' copyright material. Bilateral copyright agreements, however, assume the domestic law of the contracting countries gives copyright holders similar protection. In an agreement open to any country, article 2 on its own would have given those living in countries with less copyright protection greater access to copyright material. To avoid this situation, the Convention lays down minimum standards for the copyright

law of a country that wants to be party to the Convention. We will look at these minimum standards in the following chapters.

The Berne Convention sets a minimum standard of copyright protection but it does not stop member countries giving authors and artists more than the minimum protection. In practice this leads to increases in minimum copyright protection. For example, when one member of the Union increases the copyright term from the Convention minimum of 50 years to 70 years, copyright holders in that country will begin to expect the same protection in other countries. And copyright holders in other countries will also begin to want a similar increase for themselves. Once enough countries have responded to these pressures and increased the copyright term, it is easy to argue that individuals living in countries that have not increased the term have an unfair advantage and that the Berne Convention should be changed to require all countries to meet this standard.

Reducing the term of copyright protection is more difficult. There is no way to move gradually towards a reduced term. Countries can only begin to reduce the copyright term if the Berne Convention is revised to let them do this. So the Berne Convention is like a ratchet; it is easy to make it stricter, but difficult to make it less strict.

The 1886 Convention required all the countries of the Union to agree to any change in the Convention and any change still requires “the unanimity of the votes cast”. The last revision of the Berne Convention was made at Paris in 1971. As a result, and to the confusion of non-experts, the Berne Convention in its present form is sometimes referred to as the Paris Act or the Paris text. The revisions changed the original order of the articles. They also nearly doubled the length of the Convention. It started with 21 articles and has grown to 37 articles, with a further six articles that apply to developing countries.

The 1971 revision was amended in 1979. Since then members of the Union seem to have been reluctant to make further changes. This may be because it has become more difficult to get all the members to agree on the changes. Or it may be because changes to the Berne Convention would involve changing the Agreement on

Trade-Related Aspects of Intellectual Property Rights (TRIPS). We will look at these issues later in this chapter.

Whatever the reason, when it became necessary to clarify copyright in computer programs and to regulate the technology being used to protect copyright material, members of the Union did not revise the Berne Convention. Instead, they dealt with these matters in a separate international agreement, the WIPO Copyright Treaty of 1996.

The WIPO Copyright Treaty claims to be a special agreement on copyright of the sort envisaged in article 20 of the Berne Convention. Article 20 says that members of the Union are free “to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention”. The WIPO Copyright Treaty fits this description in that it grants authors more protection than the Berne Convention. But the fit is awkward because those who framed article 20 seem to have had in mind special bilateral or multiparty agreements. The WIPO Copyright Treaty, on the other hand, is really an appendix to the Berne Convention.

Universal Copyright Convention

The Berne Convention is so well established that it has become part of the natural order of copyright. People even complain that a country has “no copyright” when what they mean is that the country’s copyright law or the way it enforces its copyright law does not reflect the standards set by the Berne Convention.

There is, however, an alternative to the Berne Convention. This is the Universal Copyright Convention that UNESCO developed after the Second World War. UNESCO is the United Nations agency that deals with education, science and culture. Until 1974, when the United Nations recognised WIPO as a special agency, UNESCO was the United Nations agency responsible for copyright. UNESCO still has an interest in this topic.

UNESCO developed the Universal Copyright Convention to meet the concerns of countries that felt the Berne Convention gave

authors too much protection and users of copyright material too little access to copyright material. The first version of the Universal Copyright Convention was made at Geneva in 1952. It differed from the Berne Convention mainly in specifying a shorter copyright term – 25 years as opposed to 50 years – and in having special provisions allowing for translations from original works. A revised version made at Paris in 1971 allowed for countries to make exceptions to copyright law “that do not conflict with the spirit and provisions of this Convention” and for compulsory licences to translate and use copyright material.

UNESCO had developing countries in mind when it drafted the Universal Copyright Convention. But there was nothing to stop developed countries and countries that were members of the Berne Copyright Union from joining the Universal Copyright Convention. The United States, for example, became a member of the Universal Copyright Convention in 1954 but only joined the Berne Convention in 1989.

The Universal Copyright Convention still exists but it has lost its importance for two reasons. One is that in 1967 the Stockholm revision of the Berne Convention took over some of the ideas in the Universal Copyright Convention. It did not reduce the copyright term but it made it possible for countries to allow exceptions to copyright law if the exceptions complied with a three-step test. The Stockholm revision also introduced special provisions for developing countries. These changes, which we will discuss in Chapter 5 (Users’ Rights), made the Berne Convention more attractive to developing countries.

The main reason for the decline in the importance of the Universal Copyright Convention was the decision to make most of what the Berne Convention says about international copyright protection part of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). This meant that countries wanting the benefits that go with membership of the World Trade Organization (WTO) have had to accept the Berne Convention standards for copyright protection. We will discuss TRIPS later in this chapter.

If, however, the WTO fails to deliver the expected benefits, it is possible that developing countries will return to the Universal Copyright Convention or some other alternative to the Berne Convention.

International agreements on copyright-related rights

Other international agreements recognise what are called copyright-related rights. These rights are also called neighbouring rights, which is a literal translation of the French term for these rights – *droits voisins*. No official definition or list of copyright-related rights exists.

It has been suggested that copyright-related rights differ from copyright in that copyright-related rights do not have a creative author. In 1928, for example, the revision of the Berne Convention extended copyright protection to the authors of cinematographic works. This was the year after *The Jazz Singer*, often said to be first full-length “talkie”, was released. By this time the record industry was as well-established as the cinema industry. But the Berne Convention has never given copyright protection to those who produced sound recordings.

International protection for producers and performers of sound recordings had to wait until the Rome Convention (International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations) of 1961. Countries did not rush to become party to the Rome Convention. It still has only half as many contracting parties as the Berne Convention.

In 1971 the Phonograms Convention (Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of Their Phonograms) tried to deal with the illegal copying of sound recordings. And in 1996 the WIPO Performances and Phonograms Treaty (WPPT) dealt with the digitisation of performances and phonograms (sound recordings) in the same way as the WIPO Copyright Treaty protected digitised works covered by copyright.

Other copyright-related rights concern programme-carrying signals transmitted by satellite (Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite of 1974) and the design of integrated circuits (Washington Treaty

on Intellectual Property in Respect of Integrated Circuits of 1989). The Vienna Agreement for the Protection of Type Faces and their International Deposit of 1973, which recognises rights in typeface, can also be seen as a form of copyright-related right.

TRIPS agreements

We have been speaking of international agreements on copyright as protecting the rights of authors and artists. What this means in practice is that copyright holders can insist that anyone using copyright material pays them licence fees or royalties.

Licence fees and royalties are revenue for the copyright holders. When copyright users in one country pay royalties to copyright holders in another country they are taking part in international trade. But a copyright holder can only collect licence fees and royalties in a foreign country if the copyright legislation of that country allows him or her to do this. So it was not surprising that, when the Uruguay Round of trade talks ended in the Marrakech Declaration of 1994, Annex 1C set out the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Articles 9 to 14 of this agreement deal with copyright.

Article 9 of TRIPS obliges member states of the World Trade Organization to pass domestic legislation giving effect to articles 1 to 21 of the Paris Act of the Berne Convention and the Appendix of the Berne Convention. TRIPS makes an exception for article *6bis* of the Berne Convention that requires countries to protect moral rights. As well as expecting members to comply with these parts of the Berne Convention, TRIPS restates some of the provisions in the Convention such as the three-step test and the 50-year minimum term for copyright protection. We will discuss the three-step test in Chapter 5 (Users' Rights).

TRIPS also requires WTO members to protect some copyright-related rights. Article 6 requires protection for the design of integrated circuits, and article 14 does the same for the rights of performers and producers of phonograms and for the rights of broadcasting organisations.

It seems clear that TRIPS did not mean to change the substance of existing international agreements on copyright. What is not clear is

the relationship between TRIPS and the Berne Convention. Article 64 of TRIPS, for example, says that countries must use the General Agreement on Tariffs and Trade dispute settlement procedure to settle any dispute about TRIPS. Does this rule out using Berne Convention dispute settlement rules for any matters to which TRIPS refers? Another question is whether members of the Union who are also members of the WTO may revise the Berne Convention without negotiating a corresponding change in TRIPS. Finally, do a country's obligations under TRIPS take priority over a country's obligations under the Berne Convention?

TRIPS and the other appendices to the Marrakech Declaration were, to a large extent, the result of negotiations among the developed nations. Since 1994 countries such as China, India, Brazil and South Africa, have begun to take a more active part in the negotiations. The Doha Round of talks that began in 2001 dealt with development and agricultural subsidies. But the negotiating parties could not agree and the talks collapsed in 2006. They were revived and collapsed again in 2008. Copyright had almost no part in the Doha negotiations. But the inability to make progress with the Doha Round suggests that it may be difficult to negotiate further changes on copyright as part of TRIPS.

Experience has shown that some form of international copyright protection is necessary. But copyright and copyright-related rights are a form of monopoly or protective tariff. Developing countries, some of which were party to the Universal Copyright Convention, may find it incongruous to negotiate international copyright protection in a series of agreements aimed at doing away with protective tariffs. It also seems incongruous to limit the rights of citizens to have access to knowledge in return, for example, for easier access to markets for agricultural produce.

TRIPS-plus agreements

Some WTO countries have agreed to give each other's citizens more copyright protection than TRIPS requires. Such agreements are called TRIPS-plus (TRIPS+) agreements.

The Berne Convention allows such agreements but their status under TRIPS is not entirely clear. Article 4 of TRIPS Most-Favoured-Nation Treatment says that “any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members”.

This seems to reduce the special value of bilateral free trade agreements to the countries that negotiate them. Article 4(b) does make an exception for special treatment “granted in accordance with the provisions of the Berne Convention (1971) or the Rome Convention authorising that the treatment accorded be a function not of national treatment but of the treatment accorded in another country”.

Countries joining the WTO may have to give TRIPS-plus undertakings. This was reported to be the case when Tonga joined the WTO in 1995.

International copyright agreements and the United States

As well as being the world’s biggest economy, the United States is the world’s biggest holder of intellectual property. Copyright is part of intellectual property and the United States earns important foreign revenue from copyright licences and royalties. As a result its attitude to international copyright protection is important.

The United States did not become a member of the Berne Convention in 1886. Instead, the United States provided international copyright protection for its copyright holders by entering into bilateral agreements with other countries. In fact, the United States had no general commitment to protect foreign copyright holders until it became a member of the Buenos Aires Convention in 1910. This is an international agreement on copyright protection between the United States and, at present, 17 Latin American countries. It provides for more limited international protection than the Berne Convention.

The United States played an important part in reviving international trade after the Second World War and was a member of the General Agreement on Tariffs and Trade (GATT). GATT, however, did not deal with copyright. The United States joined the Universal Copyright Convention in 1947 but it only joined the Berne

Convention in 1989. The United States is also a member of the WTO and bound by TRIPS.

The United States has continued to enter into bilateral free trade agreements with other countries. Some of these agreements, such as that with Singapore in 2003, require the other country to have copyright protection that goes beyond the minimum set by the Berne Convention and TRIPS.

As well as negotiating bilateral free trade agreements, the United States uses its influence to protect its citizens' international copyright interests in other ways. One way is a provision in the US Trade Act of 1974, which requires that every year the US Trade Representative publish a list of countries that, in its opinion, do not provide adequate intellectual property protection. This is known as a section 301 report. The report is a warning to offending countries that the United States is aware of their shortcomings and, if they do not improve, may complain to the WTO.

The International Office and WIPO

We have mentioned the international office that the Berne Convention set up to help members of the Union. In 1893 this office joined with the international office set up by the Paris Convention for the Protection of Industrial Property of 1883. Together they formed the United International Bureaux for the Protection of Intellectual Property (BIRPI) based in Berne. In 1960 BIRPI moved to Geneva and in 1967 an international convention established the World Intellectual Property Organization (WIPO) to replace BIRPI. In 1974 the United Nations recognised WIPO “as a specialized agency and as being responsible for taking appropriate action in accordance with its basic instrument, treaties and agreements administered by it”. It shares this responsibility with UNESCO.

WIPO now has a staff of nearly one thousand, who deal with all forms of intellectual property, of which copyright is only one. WIPO staff occupy a handsome building described on the WIPO website as “a Geneva landmark, with spectacular views of the surrounding Swiss and French countryside”. On display in the building are works of art given by member countries. Despite the imposing offices,

the WIPO staff, headed by a Director General, are a civil service not a government. As with any civil service, they can be influential but the power to make decisions rests with the member countries.

The WIPO Convention of 1967 set up a general assembly, a conference and a coordinating committee. These bodies approve a budget for WIPO, appoint the Director General and give instructions for running WIPO.

There are different sectors in WIPO, including one for copyright and related rights. Each sector has its own staff. A standing committee of delegates from countries that are members of the Union meets regularly to discuss copyright topics raised by members. On the agenda of the meeting of the Standing Committee on Copyright and Related Rights in March 2008, for example, were the possibility of new international agreements to protect audiovisual performances and broadcasting organisations and proposals from Latin American countries on exceptions and limitations. The proposals on exceptions and limitations resulted in a request to the Secretariat to produce “a study on exceptions and limitations for the benefit of educational activities, including distance education and the trans-border aspect in it”. Copyright is also part of the WIPO Development Agenda that will be discussed in Chapter 5 (Users’ Rights).

Delegates to the standing committee on copyright come from the government department responsible for copyright. In Commonwealth countries these are usually the departments responsible for trade and industry. Government departments responsible for education do not have a direct say in copyright. In countries that follow the Continental tradition, copyright is usually the responsibility of the department that deals with culture.

Not much to do with copyright has come out of WIPO since the WIPO Copyright Treaty of 1996. Despite this it does seem that progress is more likely in the WIPO standing committee than at WTO negotiations. The great advantage of the standing committee on copyright is that it meets regularly. This means delegates are not working against the clock. They can get to know one another and

become familiar with the issues. WIPO also provides experienced staff to support the negotiations.

Comments

There have to be international standards of copyright protection if authors and artists are to be properly rewarded for their work. But if the rewards are too high, then those in poorer countries will not be able to pay for access to these works. And countries need copyright material to educate and inform their citizens just as much as they need food for them.

There is clearly no “correct” level of copyright protection. At best, copyright protection will be a compromise that will leave every country feeling it is not being exploited. The present levels of protection, however, satisfy no one. Developed countries want more protection; developing countries are demanding better access.

In the 1800s Victor Hugo and those he associated with his ideas provided credible leadership and a principled programme for international copyright. This resulted in a form of international copyright protection that lasted 100 years. Any lasting changes to international copyright will need similar credible leadership and a similar principled programme of reform.

It is a pity that international negotiations about copyright, particularly since TRIPS, usually sees copyright as having only to do with generating wealth and international trade. If countries understood copyright as having also to do with education and culture, it might be easier to reach an understanding on copyright protection among developed and developing countries.

3

Copyright Works

In the previous two chapters we dealt with the background and principles of modern copyright. This chapter and the chapters that follow provide more detail. You need a more detailed understanding because the rules that govern copyright are not intuitive; they are not always what someone who knows the principles of copyright might expect.

This chapter looks at which works qualify for copyright protection and who holds the copyright in a new work. The rules about which works qualify for copyright protection are the most difficult part of copyright. You may prefer to leave this chapter until you feel you need the information it contains.

Which works qualify for copyright?

Not every work can be copyright. To qualify for copyright a work must be a literary or artistic work. The work must be original and, in most countries, it must be fixed in a material form. And in some cases an author must publish a work to have copyright protection. We will look at each of these requirements in turn.

Literary or artistic work

Copyright, as we have seen, began as a way to protect the authors of books. With time this protection was extended to the work of artists and other creative people. But copyright does not protect just any work an author or artist produces. To qualify for copyright protection the work must be a literary or artistic work.

There is no simple test for a literary or artistic work. Article 2(1) of the Berne Convention says literary or artistic works include “every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression”. Article 2(1) then goes on to give some examples:

. . . books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.

Most of the examples article 2(1) gives are in two dimensions; the medium on which the author or artist expresses the work is two-dimensional. Examples are paper (for a book), canvas (for a painting) and celluloid (for a movie). In the 21st century authors are increasingly using computers to create and store their works in digital form. But the works are still viewed or read on a two-dimensional medium such as a printout or a screen.

It is also possible, as article 2(1) makes clear, to have copyright in a three-dimensional work such as a sculpture or a building and in a dynamic work such as what the Berne Convention calls a “dumb show” entertainment. The possibility of copyright in a building means that an architect has copyright in the completed building as well as in the plans for the building.

Article 2(1) also applies copyright to “cinematographic works to which are assimilated works expressed by a process analogous to cinematography”. Copyright, as we mentioned in Chapter 2 (International Copyright Agreements), does not apply to sound recordings.

The list of examples in article 2(1) is not complete. It does not mention derivative works, which are works that an author or artist produces derived from (based on) another work. Article 2(3) deals with such works when it says “translations, adaptations, arrangements of music and other alterations of a literary or artistic work” are derivative works and qualify for copyright protection. Copyright protection for a derivative work does not deprive the person who creates the original work of copyright in that work. So, for example, a translator has copyright in the translation but the author still has copyright in the original work. The author of a derivative work who does not get permission from the person who holds copyright in the original work still has copyright in the derivative work. Without permission, of course, he or she will have infringed the other’s copyright and will be liable to the penalties explained in Chapter 4 (Holders’ Rights).

It is possible to have copyright in a derivative work even when there is no copyright in the work from which it was derived. So, for example, an educator wants to copy and give out to students that part of John Locke’s *Second Treatise of Government* where the author explains the connection between property and labour. Locke published the *Second Treatise* in 1690 and he died in 1704. This means the work is out of copyright. If the educator only has access to a modern edition that is still in copyright, he or she may take the text from the modern edition and copy and give it out. But he or she may not use any notes or commentary or even the printed layout of the text without permission from the copyright holder. Strictly speaking, to avoid infringing copyright in the layout, the educator must retype or in some other way reprocess the text. (This example assumes that domestic copyright legislation does not make an exception for educators.)

Another form of work that, in some situations, can have copyright protection is a collective work. A collective work is a work that is made up of works or parts of works by different authors. Article 2(5) of the Berne Convention says the person who puts together a collective work may have copyright in that work if the collective work is sufficiently original. Simply assembling a collection

of works does not give the person who assembles the collection copyright protection. The assembling must be original. Originality is discussed as the next requirement for copyright.

As with a derivative work, those who have copyright in the works used in the collective work do not lose their copyright. As article 2(5) says:

Collections of literary or artistic works such as encyclopaedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations shall be protected as such, without prejudice to the copyright in each of the works forming part of such collections.

Article 2 does not mention computer programs. These are dealt with in article 4 of the WIPO Copyright Treaty of 1996, which says:

Computer programs are protected as literary works within the meaning of Article 2 of the Berne Convention. Such protection applies to computer programs, whatever may be the mode or form of their expression.

We will look at copyright protection for computer programs in Chapter 10 (Software Protection).

Some works that would otherwise qualify for copyright protection, the Berne Convention either excludes from copyright protection or allows member countries to exclude. We shall look at these exclusions in Chapter 5 (Users' Rights).

From what has gone before it should be clear that it is not always easy to know what, for copyright protection, is a literary or artistic work. Domestic copyright legislation usually distinguishes different "classes" or categories of copyright material. There is no official list of these classes.

Original work

To qualify for copyright protection a work must not only be a literary or artistic work it must be an original literary or artistic work. Originality is probably the most difficult concept in copyright. The Berne Convention is not much help on this matter; it refers to originality only in passing. Even judges have not been able to come up with one-size-fits-all test for copyright originality.

We can start by saying that a work copied from another work is definitely not original and does not qualify for copyright protection. But it is the act of copying rather than the fact of having produced a similar work that is important. Two or more authors working independently may produce similar works. If this happens, then each author has copyright in his or her own work.

It seems reasonable that someone who works hard to produce a new work, for example a telephone directory, should have copyright in that work. This used to be the position in Commonwealth countries and the United States. In the United States the hard-work test for originality is known as “the sweat of the brow” test, a phrase taken from the book of Genesis, where God tells Adam, “In the sweat of thy face shalt thou eat bread”. In 1991, however, an important US case (*Feist Publications v Rural Telephone Service*) denied copyright to the compilers of a telephone directory and since then US judges have stopped using the sweat of the brow test. They now look for something creative in a work before they find that it is an original work. Article 2(5) of the Berne Convention supports this position when it says that a collection has to be an “intellectual creation” before it qualifies for copyright protection.

Commonwealth judges have not followed the new US approach. They still seem to accept that hard work can satisfy the need for originality provided the hard work involves more than simply copying material from another source.

Even in the United States, however, not much creativity is needed for copyright. Certainly, an author or artist does not have to be a genius or inspired to produce creative work. He or she only needs to show some judgement.

This is probably a good place to explain that copyright neither requires nor protects inspiration. There is no copyright in ideas, no matter how original. Archimedes could not have claimed copyright in the insight into hydrostatics that is supposed to have sent him running through the streets of Syracuse. But if Archimedes had written up his insight, then he would have had copyright in his account. As article 2 of the WIPO Copyright Treaty says: “Copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.”

We started this discussion by saying that deciding what original means is probably the most awkward question in copyright. In 1923, in *Macmillan & Co v Cooper* Lord Atkinson explained why deciding what is original is so difficult, in words that other judges have often quoted:

What is the precise amount of the knowledge, labour, judgment or literary skill or taste which the author of any book or other compilation must bestow upon its composition in order to acquire copyright in it within the meaning of the Copyright Act of 1911 cannot be defined in precise terms. In every case it must depend largely on the special facts of that case, and must in each case be very much a question of degree.

Originality is a particular problem for copyright in collective works (as we mentioned) and it is also a problem for databases. Some countries, especially those in the Continental tradition that set higher requirements for originality, have introduced special protection for databases to deal with this problem. We will look at this protection later in this chapter.

Fixed work

Fixing a work (fixation) means putting the work into some material form by, for example, writing it down or recording it. A work can exist without being fixed. An author can compose a poem, recite it in public and even teach it to others without ever writing it down

or recording it. It seems only fair that such an author should have copyright in the poem.

Article 2(2) of the Berne Convention, however, leaves member countries to decide whether a work must be fixed to qualify for copyright protection:

It shall, however, be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form.

Most countries require a work to be fixed to qualify for copyright protection.

Published work

Publishing a work is not the same as fixing a work. Fixing a work means writing it down or recording it, a process that can be done in private. Publishing means communicating a work to the public. Publishing does not require a commercial publisher. Article 3(3) of the Berne Convention explains that published work means:

. . . works published with the consent of their authors, whatever may be the means of manufacture of the copies, provided that the availability of such copies has been such as to satisfy the reasonable requirements of the public, having regard to the nature of the work. The performance of a dramatic, dramatico-musical, cinematographic or musical work, the public recitation of a literary work, the communication by wire or the broadcasting of literary or artistic works, the exhibition of a work of art and the construction of a work of architecture shall not constitute publication.

Citizens and residents of Union countries do not have to publish a work to have copyright. Publication is, however, necessary for authors and artists who are not citizens or residents of a Union country to have copyright protection in terms of article 3(1)(b) of the Berne Convention. Publication is also important for calculating

the term of copyright protection, as we will see in Chapter 5 (Users' Rights).

In most countries domestic legislation requires anyone who publishes a work or distributes a published work to give copies to what are known as legal deposit libraries. Failing to do this may involve the publisher or distributor in penalties but does not affect copyright in the work.

Registered work

Having to register a work to get copyright protection goes back to before the Statute of Anne, as we saw in Chapter 1 (Copyright History). Having a register of copyright works is useful. It makes it easier to prove who holds copyright, and many countries still maintain a copyright register as an option.

The Berne Convention of 1886 did not prohibit formalities such as registration. Article 4 of the Berlin revision of the Convention in 1908, however, said that "(t)he enjoyment and the exercise of these rights shall not be subject to any formality". In this copyright differs from patents and trademarks where registration is necessary for protection.

The Universal Copyright Convention, unlike the Berne Convention, did not stop countries insisting on registration for copyright protection. Article 3, however, did require countries to recognise that putting the copyright symbol ©, followed by the name of the copyright holder and the year of first publication, on all copies of a published work would have the same effect as registration. This information is useful and most published works now provide it. But in Berne Convention countries it is not a requirement for copyright.

Books and journals usually carry an International Standard Book Number (ISBN) or International Standard Serial Number (ISSN). These are unique identifier numbers for a book or for a serial publication such as a journal. The numbers show the country and publisher and are useful for librarians and booksellers. The International Organization for Standardization (ISO) that administers these numbers has recently produced an International Standard Text Code (ISTC) for identifying a text regardless of its format.

The ISTC carries no information about the country of origin or publisher. As with the copyright symbol, having an ISBN, ISSN or ISTC number is useful but is not a requirement for copyright.

Who has copyright in a work?

At the beginning of this chapter we mentioned that authors and artists who produce a copyright work do not always have copyright in that work. The Berne Convention does not go into detail on this point, and the rules about who has copyright vary from country to country. What follows is a general guide.

Author of a work

We saw that to qualify for copyright protection a work has to be an original work or, as article 2(5) of the Berne Convention says, an “intellectual creation”. It seems to follow that the person who does the original, creative work will have copyright in the work. In general this is true but there are some exceptions.

Author’s employer

The law of most countries says that, where the author of a literary or artistic work is employed and produces a copyright work in the course of his or her employment, copyright in the work belongs to the employer.

“Course of employment” means the work which a person is employed to do. So a school that employs someone as a history teacher will not have copyright in paintings that teacher does over the weekend. If the teacher’s duties are limited to teaching history, then the school may not even have copyright in a history textbook the teacher writes.

The US Copyright Act calls a work done in the course of employment a “work made for hire”. Section 101 of the Act defines a work made for hire as “a work prepared by an employee within the scope of his or her employment” or a work that, although specially commissioned, is in some way part of or supplementary to another work. The second part of section 101 means that “work made for hire” covers more than the Commonwealth “course of employment”.

In the United States, a work made for hire has its own copyright term, as we shall see in Chapter 5 (Users' Rights).

Author who is an independent agent

Employing a person is not the same as commissioning a person to do some work. The fine points of the distinction between an employee and an independent agent or contractor are matters for the contract law of each country, and they go beyond the scope of an introduction to copyright. But, generally, if someone pays an author or artist to produce a piece of work, then the author is probably not an employee. This means copyright in the work will belong to the author of the work and not to the person who pays the author.

This can cause trouble, for example, when someone commissions an independent programmer to write a computer program. Unless the contract between the programmer and the individual who commissions the programmer gives copyright in the program to the person who commissions it, then nothing stops the programmer from licensing or selling the program to other users.

In the United States the second part of the definition of a work made for hire avoids some of these difficulties. It applies to those who, in other countries, might qualify as an independent contractor.

Awkward cases

In some cases it is not easy to say who does the creative work. Is the author of a photograph the person who holds the camera or the person who composes the picture? Is the author of a film the producer, the director or the actors?

Domestic copyright legislation often settles who has copyright in such cases. When looking at the legislation of a Commonwealth country you should always check the definitions of "author" and "artist" and other similar words in the definitions section of the legislation. Those who draft legislation often seem to enjoy hiding important detail in the definitions.

Some countries make a special exception for journalists in the sense that an employer's copyright in what a journalist writes only extends to publishing the work in the employer's newspaper or

magazine. A journalist has copyright in his or her work for other purposes such as publishing the work in a book or publishing it in electronic format or online. So a publisher who wants to use a journalist's work in these ways needs to write this into the contract of employment with the journalist.

Anticipating awkward cases by contract

These and other awkward cases are best dealt with by a written contract between the parties that settles who will have copyright in the work to be produced. A contract of this sort, provided it is in writing, will usually take priority over anything in domestic copyright legislation.

The academic exception

A special case of copyright ownership is what is called "the academic exception". Most educators are employed by educational institutions. As such it might seem that copyright in anything educators produce in the course of their employment should belong to the institutions that employ them.

Where an educator works at a tertiary or higher education institution, however, the academic exception may apply. According to this exception an academic author is the first holder of the copyright in any work he or she produces. The academic exception appears to be well-established in the United States, Britain and Canada.

To avoid the academic exception, some academic institutions require employees to assign to the institution copyright in any work he or she produces. Some institutions even require students to assign to the institution copyright in the work they produce when studying at the institution.

Whole books have been written about the academic exception but the question is why would any institution want copyright in academic work? Academics do not usually earn a great deal from their academic publishing. Academic institutions that want a share in these earnings can negotiate for it as part of the contract of employment without having to take copyright. What some institutions do not seem to appreciate is that copyright brings with it responsibilities.

A copyright holder has to protect a work from copyright piracy, give or refuse permission to copy or perform the work and think of ways to exploit it. All an institution probably wants when an academic produces a work is the right to take some credit for the work and the right to use it without having to pay royalties to the author.

In some cases it is reasonable for an academic institution to want copyright in the work staff produce. So when staff work together, for example, developing online teaching materials, they have joint copyright in work they produce. This could lead to problems if staff leave the project or start to disagree.

The academic exception probably does not apply to discoveries academics make that qualify for patent protection rather than copyright. For this reason institutions that draw up “intellectual property” policies for the academics in their employ need to distinguish between copyright works and patentable ideas.

Official works

Domestic copyright legislation usually says who has copyright in official works such as legislation. Commonwealth countries often refer to copyright in official works as Crown copyright.

Copyright in international works may be more difficult to establish. Domestic copyright legislation in some countries, for example, in Jamaica, allows for copyright in works such as international agreements. Where domestic law offers no protection, Protocol 2 of the Universal Copyright Convention of 1952 protects official works of the United Nations, of specialised UN agencies and of the Organization of American States. The Berne Convention has no equivalent to Protocol 2. So the position is more difficult in countries that are not members of the UCC and for organisations that Protocol 2 does not mention. It might be possible in these cases to rely on the protection, discussed in the next section, that article 3 of the Berne Convention gives to foreign authors. Even if this does not apply, it is courteous to ask permission to copy international agreements. The organisations responsible for these agreements will usually give this permission.

Copyright protection for foreign authors and artists

An important feature of the Berne Convention is that each member country of the Union should give citizens of other Union countries the same protection as its own citizens enjoy. According to article 3(1)(a) and 3(2), this protection must apply to the published and unpublished works of nationals of a Union country and of those who have their habitual residence in a Union country.

Article 3(1)(b), as we mentioned when discussing the meaning of publication, extends this protection to “authors who are not nationals of one of the countries of the Union, for their works first published in one of those countries, or simultaneously in a country outside the Union and in a country of the Union”.

To avoid difficulties, article 3(3) explains that this protection only applies to works published with the consent of their authors. Article 3(4) says that simultaneous publishing means “if it has been published in two or more countries within thirty days of its first publication”.

Copyright-related rights

The special international agreements that apply to copyright-related rights such as sound recordings were discussed in Chapter 2 (International Copyright Agreements). Although these rights are, strictly speaking, different from copyright, domestic legislation in Commonwealth countries treats them as part of copyright.

Database protection

Most countries treat a database as a literary work. This means a database can be copyright if it satisfies the requirements for copyright. The requirement that causes most difficulties with database protection is whether a database is original enough to qualify for copyright protection.

Originality in a database is usually a matter of how the information in the database is selected or arranged. But in many electronic databases the information is not arranged. It is dumped into the database and a search program finds what the user wants. And because size is not an issue with an electronic database, some databases aim

at including every piece of information about a subject. This can mean there is no selection of material. Databases of this sort are unlikely to qualify for copyright protection.

In 1996, to deal with these cases, the European Union adopted a database directive that requires EU countries to recognise a new right of unfair extraction. Instead of being based on originality, the database right requires that the compiler of the database should have made a substantial investment in producing the database. The term of the database right is 15 years, but the term starts again when the compiler makes a new substantial investment in the database. So a database that is regularly updated is likely to have permanent protection.

In 1996 WIPO released a draft treaty on Intellectual Property in Respect of Databases. The draft was not accepted but WIPO may yet agree on an international standard for protecting databases.

Rights in personal images

In some countries, copyright legislation also sets out individuals' rights to their images. Rights in personal images are part of the law of privacy rather than copyright; an individual does not have copyright in his or her image. But copyright legislation is a convenient place to deal with rights in personal images.

Comments

Congratulations on reaching the end of this chapter. You are unlikely to find any of the following chapters as difficult.

4

4 Holders' Rights

In the previous chapter we saw which works qualify for copyright and how authors and artists acquire copyright in them. In this chapter we will look at the rights copyright holders have in copyright works and how they protect them. We will also look at how a copyright holder transfers some or all the rights in a work to another.

In practice, of course, copyright is not so much about rights as about remuneration. Copyright holders usually assert their rights to stop someone exploiting a work without their permission and so depriving them of income. And they usually only transfer their rights in return for payment. The desire to be paid is at the heart of all the international agreements and domestic legislation on copyright but, curiously, this does not emerge clearly from the legislation and international agreements.

Six basic rights

Someone who has copyright in a work has six basic rights in that work. Looked at this way copyright is not one right but a bundle of six rights. This is how we will treat it.

The Berne Convention doesn't use this structure of six basic rights; neither does the legislation of all Commonwealth countries. Some legislation, for example, presents the rights of a copyright holder in a negative way. It speaks of restricted acts, acts that no one may do without permission from the copyright holder.

First right: right to make copies of (reproduce) the work

Copyright began as the exclusive right to copy, and this is still an important part of copyright. As article 9(1) of the Berne Convention says: “Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.”

When copyright applied only to books and the printing press was the only efficient way to make copies, reproducing meant printing. Now other classes of copyright works exist and the ways in which they are copied depends on the nature of the work and the technology that is available. Two-dimensional works can be photocopied, scanned and copied digitally. If you want to copy a three-dimensional work such as a building you will need to hire a builder.

The Berne Convention allows for exceptions to the copyright holder’s exclusive right to copy a work. We shall look at these exceptions in the next chapter when we look at users’ rights in copyright material.

Second right: right to make derivative works

Derivative works (adaptations of another work) are protected under article 12 of the Berne Convention, which says: “Authors of literary or artistic works shall enjoy the exclusive right of authorizing adaptations, arrangements and other alterations of their works.”

A derivative work can be made in many ways. Movies can be based on books, books can be condensed or translated, music can be arranged for different types of performance and original artwork can be used for advertising. The Berne Convention, in article 8, deals with only one case:

Authors of literary and artistic works protected by this Convention shall enjoy the exclusive right of making and of authorizing the translation of their works throughout the term of protection of their rights in the original works.

It is not always easy to say when a work is a derivative work. If two works are similar, it does not follow that one is a derivative of the other. As we noted in Chapter 3 (Copyright Works), two authors can independently come up with similar work. The test for a derivative work is not similarity or priority (which came first) but whether the author of one work was actually copying from the other work.

Third right: right to sell or distribute copies of a work

The Berne Convention does not say anything about a separate right to sell or distribute copies of a work. As a result unauthorised selling or distributing is sometimes called secondary copyright infringement. It is secondary because it is only possible if someone (who may not be the distributor or seller) has already made the unauthorised copies being sold or distributed.

Parallel importing is a form of unauthorised distributing. It involves bringing into a country and distributing works the copyright holder has not licensed for sale in that country. Parallel importing usually happens when it is possible to buy copies of a work more cheaply in one country than in another. The works might be cheaper because production costs and profit margins are lower or because the copyright holder has licensed the work in that country under more favourable terms. Or they might be cheaper because they have been copied without authorisation.

It is difficult to say whether providing file-sharing software is a form of secondary copyright infringement. The first forms of file-sharing software let users put copies in a central archive or repository for other users to download. When users placed unauthorised copyright material into the archive, those running the repository could have been secondary copyright infringers. They did not make the unauthorised copies, but they helped to distribute them. Peer-to-peer file-sharing, however, makes it possible for people to copy directly from each other. The material is not archived centrally. If a user copies unauthorised material from another user, are those who provide the peer-to-peer software secondary copyright infringers or are they simply providing a tool the users are abusing?

Fourth right: right to perform a copyright work in public

Some kinds of copyright works are written to be performed in public.

Article 11 of the Berne Convention protects authors of these works:

- (1) Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing:
 - (i) the public performance of their works, including such public performance by any means or process;
 - (ii) any communication to the public of the performance of their works.
- (2) Authors of dramatic or dramatico-musical works shall enjoy, during the full term of their rights in the original works, the same rights with respect to translations thereof.

Article 11 does not extend this protection to authors of other classes of works such as books and poems. In most countries, however, it is necessary to get permission from the copyright holder if you want to read from a book or recite a poem in public.

It is not always easy to say what constitutes a public performance. Performing a play or piece of music at home or in a classroom is not a public performance and neither, possibly, is performing it in a school assembly even if outsiders are present. But when members of the public are invited to attend a performance, even if these members of the public are associated with the school and do not pay an admission fee, the performance is probably public. Some countries have detailed legislation that tries to settle these questions.

Performing a copyright work in a church as part of a service is a public performance. Performing it in a house church, a small group who gather by invitation to worship in a private home, is probably not a public performance.

Fifth right: moral rights

Moral rights are a feature of French and Continental copyright, as explained in Chapter 2 (International Copyright Agreements). The Anglo-American copyright tradition knew nothing of moral rights,

and moral rights were not part of the original version of the Berne Convention of 1886.

In 1928 the Rome Act of the Berne Convention added article *6bis* requiring every member of the Union to protect an author's moral rights. Article *6bis*(1) reads as follows:

Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

Commonwealth countries took their time implementing article *6bis* but most now protect moral rights. In some countries authors and artists only have moral rights if they expressly claim or assert them.

The United States still has no general moral rights legislation. In 1990 the Visual Artists Rights Act introduced a form of moral rights protection for authors of works of visual art.

Sixth right: *droit de suite* or special protection for authors of original works of art and manuscripts

Having copyright in a work and owning the work itself are two different things. Authors of books usually license or assign copyright in the works they produce but keep the manuscript. Artists usually sell the works of art but keep the copyright. If they do this they can earn money by selling prints or pictures of the work, by publishing them in books or by painting copies or derivatives of the work. Commercial artists will usually have to sell both their work and the copyright or, at least, an exclusive licence.

Some artists earned little from works that later began to change hands for millions. When the works of art increased in value, neither the artist nor the artist's family benefited from the increase. An example was the painter Vincent van Gogh, who made so little from his art that he died in poverty.

In 1948, to address such cases, article *14ter* of the Berne Convention introduced the *droit de suite*. Article *14ter*(1) reads as follows:

The author, or after his death the persons or institutions authorized by national legislation, shall, with respect to original works of art and original manuscripts of writers and composers, enjoy the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work.

Critics of the *droit de suite* say it distorts the market in works of art and is easy to avoid. They say Van Gogh's was an exceptional case and that many of those who benefit from the *droit de suite*, for example, the family of Pablo Picasso, don't need the benefits.

Article 14ter is not an optional part of the Berne Convention. But the *droit de suite* has never been popular in Anglo-American countries, and the United States and most Commonwealth countries have not implemented it. Even if Commonwealth countries were pressured into implementing *droit de suite*, article 14ter(3) allows countries to fix the amount to which the author is entitled from each sale and the procedure for collecting it.

Article 14ter(1) also applies the *droit de suite* to the original manuscripts of writers and composers. While not usually works of art, the manuscripts of famous books and musical compositions can be of historical and critical interest. They can have a high market value.

Five copyright remedies

A right without a remedy to assert or protect it is of little use to a copyright holder. In Commonwealth countries and the United States, copyright holders have the following five remedies to protect their rights. These remedies are usually sought by individual copyright holders. Some countries allow for class actions where a group can collectively ask for a remedy.

The Berne Convention only deals with the first remedy. Part III of TRIPS goes into more detail about the remedies that countries must provide to copyright holders.

First remedy: seizing infringing copies

Even before the Statute of Anne, confiscating offending books was a way of punishing those who made unauthorised copies. Article 16

of the Berne Convention still requires member countries to provide for works to be confiscated:

- (1) Infringing copies of a work shall be liable to seizure in any country of the Union where the work enjoys legal protection.
- (2) The provisions of the preceding paragraph shall also apply to reproductions coming from a country where the work is not protected, or has ceased to be protected.
- (3) The seizure shall take place in accordance with the legislation of each country.

Article 46 of TRIPS goes into more detail about how to dispose of infringing goods. It does not simply allow confiscation but requires any confiscation to take into account the interests of third parties and proportionality between the offence and the remedies.

Confiscation, of course, is only a remedy when copies are available that can be confiscated. It is not easy to confiscate digital copies that circulate on the Internet and it is impossible to apply this remedy to unauthorised performances.

Second remedy: an order to stop infringing

What most copyright holders want when they find their copyright being infringed is an order from a court to stop the infringement. This court order is known as an injunction (in common law countries) or an interdict (in countries such as Scotland and South Africa that follow the Continental tradition). The Berne Convention does not require a remedy of this sort but Commonwealth countries have always allowed copyright holders to apply for an injunction if their rights are infringed. Article 44 of TRIPS makes this a requirement.

Injunctions are quicker and cheaper than suing for damages. Most legal systems have a special procedure for getting an urgent injunction. This makes it possible to get an injunction quickly if the copyright holder risks suffering permanent loss.

Third remedy: an award of damages

Another remedy that all Commonwealth copyright legislation provides is allowing a copyright holder to sue for damages for copyright infringement. Article 45 of TRIPS makes suing for damages a requirement.

This remedy is not as useful as it might seem for two reasons. First, in order to recover damages, copyright holders have to quantify their losses. This means they have to prove how much they have actually lost as a result of the copyright infringement. This can be difficult. If someone posts an unauthorised electronic version of a printed book on the Internet, who can say how much the posting has damaged sales? It might even have helped sales. To deal with problems of this sort, copyright legislation often allows a judge to award special or statutory damages as well as the damages actually proved.

The second weakness with an award of damages is that it is only effective if the infringing publisher can pay the damages. If the infringing publisher has no assets, then the copyright holder who sues for damages may end up getting nothing but a lawyer's bill. This happened to Charles Dickens when he sued for damages for copyright infringement.

Fourth remedy: criminal penalties

In the past criminal penalties only applied to those who were trying to make money out of infringing another's copyright. So article 61 of TRIPS requires countries to have criminal sanctions "to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale". As a result those who copied for private use or performed publicly without charging did not risk criminal penalties.

The Internet and, in particular, file-sharing software made it possible to copy and distribute copyright works, usually music, on a large scale. Most of those doing this were not copying and distributing work on a commercial scale in that they were not trying to make a profit. But the copyright holders complained that their actions were affecting their sales. As a result many countries have changed their copyright legislation to make it possible to bring

criminal charges against someone whose unauthorised copying is damaging the copyright holder's market.

Some have proposed that Internet Service Providers (businesses that connect ordinary users to the Internet) should be responsible for preventing ordinary users from using the Internet to copy unauthorised material.

Fifth remedy: common law actions

As well as the remedies provided by copyright legislation, copyright holders can use common law actions to protect their copyright. These common law actions include unlawful competition and passing off. Without going into detail, both these actions are based on fraud: trying to get a commercial advantage by pretending that products are different from what they are.

Protecting copyright with technology

Copyright holders have developed technology that protects their copyright by making it more difficult to copy and distribute works that are in digital or electronic format. We will discuss this technology in Chapter 9 (Digital Rights Management).

Protecting moral rights

When it comes to remedies for protecting moral rights, article 6bis(3) of the Berne Convention says: "The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed."

Legislation in some Commonwealth countries treats a breach of moral rights as a breach of a statutory duty. The expression "breach of a statutory duty" is not without its problems. In this case it probably means the holder of the moral rights can bring an action for an order to stop the infringement and an action for damages. Another approach is to say that moral rights are protected in the same way as copyright.

Transferring copyright rights

The Berne Convention does not deal with the transfer of copyright. Commonwealth countries usually recognise five ways to transfer rights in a work: assignment, an exclusive licence, a (non-exclusive) licence, inheritance and operation of law.

Assignment and licences are special contracts that, in the case of assignment and exclusive licence, have to comply with special formalities. They also have to comply with the domestic law of contract on matters such as consent, mistake and duress. Because copyright is not a form of property, the copyright holder needs no form of conveyance to transfer copyright to another.

Assignment

“Assignment” is the word used to describe the transfer of copyright from one holder to another. In Commonwealth countries, assignment must be in writing and signed.

Assignment of copyright can be complete: for the whole of copyright, for the whole of the copyright period and for anywhere in the world. It can also be limited. So an author of a book might assign to one publisher the right to publish the book in the United Kingdom and that publisher might assign to another publisher the right to publish the book in the United States. This is why some editions of books are not for sale in certain countries. Assignment can also be for a period less than the copyright period.

A partial assignment is like the exclusive licence discussed below. The difference is that a partial assignment gives the holder copyright in a work and allows the holder (subject to the terms of the partial assignment) to grant licences and proceed directly against infringers for breach of copyright.

Commonwealth copyright legislation usually allows an author to assign copyright in a work that does not yet exist. This may seem curious but it makes it possible for an author to sign an agreement transferring copyright in a book he or she has not yet written.

Exclusive licence

An exclusive licence is a licence giving someone the exclusive right to do one or more of the actions reserved to the copyright holder. In Commonwealth countries exclusive licences must be in writing.

Someone who is publishing or translating a book would normally want an exclusive licence. Otherwise they might find the edition or translation they have produced has to compete with other editions or translations.

A copyright holder cannot give the same exclusive licence to two people. But a copyright holder could, for example, give different exclusive licences to translate the same book into different languages.

Simple licence

Exclusive licences are not always necessary. An educator wanting permission to make copies of a work, for example, does not need an exclusive licence. A simple licence from the copyright holder giving permission to make the copies would be sufficient.

No formalities are needed for a simple licence and it does not have to be in writing. It is even possible to have an implied simple licence. A website user, for example, has an implied licence from the website owner to download material on the website. Without this licence it would not be possible to read or view the material.

Copyright licences are an important way for a copyright holder to earn money. The different kinds of licences will be discussed in Chapter 6 (Copyright Licences).

Inheritance

Copyright also can be inherited as an asset in the estate of a deceased person. Someone who inherits a work that has not been published usually inherits copyright in that work.

Inheritance is the only way moral rights and the *droit de suite* pass from the original creator of a work to another.

Operation of law

Copyright is an asset and can be transferred by operation of law. This happens, for example, when the holder of the copyright is insolvent

and the estate is taken over to be distributed among the holder's creditors.

Copyright-related rights

Copyright-related rights are the right of performers in a live performance to authorise broadcasting and “fixing” or recording of the performance and the rights of producers of performances. If a performance is going to be broadcast or recorded, then those giving the performance have to agree in advance. Once a performance has been fixed or recorded, performers have to authorise how that recording is used. Producers of the recordings also have the right to make copies, distribute them and rent them out.

Not every country subscribes to the international agreements on performers' rights but TRIPS, as we have seen, requires members of the WTO to recognise performers' rights. Domestic legislation in Commonwealth countries deals with performers' rights in the same legislation as copyright.

Strictly, performers and producers can prevent a recording from being used. Although some performers and producers have prevented use, most want the recordings used so they can earn royalties from the recording. Performers are entitled to what the international agreements call “equitable remuneration”.

If a producer sells copies of the recording, then an agreement between performers and the producer fixes what the performers receive. When someone uses the recording, for example, by broadcasting it on the radio, the collecting society that represents performers and producers negotiates a fee with the broadcasters. The collecting society then divides the fee among the copyright holders of the music and the words and the performers and producers. Most countries have a copyright tribunal that fixes a fee if those concerned cannot agree on one. Collecting societies are discussed further in Chapter 7 (Collecting Societies).

In some countries domestic legislation does not allow a performer to pass performance rights onto another or to agree not to enforce these rights. This restriction is meant to protect performers from exploitation and their own poor judgement.

Copying in education and plagiarism

Before ending this chapter we need to say something about illegal or unethical copying in education and research. Some educators call this plagiarism. It might be better to keep the term “plagiarism” for unethical copying. Copying that infringes copyright or moral rights is illegal or unlawful.

Copyright in education and research

Most Commonwealth domestic copyright legislation allows “fair dealing” in copyright works for private study and research and for criticism and review. What this means is that a student or academic does not infringe copyright when copying out a passage from a copyright work in a paper, review article or critical study. (The term “fair dealing” is explained in more detail in Chapter 5 [Users' Rights].)

If a student, researcher or teacher paraphrases a passage from a copyright work (puts the passage into different words), then copyright may not be infringed. As we have said, ideas are not protected by copyright and, if the language of the paraphrase is sufficiently different from the original, then the paraphrase will not be a derivative work.

Copying and moral rights

Even when legislation allows copying from a copyright work, the author of the work (who may not be the copyright holder) still has moral rights in the work. This means that a student, researcher or teacher must acknowledge the author of the work and not distort or mutilate the work.

Acknowledgement is also usually one of the conditions imposed by the legislation that allows for educational copying from a copyright work. Someone who copies without acknowledging the author of the copied work loses the benefit of the exception and infringes copyright as well as the author's moral rights.

Plagiarism

There is, of course, a term to copyright and moral rights. In Commonwealth countries this term is usually the same. Once copyright and

moral rights have reached their term, there is no restriction on copying the work and no legal duty to acknowledge the author of the work.

Most educational institutions, however, subscribe to an unwritten code that requires students, researchers and academic authors to acknowledge the authors of the works and the ideas they have used. This is considered to be part of academic honesty. Not doing so is known as plagiarism and most academic institutions have strict penalties for those who plagiarise.

What exactly constitutes plagiarism concerns many who work in education and research. It is clear that plagiarism applies to copying directly from another work, even if copyright has expired, without acknowledging the author. Plagiarism is a form of academic fraud, passing off the work of another as one's own.

This form of plagiarism has become more common since the Internet made it easy to find and copy the work of others. In response developers have produced software that can detect material that has been copied from the Internet or from other sources. This software cannot, however, detect copyright infringement or plagiarism because it cannot decide whether the copying is legitimate, illegal or unethical. It can only alert a user to the possibility of plagiarism or copyright infringement.

Another form of plagiarism involves using an idea or an expression of another without acknowledging it. It is not so clear when use without acknowledgement becomes plagiarism. Any original research or writing must build on work done by others. To what extent is it necessary for an author or researcher to acknowledge the source of every idea or expression he or she uses?

It may be helpful to draw an analogy with legal argument. In law, propositions exist that qualify as "trite law". It is not necessary to give an authority for them. More contentious propositions require authority. Something similar seems to be the case in academic writing. In every subject there is what is trite and can be taken for granted and what is original or contentious and should be referenced. It will not always be easy to decide when someone has drawn the line between these two so inappropriately as to be guilty of plagiarism.

Theft of ideas

Discussion of plagiarism leads to the problem of theft of ideas. As we have seen, there are no copyright and moral rights in ideas. Consequently, there is no copyright protection for ideas.

Although ideas are not protected by copyright, ideas can have an economic value. A person with the appropriate skills may only need to be given an original idea to be able to start a business or produce an original work of literature or art. Business practice acknowledges the economic value of ideas by requiring those who have to be told about an important original idea to sign non-disclosure agreements. Business can also rely on legal protection for trade secrets.

In academic life there are no non-disclosure agreements and academic ideas do not qualify as trade secrets. Ideas, however, are an important part of academic research and writing. In theory, research degrees are only awarded for original work and research papers are not published unless they contain something original. Finding an original idea can be the most difficult part of academic research. In his book *A Brief History of Time*, Stephen Hawking, for example, said that as a research student he was “desperately looking for a problem” with which to complete his Ph.D. thesis so that he could get a job and afford to get married. Solving the problem did not seem to concern him; his problem was finding a problem to solve.

To some extent, original ideas are protected by the code of academic honesty. Yet researchers sometimes complain that their supervisors have “stolen” their ideas. Some supervisors complain that students they supervise do not give them credit for ideas they contribute to the students’ work. Some academics will not review articles for publication because, they say, the authors who submit these articles are fishing for ideas to improve their work. Complaints of this sort are likely to increase as academic institutions attach more importance to individual research output (the publication count) and less to contributions to the collegial enterprise such as teaching and supervision.

Some institutions have policies to deal with these issues and administrative procedures to enforce them. But these policies are

not much help to someone who feels his or her idea has been stolen, because it is usually difficult to prove where an idea came from. The only effective way to protect a new idea is to keep quiet about it while writing it up, and then get it into print as quickly as possible. This, of course, means publishing without the benefit of feedback from colleagues and others working in the field.

It is possible to protect an idea and still get feedback by publishing a draft of the work that contains the idea. This gives the author copyright protection for the work and for any derivatives of the work. The traditional practice of sending a draft to a colleague for comment achieved this kind of copyright protection. But posting a draft online is better. It is quick and costs little and is likely to produce more in the way of feedback. Having published a draft online also makes it easier for the author to show prior publication should someone else publish a similar work.

Technically, posting a draft online is publication, and most peer-reviewed journals will not publish a work that has already been published. In some disciplines, however, online posting to a pre-print archive has become an established practice. The practice began in physics and applied mathematics for which, in 1991, Paul Ginsparg set up the influential pre-print archive at Los Alamos. Editors of peer-reviewed journals in these disciplines do not treat pre-print archiving as a bar to publication. If authors in other disciplines start publishing pre-print versions of their work, editors in those disciplines will have to take the same approach.

Comments

As we saw in Chapter 1 (Copyright History), copyright infringement has always been a problem. Modern technology has made it easier to infringe copyright and this is happening on a large scale. Copyright holders have reacted by calling for more protection from the law. They want the police to enforce their rights and they want more vigorous prosecuting and tougher penalties.

What is different about modern copyright infringement is that many of the infringers are not rival businesses or criminal organisations. Many, possibly even most, offenders are otherwise law-

abiding individuals who do not make money from infringing copyright. Many of these offenders know that what they are doing is technically illegal, but do not feel that it is morally wrong.

The interesting question is whether tougher sanctions will stop illegal copying or whether the new technology has brought about an irreversible change in the attitude of people to copyright. If the change of attitude is irreversible, it is the international agreements on copyright and domestic copyright legislation that will have to change.

5

Users' Rights

Users can use any work to which copyright does not apply. Such works are said to be in the public domain.

This chapter looks at the rights of copyright users in works to which copyright still applies. Users' rights are sometimes treated as limits on or exceptions to the rights of copyright holders. This language gives the impression that having copyright is a fundamental right, like being the owner of land. If it is, the rights of copyright users would be a limited inroad on this right. They would resemble building regulations that are a limited inroad on the rights of a landowner.

This chapter takes a different view. It regards users as having rights of their own in copyright works.

Users' rights in copyright works are, of course, complementary to copyright holders' rights. So when we discussed copyright holders' rights, we learned something about copyright users' rights. We saw, for example, that a copyright user may not copy the way an author or artist expresses an idea but is free to use the idea that inspired the expression. In this chapter we look at the other rights of copyright users.

Term

An important feature of copyright is that it does not last forever. In the United States this feature is written into the Constitution, which says that copyright and other similar legislation can only be “for limited Times”.

When copyright in a work ends, the work no longer has copyright protection and the work falls into the public domain. The time it takes for copyright to end is called the copyright term or simply “term”. Copyright-related rights also have terms.

Term for copyright works

In 1886 the Berne Convention set 50 years after the death of the author of a work as the minimum copyright term. The member countries of the Union have not increased this period and TRIPS also sets 50 years as the term for copyright. But, as we have seen, the Berne Convention and TRIPS allow member countries to give authors greater protection, and some countries have done this by increasing the copyright term.

In the United States the Copyright Term Extension Act, or CTEA, of 1998 (known as the Sonny Bono Act in memory of the entertainer and member of Congress who was one of the proposers of the Act) changed the term to 70 years after the death of the author of a work. The Act also extended the term for anonymous works and works for hire. The Act had complicated rules for applying the extension to works that were already in copyright.

Opponents of the CTEA called it the Mickey Mouse Protection Act. Walt Disney created the Mickey Mouse cartoon character in 1928 and, either coincidentally or as the result of pressure from the copyright holders, the CTEA stopped Mickey Mouse from going into the public domain. The concern was that copyright term would be extended in the future to ensure that Mickey Mouse and later works never went into the public domain. In 2003, in *Eldred v Ashcroft*, a group of publishers who used public domain works unsuccessfully attempted to have the increases in copyright term in the CTEA declared unconstitutional.

Although opponents usually blame the United States for increases in the copyright term, the European Union was the first to increase the term. In 1993 an EU directive required all EU countries to increase the copyright term to 70 years. The EU directive required EU countries to pass legislation that, unlike the US CTEA,

had the curious effect of putting back into copyright works that had already gone into the public domain.

Term for works made by employees and works made “for hire”

Commonwealth countries treat the employer's copyright in works created by an employee as an assignment of copyright to the employer. The copyright term of such works is calculated in the ordinary way from the date of death of the employee. This means the employer has to keep track of the employee (or employees) who created a work to know when copyright in the work ends.

US Copyright law, as we have seen, recognises a special category of works made for hire, in which an employer has copyright. The term for copyright in works made for hire is the earlier of 120 years after creation or 95 years after publication. This term is easier for the employer to calculate.

Calculating the term for copyright works

Knowing the number of years for the copyright term does not tell us exactly when the term ends. To deal with this the Berne Convention has the following special rules:

The death of an author is taken to be 1 January of the year following the death. (Article 7(5))

The term of an anonymous or pseudonymous work is calculated from the date of publication. This is taken to be 1 January of the year following publication. (Article 7(3))

The term of a work of joint authorship is taken to be 1 January of the year following the death of the last surviving author. (Article 7*bis*)

Term for moral rights

Article 6*bis*(2) of the Berne Convention says the term for moral rights must be at least as long as the term for economic rights. This is usually the case in Commonwealth countries. In Continental countries it may be longer.

The United States has no general protection for moral rights, as we saw in Chapter 3 (Copyright Works). Under the special protection the Visual Artists Rights Act of 1990, the term for a work of visual art is the life of the author. This is 70 years shorter than the copyright term.

Term for performers' and producers' rights

Article 17(1) of the WIPO Performances and Phonograms Treaty of 1996 says that protection for performers shall last “at least, until the end of a period of 50 years computed from the end of the year in which the performance was fixed in a phonogram”. In the United Kingdom, Sir Cliff Richard and other performers are campaigning for the term for performers' rights to be extended to 70 years.

Special users' rights in copyright works

In some cases a user is entitled to use a copyright work before the copyright term has expired. These cases fall into three groups: those required by the Berne Convention, those allowed by the Berne Convention and those in domestic copyright legislation that have no basis in the Berne Convention.

Cases required by the Berne Convention

The Berne Convention requires countries to provide for only two cases where users have the right to use a copyright work:

The protection of this Convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information. (Article 2(8))

It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries. (Article 10(1))

“Fair practice” is an expression that occurs only in article 10(1) and (2) of the Berne Convention. It is not necessarily the same as the fair dealing or fair use we will discuss later in this chapter. In article 10 it probably means restricting use to what is necessary.

Article 10(3) requires a user who relies on article 10(1) to give the source and the name of the author. Anyone not doing this loses the rights that article 10 gives. This is not a requirement for the right that article 2(8) gives.

Cases left to domestic legislation

The Berne Convention recognises cases where the domestic legislation of member countries may allow the use of copyright works. It does not follow that a country has allowed the use of a copyright work in any of these cases. And those countries that have allowed the use of copyright works have not always taken full advantage of the Berne exceptions. You need to check the copyright legislation of each country to see what rights a user has.

The cases left to domestic legislation are scattered through the Berne Convention. They come under five headings.

1. Legal and political works: The first class of exceptions to the Berne Convention has to do with legal and political works. The relevant articles state:

It shall be a matter for legislation in the countries of the Union to determine the protection to be granted to official texts of a legislative, administrative and legal nature, and to official translations of such texts. (Article 2(4))

It shall be a matter for legislation in the countries of the Union to exclude, wholly or in part, from the protection provided by the preceding Article political speeches and speeches delivered in the course of legal proceedings. (Article 2*bis*(1))

2. Works for public information: The second class of exceptions has to do with works that inform the public. The relevant articles state:

It shall also be a matter for legislation in the countries of the Union to determine the conditions under which lectures, addresses and other works of the same nature which are delivered in public may be reproduced by the press, broadcast, communicated to the public by wire and made the subject of public communication . . . when such use is justified by the informatory purpose. (Article 2*bis*(2))

It shall be a matter for legislation in the countries of the Union to permit the reproduction by the press, the broadcasting or the communication to the public by wire of articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character, in cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved. Nevertheless, the source must always be clearly indicated . . . (Article 10*bis*(1))

It shall also be a matter for legislation in the countries of the Union to determine the conditions under which, for the purpose of reporting current events by means of photography, cinematography, broadcasting or communication to the public by wire, literary or artistic works seen or heard in the course of the event may, to the extent justified by the informatory purpose, be reproduced and made available to the public. (Article 10*bis*(2))

3. *Ephemeral recordings:* The third class of exceptions deals with ephemeral recordings. For technical reasons, a broadcaster sometimes needs to make a recording of a work to broadcast it. This is what the Berne Convention calls an “ephemeral” recording. Domestic legislation may allow the broadcaster who has a licence to broadcast, but not record, to make an ephemeral recording. Article 11*bis*(3) says in part:

. . . It shall, however, be a matter for legislation in the countries of the Union to determine the regulations for ephemeral recordings made by a broadcasting organization by means of its

own facilities and used for its own broadcasts. The preservation of these recordings in official archives may, on the ground of their exceptional documentary character, be authorized by such legislation.

4. Teaching: The fourth class of exceptions deals with teaching. Article 10(2) allows member countries to give a right to use copyright material for teaching:

It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.

Article 10(2) limits the right to use a copyright work for teaching in three ways. A work can only be used “by way of illustration”, “to the extent justified by the purpose” and “provided such utilization is compatible with fair practice”. When commenting earlier on article 10(1) we explained that fair practice in the Berne Convention probably means the minimum necessary. The limitations in article 10 mean this exception is narrow.

As with the right to quote from a work provided in article 10(1), article 10(3) requires legislation allowing anyone using material for teaching to give the source and the name of the author. Anyone not doing this loses the right article 10(1) gives.

Any further exceptions for teaching will have to fall under the general three-step test given below.

5. Three-step test: The fifth class of exceptions concerns cases covered by what is known as the three-step test. This is a general test for domestic legislation that gives users' rights in copyright material going beyond those already discussed.

Before 1967 the Berne Convention did not have a general test for what rights in copyright works that domestic legislation could allow users. In 1967, however, article 9(2) of the Stockholm revision of

the Berne Convention introduced what has become known as the three-step test.

We have formatted article 9(2) of the Berne Convention to emphasize the three steps:

It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works
[1] in certain special cases,
[2] provided that such reproduction does not conflict with a normal exploitation of the work and
[3] [provided that such reproduction] does not unreasonably prejudice the legitimate interests of the author.

TRIPS has its own wording for the three-step test that differs slightly from that of the Berne Convention.

Not all countries have taken advantage of article 9(2) to allow for users' rights. If a country has not done this, then a user in that country cannot rely on the three-step test in the Berne Convention to claim rights in a copyright work. Commonwealth domestic legislation usually allows some or all of the following user rights that fall under the three-step test. In Commonwealth countries they are often called "fair dealing":

- "Fair dealing" in copyright works for criticism, review, research or private study. The legislation often explains what "fair dealing" means.
- Allowing a teacher to use copyright material when teaching and when setting examinations.
- Allowing multiple copying or making an anthology for educational purposes. Domestic legislation that allows these uses usually limits how much use can be made of copyright material. We will return to multiple copying and anthologies in Chapter 6 (Copyright Licences), when we look at blanket licences for educational copying.
- Librarians and archivists often need to copy a copyright work or change its format (make a derivative work) to make the

work available to users or other libraries or to preserve it. Some domestic legislation allows librarians and archivists to do these things.

- Many countries have passed domestic legislation allowing for single or multiple copies of a work in a format that allows the visually impaired to use the work. WIPO is considering amending the Berne Convention to allow or require countries to pass such legislation.
- Another exception the domestic legislation of some countries allows is making backup copies of computer software.

In the United States these user rights are known as “fair use”. Fair use differs from the fair dealing provisions in Commonwealth legislation and it is worth looking at it in a little detail. Section 107 of the US Copyright Act sets out its own “four-step test”:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include –

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work . . .

Fair use in section 107 is more restrictive than article 9(2) of the Berne Convention. It contains limitations not included in article 9(2), such as “nonprofit educational purposes” and “substantial portion”. This is perfectly in order; the Berne Convention does not

require countries to implement the three-step test in its fullness or even at all. Section 107 is also more restrictive than the “fair dealing” exceptions in some Commonwealth legislation. This does not mean that Commonwealth countries should follow the US lead.

The United States relies on case law to fill in the details of the general statement in section 107. When Google recently settled a class action brought by authors and publishers, an opportunity was lost for case law to clarify whether fair use in US copyright law allowed anyone to publish indexes of and short excerpts from books. The authors and publishers had objected to Google doing this as part of its Google Library Project. The complex agreement, if approved, will allow Google to continue to do this and also, subject to conditions and payments, give access to out-of-print works. It is not clear whether anyone else in the United States can do this. If anything, the agreement suggests that they cannot.

Most Commonwealth countries do not have the benefit of case law on the meaning of fair dealing. So they often have a more detailed explanation of users’ rights. Sometimes, as in South Africa, this more detailed explanation is contained in a statutory instrument (delegated legislation). Stating the exceptions in a statutory instrument can result in technical problems of interpretation if the statutory instrument explains fair dealing more restrictively than the Act of Parliament. Continental countries usually avoid these problems by including detailed lists of exceptions in their copyright legislation.

Some libraries and collecting societies have their own tests for how much may be copied from a copyright work. They may limit copying to a set number of articles in an issue of a journal or a percentage of the number of pages in a book. These tests bind those who have an agreement or contract with the collecting society or library. They do not bind anyone else unless they are specified in the domestic legislation of the country.

Linking, framing and thumbnails

Anyone who uses the Internet will know the importance of the links that take users from one site to another. Web search engines, in particular, make it easy to find information on the Web by producing

huge collections of links. Does linking involve a breach of copyright? Do I need permission to set up a link to another's website?

Linking does not involve unauthorised copying and it is hard to see how it infringes copyright. There have been cases where a website linked to information in a way that gave the impression the information was part of the website and not a link. This has happened with both commercial and educational websites. Abuses of this sort will be an infringement of moral rights. They may also be a form of what the common law calls unfair competition or "passing off". But they are not a breach of copyright.

A website owner who doesn't want links to a site can always make this a condition for using the website. It is also possible to use robot.txt to stipulate a policy that will stop automated search engines or spiders from indexing material on the site.

Framing happens when a website displays material from another website within a frame of its own. Despite appearances no copy of the framed information exists on the framing website so it is difficult to see it as a breach of copyright. Framing doesn't serve the same useful purpose as linking and is more likely to be abused. The same protection is available against unauthorised framing as against unauthorised linking.

Thumbnails are small copies of a web image that a search engine produces. They clearly involve copying. In the United States thumbnails are protected as a form of fair use (something we will discuss in Chapter 6 [Copyright Licences]) provided it is not commercial. It is not clear whether the courts in Commonwealth countries will take the same approach.

Users' rights not based on the Berne Convention

Two users' rights sometimes found in domestic copyright legislation have no basis in the Berne Convention.

1. Using a non-substantial part: In most Commonwealth countries copyright legislation says that copyright applies only to a substantial part of a copyright work. This means that a user is free to use a non-substantial part of a copyright work.

There is no basis in the Berne Convention for giving users this right. This suggests the rule reflects the legal maxim that the law does not concern itself with small or trivial matters (*de minimis non curat lex*). If this is so, a non-substantial part is an insignificant part of a work.

2. *Works against public policy*: In some countries copyright does not protect works that are against public policy (*contra bonos mores*). So, for example, the author of an original work promoting terrorism might not be able to claim copyright in the work.

Limits to holders' rights in a musical work

It often happens that more than one person has rights in a musical work. So, a broadcaster has copyright in a broadcast but an author may also have copyright in the words and a composer may have copyright in the music. In theory all of these copyright holders have the right to stop users rebroadcasting a broadcast.

Article 13 of the Berne Convention deals with holders' rights by allowing countries to restrict rights in musical works so long as the rights holders receive "equitable remuneration". What is equitable, according to article 13(1) "in the absence of agreement, shall be fixed by competent authority".

Right of exhaustion or first sale

Another users' right is what in Europe is called the right of exhaustion and, in the United States, the first sale doctrine. This right needs some explanation.

Those who buy books do not get copyright in the books. But they can read them. They can also sell them or give them away. And when they do this, they pass on similar rights to the new owner. The copyright holder cannot prevent them from doing this. The copyright holder's right to control these activities ends (is exhausted) the first time he or she sells the book.

The right of exhaustion is well established for books but those marketing software and works in electronic format have argued

that it should not apply to them. We will return to this in Chapter 10 (Software Protection), when we discuss software protection.

Orphan works

An orphan work is a work that is subject to copyright but for which it is not possible to locate the copyright holder. This means there is no one to give or refuse permission to copy or perform the work and no one to receive any royalties. Anyone who copies an orphan work is infringing copyright and risks legal action by the holder of the copyright.

Only Canada has so far dealt with orphan works. The Copyright Board of Canada can license the use of an orphan work if the Board is satisfied that the copyright holder cannot be found. (The Copyright Board of Canada is discussed in more detail in this Chapter 7 [Collecting Societies].) When the Board licenses an orphan work, it fixes a royalty. The copyright holder then has five years to collect the royalty from the licence holder.

Other countries are looking at ways to deal with orphan works. In the United States the proposal is to pay royalties owed to the copyright holder into a special fund.

Users in developing countries

Since the 1960s there has been an appreciation that developing countries have different copyright needs. There are provisions in TRIPS and the Berne Convention that allow developing countries to give their users additional rights in copyright works. There is also the WIPO Development Agenda, which aims to narrow the gap between developing and developed countries.

Berne Convention Appendix

An Appendix to the Berne Convention has special provisions for countries that qualify as developing countries. The Appendix became part of the Berne Convention when the Convention was revised at Stockholm in 1967.

The Appendix allows a developing country to set up a system of licences to replace the author's right of reproduction and translation. The Appendix has two alternatives to this. One alternative is

to continue with any exemptions the country's legislation allowed before joining the Berne Convention. The other alternative is to return to the 10-year translation right that the original 1886 Berne Convention allowed. The provisions in the Appendix applied to a developing country for 10 years but could be renewed.

The Appendix poses two problems. First, no official list says which countries qualify as developing countries. Second, countries that want to take advantage of the Appendix have to make a declaration to this effect when they accede to the Convention.

TRIPS

Article 9(1) of TRIPS requires member countries to comply with the Berne Convention Appendix mentioned above. In addition, Article 66 of TRIPS has special rules for members that are least-developed countries. These members are not "required to apply the provisions of this Agreement, other than Articles 3, 4 and 5, for a period of 10 years from the date of application" of the WTO Agreement. (Articles 3, 4 and 5 of TRIPS deal with national treatment, most favoured nation treatment and multilateral agreements.) The Council for TRIPS has the authority to extend this period and has, in fact, done so. The period now ends on July 1, 2013.

An official list of least developed countries is kept by the United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and the Small Island Developing States (UN-OHRLS).

WIPO Development Agenda

In 2004 the WIPO General Assembly adopted a proposal by Brazil and Argentina for a "Development Agenda". The agenda called on WIPO to overcome the disparity in matters that had to do with WIPO between developing and developed nations.

Comments

Two concerns about users' rights in the Berne Convention need to be addressed.

The first concern is the limited scope of users' rights in copyright works. In the short term, this may suit copyright holders. In the long term, limited users' rights may be contributing to the attitude we have mentioned: that copyright benefits only rights holders and that copyright users are under no ethical or moral duty to respect these rights. If copyright users felt that copyright law balanced the rights of copyright users and copyright holders more evenly, it might be easier to persuade copyright users to respect the rights of copyright holders.

The second concern is about the right to use copyright works for education. Compared with the rights the Berne Convention requires or allows for news reporting, the rights it allows for education seem very limited. We should be asking why, in the 21st century, educators do not have at least as much royalty-free access to copyright works as news reporters.

6

Copyright Licences

In Chapter 4 (Holders' Rights) we said that copyright licences are an important way for copyright holders to earn money from works in which they have copyright. Radio and television stations, performers of music, plays and operas and those who screen films all pay licence fees. Educators also pay licences to copy the material they distribute to students. This chapter will look at the different licences copyright holders use to license or give permission to use their work.

Individual licences

Copying or performing a copyright work without permission infringes copyright. The obvious way to avoid infringing copyright is to get a licence from the copyright holder to perform or copy the work.

The terms of the licence will vary with the nature of the work and what the user wants to do with it. So a theatre company will want a licence to perform a play a certain number of times. An educator will want a licence to copy a passage from a textbook and give out the copies to a certain number of students.

Copying material to give out to students has become an important part of education. In the past, students at all levels bought or were given prescribed textbooks and educators taught from these books. Many educators now do not rely on a single textbook. They prefer to use material taken from different sources: passages from books, journals and newspapers and even recordings of radio and video material.

Such educators copy parts of different works and make them available to students as photocopies (in the case of printed material) or in electronic format. Distance learning institutions, in particular, need to be able to copy parts of works for students who do not have access to libraries. When they do this they need a licence from the copyright holder.

General licences

Getting an individual licence in advance needs planning, something that does not suit every user. To make it easier for users, the rights holder can agree in advance that a copyright work may be used in a set way for a set royalty. The user then copies or performs the work, reports the use and calculates and pays the licence fee.

Nothing stops the individual copyright holders from giving general licences. Most general licences, however, are granted by collecting societies that collect royalties for the copyright holders they represent. Collecting societies, as we will explain in the next chapter, have a catalogue of copyright works for which they can issue general licences and blanket licences.

Blanket licence to copy

Blanket licences are another way collecting societies license copyright works. A blanket licence allows the licence holder to use all the works in a collecting society's catalogue in return for paying a set fee. A blanket licence will, of course, only apply for a limited period.

The terms of a blanket licence can vary. They may allow unrestricted use of material in the collecting society's catalogue or they may restrict it. Some blanket licences to copy and distribute material, for example, have their own "fair dealing" conditions and only allow the licence holder to copy a part of each work. Educators thinking of taking out a blanket licence need to be sure the licence they are paying for gives them more than they would get from the fair dealing provisions in their domestic legislation.

What teaching institutions like about blanket licences is the set fee. They can negotiate the fee in advance and budget for copyright use.

Some blanket licences require a licence holder to keep a record of how much material is copied. This helps the collecting society decide what fee to charge in the future. It also helps the collecting society distribute the blanket licence fee as royalties to the copyright holders.

Grand rights licence for dramatic works

An author who writes a dramatic work such as a play or an opera can publish the work in book form. Anyone can read the work and get a licence to copy all or part of it.

If, however, someone wants to perform a dramatic work, that person needs a special licence from the copyright holder. This licence gives what are called grand rights, the rights to perform a dramatic work.

Licence to use music

Licences to use music are commercially the most important licences. The website of the International Confederation of Societies of Authors and Composers (CISAC), for example, says that in 2005 almost 90 percent of the income it collected for its members came from royalties for music.

Two special licences exist for using music. A mechanical rights licence allows a producer to record and release a piece of music. It will usually provide for a licence fee based on the number of records or CDs produced or sold. A synchronisation licence allows music to be used as a soundtrack for a film.

Master rights licence

A master recording is the result of the recording process. It usually involves “mixing” the performances of the different artists. Although the individual performances are protected by copyright-related rights, the master recording is protected by copyright.

The copyright holder of a master recording can grant a master rights licence. This licence would allow the master recording to be used, for example, as a film soundtrack.

Licences for performers' rights

We have seen that performers and producers of sound recordings (phonograms) have their own form of copyright-related protection. The rights they have are known as performers' rights or performance rights. They are not the same as the performing rights that belong to the copyright holders of music or plays but royalties for performers are usually collected along with the royalties for copyright holders.

Comments

Having a complex set of licences for copyright works can give the impression that using a copyright work is only possible with a licence. This, as we saw in Chapter 5 (Users' Rights), is not the case. Copyright licences, however, may have affected the copyright users' rights described in Chapter 5 (Users' Rights) in two areas: blanket licences for educational institutions and copyright works used for private study.

Blanket licences and the three-step test

Although blanket licences for educational institutions to copy works are fairly recent, the fees from these licences have become an important source of income for copyright holders. This may mean that income from blanket licences for educational use is now part of what the three-step test in article 9(2) of the Berne Convention calls the "normal exploitation of the work". If this is the case, then legislation that allows the royalty-free use of copyright works for educational purposes will no longer fall under the three-step test.

Using copyright works for private study

Despite the impact of blanket licences on royalty-free use for educational purposes, domestic legislation may still be able to allow individuals to make royalty-free copies for private study. This is because collecting societies have not started licensing individuals to make copies of printed works for private study.

It is not clear whether the same applies to individuals who copy audio and video material for private study. This is because much of this material is protected by digital rights management (DRM)

technology (something we will discuss in Chapter 9 [Digital Rights Management]) and because it is uncertain whether the first sale doctrine applies to copyright works that are in digital format. If user rights do not take priority over DRM and, if the first sale doctrine does not apply to digital works, there will be little scope for royalty-free use of these works for private study.

Personal and institutional copying

Finally, we need to distinguish between copying by individuals and copying by institutions. The distinction may seem artificial. Why should a group of students who are entitled to copy the same work for private use not ask an institution to do the copying for them? To allow such copying, however, would do away with the distinction between private and institutional use that is an important feature of copyright. For this reason, it seems that copying for private study is not something an individual can delegate to an institution.

7

Collecting Societies

In the previous chapter we mentioned the collecting societies that collect royalties for copyright holders. In this chapter we will look at how they work and at the copyright tribunals that settle disputes about licence fees.

What are copyright collecting societies?

Collecting societies or copyright collecting societies represent copyright holders. Collecting societies act for copyright holders by licensing or “clearing” the use of copyright works and by collecting royalties from those who use copyright material. Collecting societies then pay those royalties to the copyright holders.

Why use a collecting society?

Most authors negotiate in person or through their agents to have their work published or released onto the market. They do the same if someone wants to make a derivative work such as a translation or a film. Why should authors, or anyone to whom an author has assigned copyright, want to use a collecting society?

The first reason for using a collecting society is that many royalties are paid in small amounts. Of course, nothing stops the copyright holders from managing their own licensing and royalty collection. Software companies, for example, usually manage their own licensing. But independent authors and artists, or the publishing houses to which they have assigned their copyright may not want to set up

their own systems for licensing work and collecting the relatively small amount of royalties.

Another reason for using a collecting society is to collect royalties earned in another member country of the Union. Royalties may be earned in another country where the copyright holder may not understand the law or even the language. In such cases, royalties are easier to collect if the copyright holder works through a local collecting society. The need to be familiar with local conditions and comply with local law explains why collecting societies, although they do work with one another in federations, are usually based in one country and collect royalties in that country.

The last reason for using a collecting society is that collecting societies work hard to protect the copyright holders they represent from unauthorised copying. In Commonwealth countries collecting societies are usually not-for-profit organisations that are responsible for protecting the rights of those they represent. They also take a percentage of the royalties they collect to pay their staff and overheads. So anyone who uses a copyright work without paying royalties hurts the collecting society as well as the copyright holder.

How collecting societies work

Anyone who uses a copyright work without a licence is infringing the holder's copyright. The job of a collecting society is to stop copyright infringement by providing a convenient way for someone who wants to copy or perform copyright material to get a licence.

What follows is only an outline of how collecting societies work. The reality is more complex. In particular, each collecting society has its own contract that a copyright holder has to agree to before a collecting society will act on his or her behalf. Copyright holders should check these contracts carefully before deciding which collecting society they will use.

The first thing a collecting society has to do is persuade copyright holders to let it represent them. This is because a collecting society can only collect royalties if it represents copyright holders. These copyright holders may be fellow-nationals of the collecting society or they may be residents or citizens of any country that is a

member of the Union. The list of copyright holders a collecting society represents is called that collecting society's "catalogue".

Collecting societies often get to represent foreign copyright holders by entering into agreements with other collecting societies. The more copyright holders a national collecting society represents, the more convenient it is for copyright users in that country. They will not have to track down and contact foreign copyright holders or foreign collecting societies, and they will be able to negotiate and pay royalties in the local currency.

Having a single collecting society in a country does not mean that it becomes a one-stop shop for all copyright clearances. Some copyright holders may not want to work through a collecting society, or they may not want to work through the local collecting society. So someone who wants copyright clearance may still have to approach a copyright holder directly, or they may have to approach a foreign collecting society. Some copyright holders may not be prepared to license their work in a particular country.

Regulating collecting societies

Authors and artists have a monopoly in their works, and collecting societies exercise this monopoly on their behalf. In countries where only one collecting society exists for a class of works, the collecting society can dictate what licence fees users must pay. As a result most countries have some form of check on collecting societies.

Collecting societies also deal with large sums of money. We have mentioned the International Confederation of Societies of Authors and Composers (CISAC). In 2005, according to its website, its members collected more than €6.7 billion in royalties for copyright holders. To protect the authors, artists and performers to whom this money belongs, domestic legislation usually has special controls for collecting societies. These controls may set a limit to the percentage of the royalties a collecting society can take by way of expenses, or they may require a collecting society to account to its members in a special way.

The first collecting society was set up in France in 1851. The drafters of the Berne Convention of 1886 must have known about it but neither the Berne Convention nor its revisions say anything

about collecting societies. This means member countries are free to regulate or not regulate collecting societies as they see fit.

Controlling the cost of copying

Reasonable prices and the Statute of Anne

The earliest attempt to control the price of copyright works was a procedure in the Statute of Anne of 1710 for stopping a publisher from charging an unreasonable price for a book. Lessons can be learned from this attempt, as we shall see later in this chapter.

The Statute of Anne did not fix a reasonable price for a book. It controlled prices indirectly by allowing anyone who considered the price of a book “too high and unreasonable” to complain to one of a list of officials. The list began with “the lord archbishop of Canterbury for the time being” and ended with “the rector of the college of Edinburgh, in that part of Great Britain called Scotland”. On receiving a complaint the official had to inquire into the price a bookseller was charging for a book. If the price seemed too high, the official had the authority “to limit and settle the price of every such printed book and books”. Any reduction in price had to be advertised, and a fine was charged for each copy of the book a bookseller subsequently sold or offered for sale at more than this price.

There do not seem to have been many complaints to officials about the prices booksellers were charging. The Statute of Anne allowed claimants to recover the costs of a successful application, but it was hardly worth an individual’s while to launch an application to bring down the price of a particular book.

Copyright tribunals

The first recognition of the need to control what collecting societies charged by way of licence fees came in a report of the British Copyright Committee in 1952. The report dealt only with the collecting societies that collected royalties for performing or broadcasting copyright works. Its conclusion was that these societies were using their monopoly to charge excessive fees. It recommended setting up a tribunal to grant licences and fix reasonable fees.

In 1952, in response to the Report of the British Copyright Committee, the United Kingdom introduced the Performing Right Tribunal to decide disputes about licence fees. This seems to have been a success. The United Kingdom Copyright, Designs and Patents Act of 1988 renamed it the Copyright Tribunal and extended its jurisdiction to organisations that licensed all classes of copyright work. Most Commonwealth countries now have a copyright tribunal modelled on the UK copyright tribunal.

Copyright tribunals deal only with licences and licensing fees. If a dispute arises, copyright tribunals can grant a licence to use a work and fix an appropriate licence fee. They have no power to control the price of copyright works such as books. And they have no power to launch their own investigations. They can only act when they receive a complaint.

Copyright tribunals do not have to follow strict legal procedure. But some copyright legislation allows for an appeal from the copyright tribunal to the courts, and it is always possible to take a copyright tribunal to the courts to complain about unfair procedures. (This is known as review.) So copyright tribunals usually act like courts. They prefer, like the courts, to be slow and sure rather than risk dealing with a case in a superficial or unfair way.

This means, as with almost all proceedings in which lawyers are involved, that taking a case to a copyright tribunal is usually time-consuming and costly. This situation favours the collecting societies, who may have more money to spend and who will be defending their core business. So, as with the price control provision in the Statute of Anne, it is often cheaper and always less trouble to pay higher licence fees rather than challenge them in a copyright tribunal. This is particularly the case when an educational institution negotiates the fees and then passes them on to its students. To address this problem the UK Intellectual Property Office review of the UK Copyright Tribunal in 2006 recommended simpler and less expensive procedures.

Some copyright tribunals have made important decisions. In 2001, for example, the UK universities complained to the UK Copyright Tribunal about the terms of the licence the Copyright Licensing

Agency (a collecting society) was using for educational institutions. The Copyright Tribunal fixed the licence fees and set a rate at which these fees could increase. Other copyright tribunals have not been so effective. In South Africa, for example, the copyright tribunal has been in existence for half a century but it appears to have only ever decided one matter. This was a case dating from the time of apartheid when a South African dramatic society wanted licences to perform three plays in Johannesburg. The US authors did not want to license their works to be performed in segregated theatres. The copyright tribunal, however, awarded the licences and fixed a fee.

Copyright board

Canada has a copyright board that has greater powers than a copyright tribunal. As well as dealing with disputes about royalties between users and collecting societies in much the same way as a copyright tribunal, the Copyright Board of Canada also supervises agreements between users and licensing bodies. It has used its powers to set tariffs for copying for educational purposes. It also has the power, as we saw in Chapter 5 (Users' Rights), to grant licences to copy orphan works.

Competition commissions

Modern attempts to control unfair pricing began in the United States with the Sherman Antitrust Act of 1890. Since then many countries have set up competition commissions to look into the unfair market practices that prevent competition from keeping down the price of goods and services. Even more than with copyright legislation, the details of domestic competition legislation differ from country to country. Most competition commissions differ from copyright tribunals in being able to start their own investigations and in having the power to fine offenders.

A competition commission might find itself dealing with copyright if it had to look into the possibility that mergers between booksellers, publishing houses or software developers would lessen competition. A competition commission could also be asked to look into the price publishers or booksellers charge for books if it is suspected that prices are being kept artificially high.

Competition commissions are usually reluctant to investigate an industry if legislation has set up a special body to regulate that industry. Most countries, as we shall see, have a copyright tribunal to deal with disputes about the fees collecting societies charge. So it is unlikely that a competition commission will look into copyright fees.

Comments

Collecting societies do useful work. But they take a percentage of the royalties earned by the copyright or copyright-related rights holders. Also, the collecting societies do not usually deal directly with authors, artists or performers. They pay the publishers or record companies, who also take a percentage before passing on what remains to the copyright holder. This reduces the earnings of the creative authors of the copyright works.

Another problem with collecting societies is that they make the copyright monopoly more restrictive by doing away with the possibility of a free market in licensing fees. Where a collecting society represents all the copyright holders, a copyright user cannot negotiate directly with individual copyright holders to see which will grant a licence on the most favourable terms. So both rights holders and rights users are looking for more efficient ways to administer licence fees.

In Chapter 9 (Digital Rights Management) we will look at a proposal for a blanket licence for digital material copyright and the use of levies on copying equipment. Another possibility would be for more countries to empower a body modelled on the Copyright Board of Canada to set royalty fees. If copyright fees were set rather than negotiated, it would, in theory, be possible to use an automated system to collect and pay out the royalties. Technical solutions of this sort can reduce the overheads involved in royalty collecting and so reduce licensing fees while, at the same time, increasing payments to authors and artists. But such solutions are often easier to propose than to implement.

8

Open Licences

Chapter 6 (Copyright Licences) discussed the different copyright licences that bring licence fees to copyright holders. The open licences this chapter discusses are licences that allow anyone to use a copyright without having to pay a licence fee or royalty but subject to the conditions in the licence.

There are many different open licences. The first part of this chapter looks at software open licences. The second part looks at open licences for other classes of copyright works and, in particular, it looks at the Creative Commons licences. The chapter ends by looking briefly at the Access to Knowledge (A2K) movement that aims to make all forms of information more freely available.

Software open licences

Software open licences used to be of interest only to software developers. But open licence software is becoming easier to use, and it is finding its way onto the computers of ordinary users. This means everyone who uses a computer needs to know something about open licence software.

Software open licences began with independent software developers. (These people who often refer to themselves as “hackers.” This is confusing for ordinary people who think of hackers as criminals.) Many independent software developers did not like to see commercial corporations using copyright and other forms of intellectual property to restrict access to the software they produced.

Independent software developers also objected to the way commercial software developers refused to publish their software's source code (the human-readable version of the software used to create the computer program). Without the source code it is difficult, if not impossible, to modify software.

Types of software open licences

Commercial software of the sort described above is known as “closed software” or “proprietary software”. Opposed to this is the “free” software that independent software developers produce and distribute using free or open licences.

Those who produce open licence software do not give up their copyright. They assert their copyright but allow others to copy, develop and distribute their software subject to the terms of the licence. Among the different free or open licences, the following are the more important.

BSD licences

The Berkeley Software Distribution (BSD) licence may have been the earliest open licence. It was developed by the University of California, Berkeley, and first published in 1989. Some of the BSD software goes back to 1977 and the BSD licence is said to embody the conditions under which this software was released. So the BSD licence may be the oldest open licence. Some important software is available under BSD licences. It includes the Berkeley Internet Name Domain (BIND) software that runs many domain name servers and a Unix-like operating system.

Different versions of the BSD licence are available. They differ from the GNU General Public Licence, discussed below, in not insisting that developments of BSD software be distributed on the same terms. The BSD licence also does not insist that source code be made available to those to whom the object code is distributed. This makes BSD licences attractive to those who want to keep open the possibility of developing and marketing their software commercially.

GNU licences

GNU licences are closely associated with Richard Stallman. Stallman is a prophetic figure who campaigns for free alternatives to commercial software. In particular, he wanted a free alternative to the proprietary Unix operating system that AT&T, the US telecommunications giant, had developed.

In 1985 Stallman published the GNU Manifesto (GNU stands for Gnu's Not Unix) setting out his ideals and established the Free Software Foundation (FSF) to support this work. In 1989 he published the first version of the GNU General Public Licence (the GPL). There are two other GNU licences. One is the GNU Lesser General Public Licence (LGPL) that allows for linking GPL software and non-GPL software. The other is the GNU Free Documentation Licence (FDL) for software development documentation and manuals. We will discuss the FDL when dealing with open licences for non-software works.

It is said that about three-quarters of the world's open licence software uses the GPL. This software includes the important Linux operating system, an alternative to Unix, that Linus Torvald released under the GPL in 1991. The following are some of the main features of the GPL.

A powerful (and contentious) feature of the GPL is what Stallman calls "copyleft". Copyleft, shown by a reversed © symbol, means that others are free to develop a GPL work on the condition that any work derived from it is distributed subject to a similar condition. This means the GPL licence is what some call "viral": it tends to take over software originally published under other open licences.

Another feature of the GPL is that GPL software must be conveyed with its source code. This is to make it easier to develop the software. Not every open licence requires this.

To those who think of software open licences as anti-commercial, a striking feature of the GPL is the absence of restrictions on using GPL software to make money. As the preamble to the GPL puts it: "Our General Public Licenses are designed to make sure that you have the freedom to distribute copies of free software (and charge for them if you wish) . . ."

In the past few years commercial distribution of software open licences has begun to happen. Red Hat, for example, is a company listed on the New York Stock Exchange. It develops and distributes a version (a “distro”) of Linux called Red Hat Enterprise Linux. Since 2002 IBM has been offering this version of Linux as an operating system for IBM computers. Dell, a major supplier of personal computers, has previously offered its computers with Linux operating systems. Many of the new low-cost “netbook” computers also use Linux operating systems as a way of keeping costs down and improving performance. Even a corporation such as Novell, which sells software rather than computers, uses a version of Linux called SUSE Linux.

The advantage to these and other corporations of using open licence software is that they do not have to develop this software themselves or pay licence fees for using software others have developed. They can concentrate on improving the products or applications that are their speciality. In return, independent developers get access to the work these corporations put into adapting the open licence software to their needs. Open licence developers are also well qualified to work for these corporations and to provide support to the corporations’ clients.

Copyleft means that anyone who develops GPL software may only distribute the developed software under the GPL. But someone who develops original software, software that is not a development of existing software, is free to decide how to license it. He or she may distribute the software under more than one licence such as the GPL and a proprietary licence.

Other software licences

Some software developers use other open source licences. They do this because they want to avoid the copyleft restrictions in the GPL or because they do not want to require licensees to distribute the source code. The following are some other software open licences.

Sendmail is a widely used program for managing email that was first published under a BSD licence. In 1999, following difficulties in developing and supporting the software as an open licence product,

a company was formed to do this commercially while leaving the software available under an open licence. This called for changes to the BSD licence that resulted in the Sendmail licence. (The Sendmail licence, it has been pointed out, is not listed as a separate open source licence at the Open Source Initiative website discussed below.)

Netscape, on the other hand, was a commercial software developer that produced the influential Navigator web browser and Communicator email software. Following competition from Microsoft's Internet Explorer, Netscape decided to release the source code for these products under an open licence while continuing to develop the software commercially. To do this they produced the Mozilla Public Licence. The successors to Navigator and Communicator, Firefox and Thunderbird, use this licence. Other developers, particularly those who want to have both commercial and open licence versions of their software, also use this licence.

The Apache Software Foundation has its own model for software development that has resulted in non-GPL licences. The Foundation grew out of a community of developers who, around 1995, were working on projects that included the important Apache HTTP Internet server. According to the Apache Foundation website: "All software developed within the Foundation belongs to the ASF, and therefore the members."

Open Source Initiative

As the number of open licences has grown, it has become difficult for non-specialists to understand them. In 1998 the Open Source Initiative (OSI) was founded to be "the stewards of the Open Source Definition (OSD) and the community-recognised body for reviewing and approving licenses as OSD-conformant". The OSI has 10 requirements that software must meet to qualify as open source.

OSI keeps a list of licences it considers comply with its definition of open source. It has a trademarked logo that those whose licences comply with the definition can use. It might seem it should be possible to use any OSD-compliant software with any other OSD-compliant software. This, however, is not always the case as some of the licences contain incompatible terms.

Freeware and shareware

Freeware and shareware are not open licence software, although they are similar to open licence software in some ways.

Freeware is a way of distributing software in return for the payment of a voluntary licence. It is said to have been developed in 1981 by Andrew Fluegelman to market software he had developed. Shareware is copyright material which the copyright holder allows others to use subject to a small charge or condition.

Freeware and shareware differ from open licence software in that they require or request a licence fee. In contrast, open licence software developers may solicit donations but not as part of the licence. Unlike open licence software, freeware and shareware developers do not distribute the source code with the application. Source code distribution is not a distinguishing feature of freeware and shareware, however, because not every open licence requires it.

Advantages and disadvantages of open licence software

Advantages and disadvantages for software users

In the past open licence software users were technically sophisticated and may even have helped develop the software they used. They probably shared the ideals of organisations such as the Free Software Foundation.

Increasingly, however, open licence software users have little technical expertise and no interest in the ideals of the free software movement. They simply want to avoid having to pay licence fees to suppliers such as Microsoft. Using Linux and BSD operating systems also saves them money because these operating systems can run on older, less powerful computers. (An operating system is software that manages a computer. Windows XP and Vista and Apple's OS X are operating systems.)

Another advantage of open licence operating systems and applications is that they can be customised to serve a particular purpose in a way that is not possible with their proprietary equivalents. This, of course, calls for expertise.

The move to open licence software, however, brings problems. The first problem is deciding which distribution (distro) of Linux to use as an operating system. There are hundreds of Linux distributions, each with its strengths and weaknesses. Anyone interested in learning about them can look at the DistroWatch website.

Another problem with Linux operating systems is that it is not always easy to install new applications. (An application is software that makes it possible for a user to do something such as word processing.) Some Linux distros have repositories of applications that have been modified to install easily on that distro. Whether there is such a repository and what applications it contains should be an important consideration for a non-expert deciding which Linux distro to use.

Finally, Linux operating systems are different from Windows and even experienced Windows users can find it difficult to change to Linux. That said, there are now Linux distros such as PCLinux and Ubuntu Linux for non-technical people.

Ordinary users are probably more interested in applications than in operating systems. Here the situation is more encouraging. There are open licence alternatives to many proprietary applications and they are easy to use. OpenOffice.org, for example, is supported by Sun Microsystems as an alternative to Microsoft Office. It works in much the same way as Microsoft Office 2003. Mozilla's Firefox browser and Google's Chrome browser are alternatives to Internet Explorer; Novell's Evolution is an alternative to Microsoft Outlook; and GIMP, an image manipulation program, can be used as an alternative to Adobe Photoshop.

All the applications mentioned in the previous paragraph have Windows versions as well as Linux versions. So it is possible to use a Windows operating system to run them. Using a Windows operating system also makes it possible to combine these open licence applications with proprietary applications that are not available in a Linux version. So using open licence applications with a Windows operating system is probably the best way to start moving ordinary users towards open licence software.

It may not be necessary to pay licence fees for open licence operating systems and applications, but open licence software needs

support in the same way as proprietary software. Support here means help with installing the software, manuals, training for users and access to experts to solve undocumented problems. This has provided a business opportunity for open source developers. Ubuntu Linux, for example, has a commercial sponsor, Canonical Ltd, whose business is training and supporting Ubuntu users.

It is sometimes said that an advantage to using Linux is that users need not worry about malware or malicious software such as computer viruses, worms, Trojan horses, spyware and illegal spam. This is not true. Some malware targets computers running Linux. It is not as common as the malware that targets computers running Microsoft software. Should more individuals and businesses begin to use Linux operating systems, it is likely that criminals will produce more Linux malware. Fortunately, there are open licence anti-malware programs.

It is worth noting that some software managers working in higher education have reservations about using open licence software for sensitive data. Their concern is that publishing the source code makes it easier for students, who often have the skills, the time and the motivation, to attack the software and publish, change or destroy the data.

Before deciding to move to open licence software, business users should also bear in mind that most open licences disclaim liability for any damage resulting from the software. Such users may need to consult their insurers.

Advantages and disadvantages for software developers

Open licences are popular among educators who develop software. They reflect the way academics have always worked and they make it easy for software developers to collaborate and share the results of their collaboration.

Those who develop software that carries an open licence must respect the terms of that licence. But individuals and institutions that produce original software (software they have developed themselves) and distribute it with an open licence may be reducing the possibility of earning royalty revenue from their software. They need to weigh this against the advantages of open licensing and the possibility of exploiting their software in other ways.

Software developers who develop original software do not have to choose between an open or a proprietary licence. They have the option, as we explained when discussing the GNU-GPL, of licensing their software with both an open and a proprietary licence and then developing one or the other.

Non-software open licences

The success of open licence software led to an interest in using open licences for non-software material and especially for educational and scientific material. The list of individual and institutional signatories to the Cape Town Open Education Declaration of 2007 shows how much support exists for open educational resources (OERs).

Open licences for non-software material came some time after open licences for software. The earliest such licence may have been the Open Content Licence that David Wiley of Open Content published in July 1998. The following year, in June 1999, the Open Content Project published the Open Publication Licence.

In March 2000 the Free Software Foundation released version 1 of the GNU Free Documentation Licence (the FDL). The FDL was meant for software developers writing manuals and documenting their work, but it can be used for other forms of material. Wikipedia, for example, uses the FDL. The FDL, like the GPL, is a copyleft or viral licence.

Like the GPL the FDL allows for commercial publishing. If, however, the GNU website list of 30 or so commercially published FDL books is complete, FDL material is not yet as attractive to commercial publishers as GPL software is to commercial software developers.

Creative Commons licences

Open licences for non-software material began to attract serious attention in 2001 when Lawrence Lessig and others started Creative Commons (CC). The CC licences are now the most important open licences for non-software material.

CC rights

The CC licences are based on the CC analysis of copyright rights. This distinguishes between four rights of a copyright holder. The CC website lists and explains these rights:

Attribution: You let others copy, distribute, display, and perform your copyrighted work – and derivative works based upon it – but only if they give credit the way you request.

Noncommercial: You let others copy, distribute, display, and perform your work – and derivative works based upon it – but for noncommercial purposes only.

No Derivative Works: You let others copy, distribute, display, and perform only verbatim copies of your work, not derivative works based upon it.

Share Alike: You allow others to distribute derivative works only under a license identical to the license that governs your work.

All the CC licences include what CC calls the “Baseline Rights”. These are the rights to copy, distribute, display, perform publicly or by digital performance and to shift the work into another format as a verbatim copy.

CC licences

In theory the four CC rights, used singly or combined, allow for 11 different possible licences. In practice CC offers only six licences. These licences allow copyright holders to grant users different combinations of the CC rights. This flexibility makes the CC licences more attractive to authors than the all-or-nothing open licences that are usual for software. As the CC website says:

Creative Commons defines the spectrum of possibilities between full copyright – all rights reserved – and the public domain – no rights reserved. Our licenses help you keep your copyright while inviting certain uses of your work – a “some rights reserved” copyright.

The CC website has a diagram that shows the spectrum from copyright (C) to public domain (pd), with CC licences occupying the space between these two:



CC also takes into account that copyright law differs from country to country. So, as well as a generic or unported version of each licence, CC aims at providing a version, in the appropriate language, adapted to the law of each country where the CC licences are used. This means there is no one CC licence in the way there is one GNU GPL. And this means that with CC licences it is always necessary to specify which national version of the CC licence is being used and, in some cases, even the language version of the licence.

In addition to the CC licences, CC provides a way for an author to place a work in the public domain. CC also has a licence that recreates the original US copyright term of 14 years.

CC uses symbols and abbreviations to represent the four rights of a copyright holder and combines these symbols and abbreviations to represent the different licences. The names, abbreviations and symbols of the six CC licences give some idea of the complexity of the CC licence system:

Attribution Non-commercial No Derivatives (by-nc-nd)	
Attribution Non-commercial Share Alike (by-nc-sa)	
Attribution Non-commercial (by-nc)	
Attribution No Derivatives (by-nd)	
Attribution Share Alike (by-sa)	
Attribution (by)	

CC licence generator

The text of all the CC licences and their different language versions is on the CC website. The CC website does not, however, expect users to study every licence before choosing one. Instead, a licence

generator suggests the appropriate CC licence based on the answers to the following three questions:

- (1) Will an author allow commercial use of the work?
- (2) Will an author allow users to modify the work? (Included under this question is the possibility of allowing users to modify the work if they share alike.)
- (3) In which jurisdiction does an author want to license the work?

The questions are a convenient way to approach the six CC licences.

Jurisdiction

The last question is a good place start. If a work will be used mainly in one country, an author should select that country. The licence will then reflect the law of that country. If an author is publishing a work internationally or if no licence is available for the country in which the author is publishing, the author should answer “unported”. The unported version of a licence is a generic, international licence. The following discussion of the other questions will refer to the unported versions of the licences.

Restriction on commercial use

The first question the licence generator asks is: “Allow commercial use of your work?” If the copyright holder does not want to allow commercial use of the work, the licence generator suggests a non-commercial (NC) licence. What this means is that a copyright holder who finds individuals or institutions making commercial use of the work can take legal steps to stop them doing this.

But what does non-commercial mean? Section 4b of the CC Attribution-NonCommercial 3.0 licence says:

You may not exercise any of the rights granted to You in Section 3 above in any manner that is primarily intended for or directed toward commercial advantage or private monetary compensation. The exchange of the Work for other copyrighted works by means of digital file-sharing or otherwise shall not be considered to be

intended for or directed toward commercial advantage or private monetary compensation, provided no monetary compensation is paid in connection with the exchange of copyrighted works.

One view of what this means, often forcefully expressed in workshops and discussion groups, is that non-commercial means that no money should change hands. The usual meaning of non-commercial, however, is that money may change hands if this is part of cost-recovery. Cost recovery, typically, would include copy charges, salaries and overhead expenses. The only restriction is that anyone doing this does not intend to make a profit out of distributing the work. This is the view of the Draft Guidelines that CC published to try to clarify the meaning of non-commercial.

Some uncertainty, however, still surrounds what section 4b means by “primarily intended for or directed toward commercial advantage or private monetary compensation”. It could be argued that even if a project does make a profit, the use is still non-commercial if the project was not primarily intended to make a profit. According to this view, an organisation that is run for profit may use NC material and may recover its expenses for distributing NC material provided the project using the NC licensed material does not aim at making a profit.

This raises questions such as whether private schools run for profit or public broadcasters that accept advertising revenue may use NC-licensed material for teaching or for informing their viewers. Another question is whether a business whose profits support a non-profit body such as a university, may use NC material. The Draft Guidelines appear to prohibit using NC material in these ways. Section C(2) of the Draft Guidelines, for example, says that it is not non-commercial if money changes hands to, for example, a for-profit copy shop. Section A(1)(b) insists that an educational institution or library using NC material must be non-profit. And Section B appears to classify as commercial any use of NC material in connection with advertising.

What the Draft Guidelines say, however, does not settle the matter. The Draft Guidelines are not part of the NC licence. As section 8e of the NC licence says: “This License constitutes the entire

agreement between the parties with respect to the Work licensed here.” And a notice at the end of the licence says: “Creative Commons is not a party to this License, and makes no warranty whatsoever in connection with the Work.” The Draft Guidelines themselves do not claim to be authoritative. CC published them to “elicit feedback about whether these guidelines accurately reflect the community’s (including both licensors and licensees) understanding of the term”.

This means that while what the Draft Guidelines say should be treated with respect, any dispute between a copyright holder and a user can only be settled on the basis of what the licence says. This raises the question whether any ambiguities in the wording of the licence should be interpreted strictly, to limit the use of NC material, or generously, to allow the widest use of a work.

CC plans to return to the question of the meaning of non-commercial. At issue is what authors who use the NC licence want to achieve. They do not want royalties for their work but they do, presumably, want the work to be made widely available. If these authors object to associating their work with commerce in any way, non-commercial should be interpreted to mean that no money changes hands. If, on the other hand, these authors want only to avoid commercial interests taking over and restricting access to their work, the authors may be prepared to allow their work to be used by organisations or individuals working for their own profit provided they do not limit further distribution of the CC work. Two or more versions of the NC licence may need to be written to take these views into account.

As with all the CC licences, it is always possible for a commercial user to approach the author of a work directly and ask for permission to use CC licensed work in a way the CC licence does not permit.

Modifications allowed

Once a user has decided whether to allow commercial use, the licence generator’s second question is: “Allow modifications of your work?” This question has three possible answers: “Yes”, “No” and “Yes, as long as others share alike.”

Particularly where the licensed material is educational material, users are likely to want to modify it by adding examples and other material, by translating it into another language or by adapting it in some other way. This is creating a derivative work which infringes copyright. The licence generator will suggest that those who want to allow users to modify their material use either a simple attribution (BY) licence or an attribution non-commercial (BY-NC) licence. Which licence it suggests will depend on the answer to the first question: “Allow commercial use of your work?”

The simple attribution licence, not combined with a NC restriction, allows a user to do anything with the material except claim copyright in it or authorship of it. A user may modify the material or leave it as it is and market the modified or original material commercially and keep any profit.

No modifications

If the answer to the licence generator’s second question “Allow modifications of your work?” is “No”, the licence generator will suggest an ND (no derivate works) licence. The “human readable” summary of version 3 of the unported Attribution-NoDerivs licence says: “You may not alter, transform, or build upon this work.” The legal code (the legally binding version of the licence) prefers to speak of not adapting a work. Section 1a defines adaptation as:

. . . a work based upon the Work, or upon the Work and other pre-existing works, such as a translation, adaptation, derivative work, arrangement of music or other alterations of a literary or artistic work, or phonogram or performance and includes cinematographic adaptations or any other form in which the Work may be recast, transformed, or adapted including in any form recognizably derived from the original, except that a work that constitutes a Collection will not be considered an Adaptation for the purpose of this License. For the avoidance of doubt, where the Work is a musical work, performance or phonogram, the synchronization of the Work in timed-relation with a moving image (“synching”) will be considered an Adaptation for the purpose of this License.

This means that a ND licence allows users to use, reuse and distribute a work but not adapt it.

An ND restriction is necessary in some situations. If a work is a report or set of standards, it makes sense to insist that it is only used in its original form. Changes to a work of this sort destroy its value. Even valid corrections can be harmful because they give readers a false impression of the accuracy of the original report.

The ND restriction is also necessary if an author wants to distribute a work for comment while reserving the right to publish the final version of the work.

Some educators dislike the ND restriction and say it makes it difficult for them to use material effectively. But the ND licence does allow for an ND work to be used in a collection. (Some versions of the ND licence call this a collective work.) Section 1b of the legal code defines a collection as:

. . . a collection of literary or artistic works, such as encyclopedias and anthologies, or performances, phonograms or broadcasts, or other works or subject matter other than works listed in Section 1(f) below, which, by reason of the selection and arrangement of their contents, constitute intellectual creations, in which the Work is included in its entirety in unmodified form along with one or more other contributions, each constituting separate and independent works in themselves, which together are assembled into a collective whole. A work that constitutes a Collection will not be considered an Adaptation (as defined above) for the purposes of this License.

This means that provided the ND work is reproduced whole and unmodified, it can be published in a collection with a commentary or other relevant material. But reproducing an excerpt of a ND work does amount to modifying it. It is not clear whether it would be permissible to use hyperlinks to take a user directly to parts of an ND work or to connect an ND work to a commentary or other material.

Section 4 of the legal code goes into detail about how an ND work can be incorporated into a collection and how the work must

be credited. It is possible to assemble a collective work consisting of materials carrying different licences. A collection may also, if it is sufficiently original, qualify for copyright protection and for its own licence which does not have to be an ND licence. When this happens the collective work's licence will not change the licences attaching to the components in the collective work.

Share Alike

If the answer to the licence generator's second question "Allow modifications of your work?" is "Yes, as long as others share alike" the licence generator suggests a share alike (SA) licence. This ensures that modified works based on the licensed material are available to others under the same conditions as the original work. The share alike licence offers authors the possibility of making their work "viral" in a way that is similar to the GPL. Version 3 of the Attribution-ShareAlike licence says:

You may Distribute or Publicly Perform an Adaptation only under the terms of: (i) this License; (ii) a later version of this License with the same License Elements as this License; (iii) a Creative Commons jurisdiction license (either this or a later license version) that contains the same License Elements as this License (e.g., Attribution-ShareAlike 3.0 US)); (iv) a Creative Commons Compatible License.

The CC's symbol for share alike is a reversed copyright symbol that is similar to the FSF's symbol for copyleft.

Attribution

All the CC licences require what CC calls attribution. The "human readable" summary of version 3 of the Attribution licence explains what attribution means:

You must attribute the work in the manner specified by the author or licensor (but not in any way that suggests that they endorse you or your use of the work).

Changing or withdrawing a licence

The CC licences all say the licence is for the duration of copyright and only ends if the person holding the licence breaks the terms of the licence. Section 7b of version 3 of the Unported Attribution licence, for example, says: “Subject to the above terms and conditions, the license granted here is perpetual (for the duration of the applicable copyright in the Work).”

Whether an author can stop those who have not begun using the material from acquiring rights in terms of the original licence is an awkward question. Section 8a of the licence suggests that an author cannot do this:

Each time You Distribute or Publicly Perform the Work or a Collection, the Licensor offers to the recipient a license to the Work on the same terms and conditions as the license granted to You under this License.

The problem with this clause is that the identity of the “relevant third party” is unknown until someone begins to use the work. This means that an author is bound to give a licence to an uncertain person. Not every legal system accepts that this is possible. If an author does withdraw a licence, this will certainly not affect the rights of those who had previously begun to use the material.

Mixing licences

Creating a derivative work that is based on works that have different licences can give rise to licensing problems. The simple BY licence the BY-NC licence and the BY-SA licence all allow for derivative works. How must an author license a new work that draws on material covered by all these licences? The simple answer is that the new work must have a licence that contains all these conditions: BY-NC-SA. This, of course, imposes restrictions on the new work that not all the authors of the original works intended. But it seems preferable to allowing an author to produce a new derivative work that does not respect the conditions the authors of the original works had set.

Of course, someone who wants to produce a derivative work of this sort can always approach the rights holders for permission to use their works in a derivative work.

CCPlus

CC has recently developed what it calls CCPlus. CCPlus, as CC explains, is not a new CC licence but a way of allowing the copyright holder to grant a user more rights than the CC licences that apply to the work allow. It does this, in the examples given, by inviting a user to approach the rights holder for further rights. So, an example says: “Permissions beyond the scope of this license may be available at . . .”

It has been suggested that CCPlus complements a narrow understanding of the meaning the ND and NC licences. This cannot, however, influence the meaning of the current ND and NC licences.

Concluding comments on CC licences

Creative Commons does not have a manifesto that is equivalent to the GNU Manifesto although there is now a “Free Content and Expression Definition” that may serve as a manifesto. It seems, however, that what the founders of the CC movement had in mind was a community producing material that it would make available under the CC licences in the same way as communities of software developers make software available under different licences. Two features of the CC licences might hinder this.

First, the system of CC licences is complex and, as has been shown, the meaning of the licences is not always clear. A pre-publication review of this chapter advised against publishing some of the comments for fear that they might weaken confidence in the CC licences. It seems, however, that long-term confidence in the CC licences will only be possible when difficulties about what the CC licences mean have been resolved.

Second, possibly more important, is that authors and educators need to eat. Those in regular employment and those supported by public or private grants may be happy to use the CC licences. But authors who earn their living from their work might be reluctant to

use the CC or any other open licence. In 2006, the *Association Littéraire et Artistique Internationale* (the body that worked to have the Berne Convention agreed) put out a memorandum on the CC licences. Its conclusion was “*caveat auctor*”: that authors should beware before publishing with a CC licence.

Commercial publishers, whether they publish traditionally or online, have been reluctant to pay authors for the rights to publish a work that is already freely available. This may be changing as publishers find other ways to earn money from publications. If it does not change, it is difficult to see how non-software open-licence material could be used commercially in the same way as open licence.

Licence pollution

Some copyright holders draft their own open licences. The licence can be quite simple. So, for example, the copyright notice on the Antiquarian Horological Society’s Website reads:

The material in these pages is copyright.

© AHS and Authors. 1996 – 2007.

The information may be downloaded for personal use only.

The information may be passed on to another party for their private use provided that the source and this copyright information is acknowledged.

The material may not be reproduced in quantity, or for commercial purposes.

Open licence drafting, however, is not always simple and not every home-grown licence is free of problems. The United Nations Disaster Management Training Programme, for example, has the following licence on some of its training material:

The first edition of this module was printed in 1991. Utilization and duplication of the material in this module is permissible; however, source attribution to the Disaster Management Training Programme (DMTP) is required.

In this licence, it is not clear whether “utilization and duplication” includes making derivative works and using the material commercially for profit.

The African Medical Research Foundation, to take another example, has licensed some of its educational material with a CC Attribution-Share Alike licence. The Foundation then goes on to explain that copying, reproducing and adapting the material is “to meet the needs of local health workers or for teaching purposes”. It is not clear if this limits the CC licence. The Foundation also asks, although not as a term of the licence, for feedback on how the material is being used:

This course is distributed under the Creative Commons Attribution-Share Alike 3.0 License. Any part of this unit including the illustrations, may be copied, reproduced or adapted to meet the needs of local health workers or for teaching purposes, provided proper citation is accorded AMREF. If this work is altered, transformed or built upon, the resulting work may be distributed only under a license identical to this one. AMREF would be grateful to learn how you are using this course, and welcomes constructive comments and suggestions.

Some who work with CC licences object to the proliferation of non-CC open licences as “licence pollution”. It does seem unnecessary to draft a new licence when there is an existing CC licence. And the more licences there are, the more confusion there is likely to be about what they mean. But nothing should stop copyright holders from drafting their own licences when they feel the existing CC licences do not address their needs.

Access to knowledge and information sharing

There is a growing awareness of how important it is for all to have access to knowledge and information. This goes along with preventing commercial exploitation from making important knowledge the preserve of relatively few. An example of this was US President Bill Clinton’s decision to increase funding for the Human Genome Project to ensure that commercial researchers did not patent the sequences.

When discussing access to knowledge it is useful to distinguish different kinds of knowledge or information.

Information produced by governments

Governments have detailed information about matters such as the health, safety and education of the population, trade figures, economic performance, spatial information and geodata. They collect this information for their own purposes and, in terms of the law of most countries, they have copyright in it.

Such information is often also useful to researchers and commentators and to those thinking about investing in the country either to make a profit or to help development. There is, however, no single approach about whether and on what terms this information should be available to those who want it.

In 2005 Brazil and Argentina proposed to WIPO that the organisation's development agenda should discuss the possibility of a Treaty on Access to Knowledge (A2K). Much of the draft of the treaty deals with widening the users' rights in copyright works we discussed in Chapter 5 (Users' Rights). Part 5 of the A2K treaty is entitled "Expanding and enhancing the knowledge commons". It includes articles providing for access to publicly funded research and government information.

Legal, judicial and political information

A category of government information to which some countries already allow access is material of a legal, judicial or political nature: legislation, case law and parliamentary proceedings. In 2002 delegates from some Commonwealth countries produced a "Declaration on Free Access to Law" that asserts, among other things that "(p)ublic legal information is digital common property and should be accessible to all on a non-profit basis and free of charge; . . ." Anyone who has followed the discussion in this chapter and reads the full declaration will realise that the declaration needs to go into more detail about creating derivative works and using the material commercially.

Information produced by non-profit organisations

Tax exempt foundations and non-profit educational and research institutions also fund research that produces important information. According to the law in most countries, funders and employers can decide on what terms to release this information.

It is understandable that researchers looking for funding may want to include a profit line from intellectual property in their research proposals. Educational institutions also like the idea of using the research done by their staff to produce what some call “third stream” income. Access to knowledge advocates could argue, however, that governments should consider whether institutions and funders that do this are really entitled to their tax-free status.

Science Commons

Creative Commons works through Science Commons to encourage the free flow of scientific information. One of the Science Commons projects has drafted model contracts for the transfer of biological material. Another project aims at publishing with an open licence material that is important for biological research. A third project aims at getting peer-reviewed journals to publish with open licences and enlisting academics to publish only in journals that do this.

Comments

In conclusion it seems worth mentioning two features that most open licences lack: provision for notifying the copyright holder about how material is being used and provision for alternative dispute resolution.

Notification

It is surprising that open licences do not allow an author to require a user, in return for being free to use the author’s material, to keep the author informed about what a user does with the material. The African Medical Research Foundation’s licence requests this information but it is not a condition of using the material. Drafting such a condition, of course, would have to be done so as not to impose

too much of a burden on users. But if it could be done the information would help assess the value of open licence material.

Alternative dispute resolution

There has been litigation about the meaning of the GPL. And, as things stand, only a court, possibly even a whole series of courts in different countries, will be able to settle the different view as to what the CC licences mean. Given the cost of litigation, it is unlikely that the courts will ever have an opportunity to do this.

In 1999 the Internet Corporation for Assigned Names and Numbers (ICANN), the organisation responsible for running the Internet's domain name system, adopted a Uniform Domain-Name Dispute-Resolution Policy for settling disputes about domain names without having to go to court. A similar dispute resolution procedure, possibly including a choice of law provision, could settle disputes between rights holders and users about the meaning of open licences. The draft for the Nigerian CC licence contains a clause referring disputes to alternative dispute resolution: mediation, arbitration and online dispute resolution.

9

Digital Rights Management

Material in digital format is easy to copy. Digital rights management technology, or DRM, is supposed to prevent unauthorised copying of digital material. This chapter looks at how DRM works, the international agreements that protect it and the problems to which it gives rise. It also looks at a blanket licence for digital material and a levy on copying equipment as alternatives to DRM.

Digital and non-digital copying

When a work is not digitised, non-professional copying technology limits copying, because a photocopy of a page or an analogue recording of music or a video does not have the quality of the original. And, if copies are made from the copies, then the quality falls off until the copies become unusable. Professional copying of non-digital material does not have the shortcomings of non-professional copying but it needs special equipment which is costly and easy to keep track of.

Any computer, on the other hand, can copy a digitised work. There is no loss of quality and the copies can be distributed over the Internet quickly, widely and at little cost.

Digital rights management technology

Digital rights management is a technology designed to stop unauthorised copying of digital material. DRM comes in two forms: DRM hardware and DRM software.

DRM hardware

DRM hardware is part of the equipment or hardware used to play digital material. An example was the DRM built into the equipment used to play DVDs. This equipment could only play disks encoded for one geographical region.

DRM software

DRM software prevents any equipment from copying the protected digital material. DRM software is more popular than DRM hardware. The most notorious DRM software was the Extended Copy Protection (XPC) software Sony BMG put on some of the music CDs it sold in 2005. The software installed itself on computers and made them vulnerable to attack. Sometimes it even disabled the computers' CD drives.

Weaknesses in DRM

Most DRM software doesn't damage computers. At most, so some audio-video enthusiasts claim, it affects the quality of the recorded sound or video.

The real problem with DRM is that it is easy to get round it. Not long after DVD players came onto the market, technicians worked out how to rewire the DVD players so they could play DVDs encoded for any region.

Much the same happened with DRM software. In 1999, for example, Jon Lech Johansen, also known as DVD Jon, posted software on the Internet that could override the DRM that was supposed to make it impossible to copy DVDs. And in 2005 a group of software developers, including DVD Jon, released software that could remove the FairPlay DRM from music downloaded from Apple's iTunes.

It does seem possible to get round any form of DRM. The only DRM that is likely to remain secure is DRM that protects material

in which users show little interest. Music companies, not surprisingly, are losing confidence in DRM as a way to prevent unauthorised copying.

International DRM protection

DRM may not provide copyright holders with much protection, but it is only a first (or second) line of defence for copyright material. (It is a second line of defence if ordinary copyright protection is seen as the first line.) The next and more important line of defence is legislation that makes it an offence to remove DRM technology. The WIPO Copyright Treaty of 1996 required countries to pass such legislation and so did the Council of Europe's Cybercrime Convention of 2001. TRIPS does not mention DRM. Protecting DRM in this way means that, no matter how weak the DRM, removing it is a criminal offence.

WIPO Copyright Treaty of 1996

The WIPO Copyright Treaty of 1996 has two articles that deal with DRM. The articles distinguish between technology that protects the rights of authors (what is usually called DRM) and what it calls "rights management information".

Article 11 deals with technology to protect the rights of authors:

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.

Article 12 requires countries to protect what it calls rights management information. Article 12(2) explains rights management information as follows:

. . . information which identifies the work, the author of the work, the owner of any right in the work, or information about

the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public.

The interesting point about articles 11 and 12 is that they only apply to rights the WIPO Copyright Treaty and the Berne Convention protect. So they do not require countries to protect DRM on databases that do not qualify for copyright protection. This does not, of course, prevent countries from legislating to protect DRM on non-copyright material. But if the domestic legislation protecting DRM is not clear on this point, then a court might well find the legislation did not apply to DRM that protected non-copyright material.

Phonograms

Articles 18 and 19 of the WIPO Performances and Phonograms Treaty of 1996 apply what articles 11 and 12 of the WIPO Copyright Treaty say about DRM to phonograms.

Cybercrime Convention of 2001

In 2001 the Council of Europe produced the Cybercrime Convention “to pursue, as a matter of priority, a common criminal policy aimed at the protection of society against cybercrime”. Article 10(1) of this convention deals with infringements of copyright and related rights in the following terms:

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the infringement of copyright, as defined under the law of that Party, pursuant to the obligations it has undertaken under the Paris Act of 24 July 1971 revising the Berne Convention for the Protection of Literary and Artistic Works, the Agreement on Trade-Related Aspects of Intellectual Property Rights and the WIPO Copyright Treaty, with the exception of any moral rights conferred by such conventions, where such acts are committed wilfully, on a commercial scale and by means of a computer system.

Article 10 differs from the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty in requiring that infringements be “on a commercial scale” and that they take place by using a “computer system”. Article 1 defines a computer system as “any device or a group of interconnected or related devices, one or more of which, pursuant to a program, performs automatic processing of data”.

Article 6 of the Cybercrime Convention deals with what it calls a “device”. A device, here, is anything, including software, that can be used to interfere with how a computer system works. Included in this definition would be software for getting round DRM. Article 6 requires countries to penalise “the production, sale, procurement for use, import, distribution or otherwise making available of” what it calls “devices”. Article 6(3) allows countries to reserve the right not to apply this article except insofar as it applies to computer passwords. Only the United States appears to have made this reservation.

Domestic DRM protection

Many (but not all) countries have passed legislation of the sort these international agreements require. In 2002 and 2003, for example, DVD Jon was prosecuted for breaking the Norwegian legislation that protected DRM for his part in making available software to remove the DVD DRM. He was eventually acquitted.

The most controversial piece of DRM-protecting legislation is section 1201 of the US Copyright Act. Section 1201 was part of the US Digital Millennium Copyright Act that was passed in 1998. The penalties for infringing section 1201 are up to five years’ imprisonment and fines up to \$500,000. For repeat offenders these penalties are doubled.

Problems with DRM

DRM on its own may be easy to overcome, but DRM backed by criminal sanctions is effective. There are two problems with effective DRM. The first is that it can deprive users of their legal rights to use copyright works or works that are not copyright. The second is that it can invade an individual’s privacy.

DRM and users' rights in copyright works

In Chapter 5 (Users' Rights) we saw that users have various rights in copyright works that come under the general heading of "fair dealing". Putting DRM on copyright works deprives users of these rights. DRM can also be used to protect material that copyright does not protect. So DRM can prevent users from exercising their rights to access to material.

Is it a breach of legislation protecting DRM if a user removes DRM to exercise these rights? The international agreements do not deal with this question. The answer depends on the wording of the domestic legislation of the country concerned. The answer may also depend on how much importance the courts in that country attach to education and access to knowledge. In countries where access to knowledge and education are constitutional rights that can take priority over legislation, the courts may find that legislation protecting DRM does not apply when a user is exercising these rights.

DRM and privacy

DRM software can infringe an individual's privacy by tracking how the individual is using software or other copyright works. An example was the SunnCom MediaMax that Sony put on some of their music CDs. The software used the Internet to report on the computer running the CD.

Alternatives to DRM

Blanket licences for digital material

In Chapter 6 (Copyright Licences) we looked at blanket licences that collecting societies give for copying or performing copyright material. An alternative to digital rights management would be a blanket licence to allow distributing certain classes of copyright works over the Internet. In 2006, the French parliament would have passed such legislation if the government, possibly under pressure from the record companies, had not opposed it.

A blanket licence of this sort for digital material would have to settle some difficult issues. Who, for example, should pay the licence

fee? Internet users who did not use the Internet to download copyright material could object to a universal fee. It would also be necessary to decide on a fair way to distribute royalties to copyright holders. This would need reliable file format recognition software and reporting software, as well as the cooperation of Internet service providers. Many countries already have the capacity to monitor traffic over the Internet for security purposes. The technology for this monitoring could be used to monitor copyright downloads.

Most of the proposals for blanket licences for digital material concern music. Similar licences could protect other classes of copyright works that are in digital format.

Levy on copying equipment

It is possible to copy digital material without using the Internet. One way to charge for this use would be a levy on the sale of equipment that can copy copyright work. Some countries already have such a levy that they use to compensate the victims of copyright piracy.

Comments

DRM started as a technology to protect copyright. The technology has not proved effective and has itself needed legal protection. The irony is that in many countries the legal protection for DRM is stronger than the legal protection for the copyright work the DRM is supposed to protect.

DRM can also have unintended consequences. In 2006, the Electronic Frontier Foundation published a paper pointing out how the strong DRM protection in the US Digital Millennium Copyright Act has hindered academic research and reduced business competition. These consequences would probably occur in all countries that introduce strong legal protection for DRM.

The Internet is making it increasingly difficult for copyright holders to collect royalties for works that are in digital format. A blanket licence for digital material would be one way to resolve this problem. It seems, however, that major holders of copyright material and the collecting societies that collect royalties for them are

reluctant to risk changes. Whether they will be able to make the current arrangements for collecting royalties work for them, or whether they will eventually have to change their approach to royalty collection, is not clear.

10

Software Protection

When computers appeared after the Second World War they were protected by patent law in the same way as other pieces of equipment. In the 1960s people working with computers began to distinguish between hardware (the equipment) and software or computer program (the instructions that ran the equipment). With the distinction came the question how to protect software: patent, copyright or some new form of protection specially devised for software?

This chapter will look at the different ways of protecting software. It will also look at the special protection international agreements give to the design of computer chips.

Software a literary work

The question how to protect software seemed to have been settled in 1994 when article 10(1) of TRIPS said: “Computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention”. Article 4 of the WIPO Copyright Treaty of 1996 took the same approach:

Computer programs are protected as literary works within the meaning of Article 2 of the Berne Convention. Such protection applies to computer programs, whatever may be the mode or form of their expression.

These two authoritative statements, however, have not prevented some countries from allowing software patents.

Software patents

To understand why some developers want patent protection for their software, you need to know something about patents and how they differ from copyright.

Patent and copyright

We saw that copyright protects the expression of an idea but not the idea. A patent, it has been said, protects an idea but not the way the idea is expressed.

A patent, of course, has to express the idea in some way: words, diagrams or formulas. And a patent application must contain enough information to enable others to carry out the invention. This is because, when someone gets a patent, the application becomes a public document from which other inventors can learn about the patented idea. This is the return the inventor makes to the community for the monopoly granted by the patent.

Not every work qualifies for copyright and not every idea qualifies for patent protection. The domestic law of most countries says that to qualify for patent protection an idea must be new, innovative (not obvious) and able to be used in business or industry. Some ideas that satisfy this test cannot be patented. Most countries, for example, do not allow patents for scientific theories or mathematical methods.

Unlike copyright, patent does not vest automatically in the inventor. The legislation that creates patent protection sets up a patent office to which an inventor has to apply for a patent. Most inventors employ specialist patent lawyers to make their applications. They have to pay their lawyers and they also have to pay licence fees to the patent office. So patenting an invention, unlike getting copyright, can be expensive.

As with copyright, patent protection has a term. Usually this is 20 years from filing the patent.

Paris Convention of 1883

Three years before the Berne Convention, the Paris Convention for the Protection of Industrial Property of 1883 set up a Union of countries for protecting industrial property. Included in industrial property were patents.

The Paris Convention differs from the Berne Convention in not requiring member countries to recognise and enforce each others' patents. It only requires that a citizen of a member country should have the same right to apply for a patent in other member countries as citizens of those countries. This means an inventor needs a separate patent for each country where he or she wants protection. The Paris Convention does, however, give those who apply for a patent in a member country a 12-month period during which they have a "right of priority" to apply for a patent in other member countries.

The Paris Convention also differs from the Berne Convention in not setting minimum standards for domestic patent protection or a minimum term for patent protection. This means the domestic patent law of member countries can vary significantly. In most member countries, for example, an idea cannot be patented after it has been disclosed. In the United States, however, an inventor has a year to apply for a patent after disclosing an idea. Countries also differ about which ideas they exclude from patent protection.

Patent Cooperation Treaty of 1970

Under the Paris Convention, as we have seen, there is no easy way to get international patent protection. To remedy this situation, the Patent Cooperation Treaty of 1970 set up a Patent Cooperation Union. It allows inventors to make a single application for patents in all Union countries.

It is still necessary to have (and pay for) separate national patents. But an application in terms of the Patent Cooperation Treaty gives the applicant 18 months of international protection before having to get national protection. During this time the inventor can decide in which of the member countries he or she wants to register the patent.

Another advantage of the Patent Cooperation Treaty is that anyone using it to apply for a patent can ask for an international

preliminary examination. If the application passes this examination, it is likely the patent will be good.

Section 5 of TRIPS

Section 5 of TRIPS is the first international agreement to set an international standard for patent protection. It defines a patentable invention and describes the rights of a patent holder. It also lists the exceptions a country may make to what can be patented. It includes a three-step test for the exceptions a country can allow to a patent holder's rights. And it lays down a minimum term for patent protection of 20 years.

Advantages of software patents

Why should anyone writing software prefer patent protection to copyright? Copyright protection costs nothing, applies internationally and has a much longer term than patent protection.

Patent protection, however, has three advantages over copyright protection.

First, many see a patent as being worth more than copyright. A patent holder has to take trouble and spend money to get a patent. So a patent is likely to impress a potential investor or a venture capitalist more than a copyright work.

Second, copyright only protects a rights holder from unauthorised copying. If another developer independently writes identical software, the first developer will have no copyright protection against that developer.

Third, and probably most important, copyright does not protect an idea. This means copyright does not stop a developer from writing software that achieves the same result as copyright software, provided the developer does not copy the other's software.

It is understandable that many who develop or invest in software are prepared to pay for the added protection having a patent gives them. The United States is the leading country that grants software patents.

Opposition to software patents

While many software developers want patent protection for their software, many others feel software patents are inappropriate. One of the opponents of software patents is software developer and software freedom activist Richard Stallman. In Chapter 8 (Open Licences) we saw something of Stallman's contribution to the open or free software movement. In 1989 Stallman started the League for Programming Freedom to oppose software patents and extensions to copyright protection for software.

Another organisation that works for "a free market in information technology" is the Foundation for a Free Information Infrastructure. In 2005 largely, it is said, because of the efforts of the Foundation for a Free Information Infrastructure, the European Parliament rejected an EU directive that would have required all EU countries to recognise software patents.

The websites of these two organisations give detailed arguments why software patents are bad for software development. The common thread running through their arguments is that software patents make it difficult, if not impossible, for developers to develop new software. This is because patents prevent those developing new software from using ideas someone else has patented.

The websites also refer to studies that claim that allowing software patents in the United States has not led to an increase in new software.

How software patents are possible

How is it possible, in view of the statement in article 4 of the WIPO Copyright Treaty, that countries can grant software patents? There are two answers to this question: the wording of domestic legislation and the existence of non-examination patent systems.

Wording of domestic legislation

The first justification for granting software patents is a loophole in the wording of many countries' patent legislation. Section 25(2) of the South African Patents Act of 1978 is typical. It says a computer program cannot be patented. Section 25(3), however, says:

The provisions of subsection (2) shall prevent, only to the extent to which a patent or an application for a patent relates to that thing as such, anything from being treated as an invention for the purposes of this Act.

The patent legislation of many countries has a qualification that it is only “a computer program as such” that cannot be patented. The qualification was intended to allow an inventor to patent an invention that used some form of computer program to achieve its business purpose. This qualification is necessary because many different appliances and pieces of equipment, from telephones to fighter jets, use some form of computerised control. But the qualification has made it possible for software developers to present their software not as software but as part of a patentable idea.

Non-examination systems

Software patents are also easy to get in countries that do not examine patents before granting them.

In a non-examination system the patent authority grants every application for a patent, provided the application is in the correct form. So, to get a patent, all that is necessary is to fill in the forms correctly. There is no guarantee that a patent granted by a non-inspection patent authority satisfies the requirements of the domestic patent legislation. This will only be known, one way or the other, if someone challenges the validity of the patent in court.

Other countries have examination patent systems. In an examination system country, the patent authority examines the application and decides whether the idea it contains satisfies the requirements for a patent. This gives a patent authority the opportunity to refuse to patent a computer program.

If the patent authority refuses to grant a patent, the person making the application can go to court and ask the court to grant the patent. And if the authority grants a patent, it is still open to anyone interested in the matter to go to court to object that the patent should not have been given. But if an application is examined before a patent is granted, then it is likely the patent is good.

In many countries that do not have an examination system, software patents have been granted without their validity even being challenged in court. This means the question whether that country recognises software patents or not has never been settled.

The future for software patents

It is not clear what the future will be for software patents. Some commentators have suggested that courts in the United States, which for years have allowed software patents, are becoming more cautious. On the other hand, a court in the United Kingdom, where the Intellectual Property Office has always rejected applications for software patents, recently ruled that the attitude of the Intellectual Property Office was wrong. It seems that the future might lie in some sort of special protection for software.

Special protection for software

In 1971, when the issue of the appropriate protection for software first came up, WIPO held a meeting of experts to discuss the problem. In 1978, following this and other meetings, WIPO published Model Provisions on the Protection of Computer Software. And in 1983 it released a draft treaty for the Protection of Computer Software.

The WIPO proposals were for a unique form of protection for software. This protection would have been similar to that the Berne Convention provides for copyright works but with a shorter term of 20 years. The WIPO proposals also gave the rights holder the right to authorise using and disclosing software. These rights are not part of copyright. The draft treaty received little attention because a consensus seemed to be emerging that software should be protected by copyright as a literary work. This consensus, as we have seen, did not last.

First sale and software licensing

When discussing users' rights in Chapter 5 (Users' Rights) we mentioned the right of exhaustion or first sale doctrine. (This gives the buyer of a copyright work the right to pass the work on to another.) Some commercial software developers argue this doctrine

does not apply to them because they license people to use their software without selling them anything they can pass on to others. They say that in this way, software differs from other copyright works such as books, CDs or works of art.

Software can be packaged more cheaply than some other copyright works and can even be licensed or sold online and delivered in digital format. But a person who buys software does have something to dispose of, even if it is only a computer file. Commercial software developers oppose the first sale doctrine for software for two reasons. One is that the first sale doctrine deprives them of the possibility of selling new licences to people who would be prepared to buy “second-hand” licences from other users. The other is that the first sale doctrine means there are legitimate licences in circulation that the software developers have not issued to the current users. This makes it difficult for the software developers to use DRM to track unlicensed users.

Article 6 of the WIPO Copyright Treaty of 1996 leaves the first sale doctrine to the domestic legislation of member countries. But DRM, as we saw in Chapter 9 (Digital Rights Management), makes it possible for software developers to deprive those who buy their software of the benefit of the first sale doctrine. Software developers are doing this without approaching the domestic legislators who, according to the WIPO Copyright Treaty, should make the decision as to whether the first sale doctrine should apply to software.

Protection for silicon chips

The design of semiconductors or silicon chips became commercially important in the late 1970s. At the time the mask work, the two- or three-dimensional layout used to make a chip, did not seem to qualify for either patent or copyright protection. So in 1984 the United States passed the Semiconductor Chip Protection Act to protect mask work. This Act gave those who produced mask work protection that was similar to copyright but for a term of only 10 years.

Other countries followed with their own legislation to protect mask work and, in 1989, the Washington Treaty on Intellectual Property in Respect of Integrated Circuits was agreed. The Washington

Treaty provided a copyright-like protection for silicon chips but it never received enough support to enter into force.

Since 1994, however, article 35 of TRIPS has obliged members of the WTO to implement much of what was in the Washington Treaty. To this requirement it has added the provisions in articles 36 to 38 of TRIPS. Article 38 of TRIPS provides a minimum term of 10 years.

Comments

Those who argue against patent protection for software make a strong case. But if software is to be protected by copyright, then it seems inappropriate that it should be protected for 50 years or (as is increasingly the case) for 70 years. If a 10-year term of protection is good enough for those who make computer chips, why should software developers want more?

It is unfortunate that interest in a separate system of protection for software died out in the 1980s. Such a system might have provided a compromise that would have been acceptable to those who wanted a different form of protection for software.

11

Traditional Knowledge

The traditional knowledge that might qualify for copyright or copyright-related protection consists of the stories, music, dances, art and design that are part of the life of a traditional group. Traditional knowledge is the usual name but, as we have seen, copyright protects “works” not “knowledge”. So traditional knowledge of this sort is often, more correctly, called folklore, traditional cultural expressions or works of traditional knowledge. This chapter looks at how it is protected.

This chapter will not deal with the traditional understanding of the uses and properties of plants. This form of traditional knowledge is different because it may qualify for patent protection.

Traditional knowledge, copyright and patent

In Chapter 1 (Copyright History), we saw that it was only in the 1400s that Western European countries began to protect authors, artists and inventors. Before that time all knowledge was, in a sense, traditional. It passed from one generation to the next in families and villages and in more formal groups such as religious communities and craft guilds.

Copyright and patent gave authors and inventors a limited-term exclusive right to exploit their original works of art or literature or

inventions. This exclusive right encouraged them to add to the body of knowledge. When the term for the exclusive right ended, their additions joined the body of common knowledge everyone was free to use.

Traditional knowledge outside Western Europe

Traditional knowledge worked well enough until people from the Western European countries that had developed it met communities with their own understanding of traditional knowledge. Those from Western Europe assumed they were free to use the traditional knowledge of these communities in the same way they used the common knowledge of their own society. In return members of the communities were free to use what was common knowledge in Western Europe. This common knowledge included the contributions of individual authors, artists and inventors for which copyright (and patent) protection had ended.

An exchange of this sort poses two problems. The first is that some individuals in Western Europe ignored the prior existence of works of traditional knowledge in the hands of the traditional communities that had produced them. They passed themselves off as the authors of these works and claimed copyright in them. Because many works of traditional knowledge are oral and not well known outside the community that produced them, there was little to stop these individuals. Even when traditional communities knew that outsiders were appropriating their knowledge, they usually were not in a position to challenge them.

Another problem has to do with outsiders using traditional knowledge commercially. This is because some traditional communities do not see their traditional knowledge as a source of wealth. Rather they see it as what creates their community and expresses their identity. They regard anyone who knows and lives by the traditional knowledge of their community as a member of the community. So, when the traditional knowledge of such a community becomes public or is used to create wealth, it weakens the community it is supposed to create.

National and international protection for traditional knowledge

National protection

Most of the communities that produced works of traditional knowledge lived in territories colonised by Western European countries. These colonial powers had little interest in or understanding of traditional knowledge.

When these territories became independent countries, some of them passed legislation to protect works of traditional knowledge. The earliest countries to do this were those that, such as Tunisia, had been influenced by Continental ideas about the *droit d'auteur*. The Continental approach, as we have seen, stressed the creativity involved in producing a literary or artistic work. It was more open to the value of traditional knowledge than was the functional British copyright tradition.

Some Commonwealth countries recognise that traditional knowledge is important. In New Zealand, for example, section 17(1) of the Trade Marks Act of 2002 says that a trademark must not be registered if “its use or registration would be likely to offend a significant section of the community, including Maori”. Similarly, South Africa is considering amending its Copyright Act to protect works of traditional knowledge. If it does so, other Southern African countries may well follow its example.

Providing national protection for works of traditional knowledge is not easy. In 1982 UNESCO and WIPO produced the “Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions”. The provisions were meant as a model for countries that wanted to legislate to protect works of traditional knowledge. As yet no country has passed legislation giving effect to them.

International protection

National protection for works of traditional knowledge, of course, applies only within the borders of the country that grants it. Having national protection does not stop someone in another country from exploiting a work of traditional knowledge.

International protection for works of traditional knowledge, as with copyright protection, needs countries to agree on a minimum standard of protection. It also needs countries to come together to grant this protection to works of traditional knowledge from other countries. As with early international copyright protection, these agreements can be bilateral or regional. But the best protection for works of traditional knowledge would be an international agreement.

Since 2001 WIPO has been hosting an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the IGC) that has been working to produce such an agreement. The IGC has yet to come up with a firm proposal for an international agreement. It has, however, produced drafts of instruments to protect traditional cultural expressions and folklore. The IGC has also published case studies and analyses including, most recently, a gap analysis on the protection of traditional cultural expressions and expressions of folklore.

In addition, the IGC has been an important forum in which organisations interested in traditional knowledge have been able to express and exchange their views. More than 150 such organisations take part in the IGC as observers.

Copyright in traditional knowledge

Clearly, finding an acceptable way to protect works of traditional knowledge is not a simple matter. But small changes to, or even a different interpretation of, some of the provisions in the Berne Convention might allow works of traditional knowledge to qualify for copyright protection. We will try to identify these provisions by asking to what extent traditional knowledge satisfies the requirements for copyright protection.

Literary or artistic works

Copyright protects a literary or artistic work. The works of traditional knowledge to which copyright protection might apply are stories, music, dances, art and design. These works qualify as literary or artistic works.

Original works

Copyright only protects original works. The works of traditional knowledge copyright might protect must once have been original. Whether a particular work was created so long ago that the term for copyright protection has ended is something we will look at below.

Different communities may claim similar traditional knowledge. They may have arrived at this knowledge independently, which would not prevent each community having copyright in the knowledge. If one community had copied from another or if they had both copied from a third community, then the community that created the work will hold the copyright.

Fixation

Fixation is a problem with works of traditional knowledge. Most countries, as we have seen, require a work to be fixed to qualify for copyright protection. Traditional works such as buildings or sculptures will satisfy this requirement. But, in traditional communities, stories, songs and dances are often not fixed. This has meant the first person to “fix” a work of traditional knowledge has been able to claim copyright in it. This person may have been a researcher who records or transcribes music or stories for research or archival purposes. Or it may have been someone looking for new material to use for commercial purposes.

Article 2(2) of the Berne Convention does not require a work to be fixed to qualify for copyright protection. It leaves member countries to decide “that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form”. This means a country can decide that a category of works, such as those of traditional knowledge, shall have copyright protection even though they are not fixed in material form.

Authorship

We have seen that copyright needs an author who will be the first holder of copyright in a work. With works of traditional knowledge, however, it is often not possible to identify an individual author. This problem can be dealt with in three ways.

1. Article 15(4) protection: Article 15(4) of the Berne Convention appears to have been an attempt to recognise an author for works of traditional knowledge. It does this by equating works of traditional knowledge to unpublished works of an unknown author:

(a) In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union.

(b) Countries of the Union which make such designation under the terms of this provision shall notify the Director General by means of a written declaration giving full information concerning the authority thus designated. The Director General shall at once communicate this declaration to all other countries of the Union.

Article 15(4) was introduced as part of the 1967 Stockholm revision of the Berne Convention. This revision, as we saw in Chapter 2 (International Copyright Agreements), tried to address the concerns of developing countries and win them over from the Universal Copyright Convention.

It is difficult to understand why countries that want to protect works of traditional knowledge have not used article 15(4). The problem may be that article 15(4) reflects the belief, common in 1960s scholarship, that only individuals can create. Works of traditional knowledge, however, are often the creations of a community in which it is not possible to point to a single creative, even if anonymous, individual in the way that article 15(4) requires.

2. Joint authorship: Another way to protect works of traditional knowledge would be to rely on article 7*bis* of the Berne Convention. Article 7*bis* recognises joint authors who together are the first holders of copyright in a work. The Berne Convention does not limit the number of joint authors, so if members of a

community have jointly created a work of traditional knowledge, then they will all be the joint authors of the work.

The law that governs joint copyright, presumably, reflects the law of joint ownership. While this law varies from country to country, joint ownership usually requires joint consent. Usually joint authors give this consent in express terms, but there seems no reason the members of a traditional community cannot give an implied consent to being joint authors of a work they create. Joint ownership also requires all joint owners to agree when disposing of what they own. With joint owners of a work of traditional knowledge, shared agreement could be problematic.

3. *Corporate ownership*: Allowing a traditional community some form of corporate ownership in works of traditional knowledge is another possibility. This approach would combine elements of the previous two approaches.

Nothing in the Berne Convention stops a country from recognising corporate legal identity in a traditional community. This corporate body would then be able to claim copyright in its works of traditional knowledge. Other member countries would then have to protect this copyright in the same way as they protect the copyright held by a person living in a member country or the copyright held by a company or trust registered in a member country.

Term

A difficulty with allowing copyright protection for traditional knowledge is that an essential feature of copyright, at least in the Anglo-American common law and Berne Convention traditions, is that copyright protection should last only for a limited time. Copyright in a traditional work would be unacceptable to this tradition without some way to set a term to it. The Berne Convention recognises two ways of setting a term to copyright, and it would be possible to use either for a work of traditional knowledge.

1. *From the death of the author*: One way to calculate the term for a work of traditional knowledge is from the death of the author

of the work. When dealing with a work of joint authorship, article 7*bis* says this should be done “from the death of the last surviving author”. This would mean, for a work of traditional knowledge, from the death of the last surviving member of that community.

This is not a trick to avoid setting a term for traditional knowledge. Many communities contributed works of art and literature to our civilisation but no longer exist. Language communities are disappearing and it is possible, because of the pressures of globalisation, that some of today’s traditional communities will no longer be with us tomorrow. Should this happen, no one would be left to assert the community’s rights in its traditional knowledge.

2. From the date of publication: When dealing with authors and artists who are not nationals of a member country, article 3 of the Berne Convention calculates copyright term from when the work is published. The Convention could be revised to apply this way of calculating the term to works of traditional knowledge.

If works of traditional knowledge do not have to be fixed, it would be necessary to consider revising what article 3(3) says about public performance not amounting to publication. It should still be the case, as article 3(3) says, that publication should mean published with the consent of the authors.

Holders’ rights

If a traditional community has copyright in a work, then it would have the usual rights of a holder. These rights would include the right to license using works for a fee. It would also include the right, for those communities that wanted to preserve the secrecy of their traditional knowledge, to prevent others using a work of traditional knowledge.

Understanding works of traditional knowledge as what creates a traditional community might, however, limit some of the usual copyright holders’ rights. It might not be appropriate, for example, for a traditional community to assign the rights in a work of its traditional knowledge to an outsider.

Users' rights

The IGC has discussed whether users should have rights in works of traditional knowledge similar to the exceptions and limitations the Berne Convention allows. If traditional knowledge is about community rather than profit, then the three-step test seems inappropriate. It would seem appropriate to allow exceptions for education and research.

Comments

The problem with copyright protection for works of traditional knowledge is not that it is impossible to accommodate such works within copyright protection. The problem, as with any copyright protection, is that protecting works of traditional knowledge prevents those who do not hold the copyright from exploiting these works unless they get permission from the copyright holders.

This tension between those who claim rights in a work of traditional knowledge and those who want to exploit the work is strong in countries where the members of the organised traditional communities that produced these works are in the minority. In these countries there are those on the fringes of these communities and there are those with no claim to membership who are familiar with these works. They want to earn a living by copying them or using them to make derivative literary, artistic or musical works.

It might be possible to resolve these issues by combining copyright for works of traditional knowledge with compulsory licences to use these works. The Appendix to the Berne Convention allows for compulsory licences for translations into local languages in developing countries.

12

Copyright Reform

Previous chapters looked at the possibility of reforming some of the details of copyright. This last chapter asks whether the 21st century in which we live needs copyright at all.

Copyright as a fundamental right

In Chapter 1 (Copyright History) we said we would return to the question whether copyright and copyright-related rights are fundamental human rights or just a convenient way to manage the technology of the printing press. The answer is important. If these are fundamental rights, then countries must oppose any inroad on copyright protection as they would oppose inroads on any other fundamental right.

Fundamental rights are often unpopular with individual members of society. We know that, when it suits them, many people will ignore even the basic rights of others such as the right to dignity and equal treatment or even the right to life. So the increasing violations of copyright that have come with digitisation of copyright material do not necessarily mean that copyright is outdated. They may mean that society must take more vigorous steps to protect copyright and educate people about its value.

There are some reasons for thinking that copyright is a fundamental right. Article 27(2) of the Universal Declaration of Human Rights of 1948 said: “Everyone has the right to the protection of the moral and material interests resulting from any scientific, liter-

ary or artistic production of which he is the author.” And in 1996 article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights repeated this idea.

On the other hand, the fairly recent and progressive Bill of Rights in the South African Constitution of 1996 does not protect copyright or any other form of intellectual property. This omission was challenged when the Constitutional Court had to approve the Constitution. After hearing arguments, the Constitutional Court said that protection for intellectual property was not a “universally accepted fundamental right” the Constitution had to protect. So it seems, even among right-minded citizens, there is no agreement that copyright qualifies as a fundamental right.

Copyright as an incentive for creativity

If copyright is not a fundamental right, it needs to justify its existence. The traditional way to justify copyright is that it is an incentive for authors and artists to put time and energy into contributing to the common pool of knowledge.

This view sees copyright as a compromise. The rewards for producing copyright works must be high enough to encourage people to create copyright work. But the cost of access to copyright material must be low so that everyone in a society can benefit from this information. From this argument it follows that copyright protection can only be justified if it does indeed encourage authors and artists to create new works.

Alternative income for authors and artists

Some have suggested that it would be possible to do away with copyright if authors and artists did not have to rely on copyright royalties and could earn money from their work in other ways.

Some creators of copyright works already do earn money in other ways. Academics and funded researchers, for example, do not usually live on their copyright royalties. They publish to establish themselves as leaders in their fields and so advance their careers.

Other creators of copyright works earn a living through sponsorship, advertising or personal appearances.

Some open licence software developers also earn a living in other ways and develop software because they find the work rewarding. This approach shows that not every creative person is motivated by the possibility of financial rewards. Other open licence software developers use their knowledge of open licence software to get jobs in the software industry. Some, of course, use their open licence software as the basis for more advanced software that they market in the usual way.

Another way to reward those who produce material in a digital format would be through a blanket licence for copying or performing digital material. We discussed how this would work in Chapter 6 (Copyright Licences).

Even if alternative income were available for everyone who produced copyright works, it would not be possible to do away with copyright or something similar. Copyright would still be needed to know which works earned income for their creators and who their creators were. And the creators might want to enter into agreements to make over to others the income their work generated.

Protecting the copyright industry

Authors and artists, of course, are not the only people who make a living out of copyright. There is a copyright industry made up of those who edit, publish, distribute and sell copyright works. There are also the collecting societies and agents who represent the authors and artists. This copyright industry often benefits more from the sale and licensing of copyright works than the authors and artists who produce the works.

Those who work in the copyright industry justify their role by pointing to the value they add to the work that authors and artists produce. Those who publish books, in particular, point to the risk that when they print books in large enough numbers to make them affordable, the public may not buy them.

New technology may be changing the publisher's role. Authors can now use ordinary word processors to produce "camera ready copy". This is text in a format that needs no further editing. Having prepared camera ready copy, authors can publish their work online

themselves or use a combination of online services and print-on-demand services to market and publish their works. Musicians and video producers are beginning to do something similar for the works they produce.

These new technologies will eventually replace the traditional books, CDs and DVDs. It is unlikely that the printed book and its audio and video equivalents will disappear completely. Photography has not replaced paintings, and CDs have not replaced music recorded on vinyl. But, as with paintings and vinyl, it is likely that interest in books and CDs will be limited to specialists and collectors. Most people want access to information and entertainment, not ownership of the medium.

New technology has begun to change the way we listen to popular music. Although CDs give better quality sound, more people now download music files rather than buy CDs. In countries where broadband Internet access is affordable, the same is happening with videos. That is not happening to the same extent with books, probably because readers are more conservative. But electronic book readers and book delivery systems are improving. It can only be a matter of time before a book reader captures the popular imagination and does for digital books what Apple's iPod did for digital music.

When digital replaces analogue, some traditional institutions will have to change. Bookshops and music shops will have to offer different services to attract customers. Diversification has already begun to happen, with many bookshops doubling as coffee shops. Lending libraries will increasingly become licensing offices for digital material. In the United Kingdom, for example, some public libraries already offer online access to a range of reference works such as the *Oxford English Dictionary*.

Members of the public and information professionals will have to pay more attention to copyright licensing and to the first sale doctrine. Why, for example, should a library be able to lend its copy of a book, a CD or a DVD to a succession of users while someone who downloads the equivalent material in electronic format is not allowed to share it with others?

Publishing houses will have to change more than most. The traditional publishing house is really a venture capital business. It risks the investment it puts into printing a book or producing a CD or DVD in the hope of substantial returns. To the venture capital business some publishing houses add the business of marketing and distributing works. In a digital world, marketing a work will still be important and some productions will still require substantial capital investment. But in many cases authors and artists will be able themselves, with some expert help, to put their works into a form that can be distributed over the Internet.

Publishing houses will only survive if they can find ways to add value to the work authors and artists do. They could help authors, for example, to improve the layout, indexing or artwork in a book or they could help mix the music on a CD. In these cases they act, in effect, as co-authors or co-producers of the work. Or they could advise authors on the best way to present or market their works. In these cases they would be doing the work of literary agents or editors. Or they could distribute a work and collect licence fees for the authors. In these cases they would be doing the work of an Internet service provider or a collecting society.

Comments

It is difficult to imagine going back to a world, if it ever existed, where authors and artists produced works without expecting acknowledgement or remuneration.

It is possible, as we have explained, that in a generation or so the way copyright works are produced and distributed will have changed. With these changes are likely to come changes in the way authors and artists who produce these works earn their living. Many traditional businesses will look very different.

But whatever the changes, recognising and rewarding those who produce literary or artistic works will surely require some form of copyright. Without copyright, as we have said, how will we know whom to reward or recognise?

Index

- academic exception 35–36
 - using copyright works for private study 51, 64, 76–77
- access to knowledge
 - alternative dispute resolution 110
 - and education 116
 - and information sharing 107–108
 - information produced by governments 108
 - information produced by non-profit organisations 109
 - legal, judicial and political information 108
 - notification 109–110
 - science commons 109
- alternative income for authors and artists 140–141
- arbitration 12
- Archimedes 30
- artists' rights 5–6, 8, 15, 18, 40, 42–44, 60
- Association Littéraire et Artistique Internationale* (ALAI) 8–9
- Atkinson, Lord 30
- authors' rights 1, 3–4, 7–8, 15, 18, 40, 42–44, 69, 113–114
- authorship 133–135
 - joint 136
- backup copies 65
- Berne Convention 6, 8–9, 10, 12, 15–17, 18–20, 21, 26, 27–28, 29, 31, 32, 33, 36, 37, 39–45, 47, 58–70, 76, 81, 106, 113–114, 120–121, 125, 132–137
 - and Union states 13–15, 16, 19, 21, 22, 31, 37, 43, 45, 58, 61–63, 80, 81, 134
 - exceptions and limitations 22, 33, 40, 57, 61–66, 137
 - Paris Act 14, 18, 114
 - Rome Act 43
 - Stockholm revision 16, 63–64, 69, 134
- bilateral agreements 13, 15, 20–21, 132
- bilateral treaties 8
- Bill of Rights of 1698 3
- BIRPI 21
- Bono, Sonny 58
- Brussels Convention Relating to the Distribution of Programme-

- Carrying Signals Transmitted by Satellite of 1974 17
- Buenos Aires Convention 20
- buildings, copyright in 5, 26, 40, 133
- Caxton, William 2
- Charles II 3
- Chénier Act (France) 7
- Chénier, Marie-Joseph 7
- cinematographic works 17, 26, 62, 101
- class actions 44
- classes of copyright work 28, 40, 42, 83, 87, 116, 117
- collecting societies 50, 66, 74–75, 76, 79–85, 116, 117, 141, 143
 - how they work 50, 80–81
 - reasonable prices 82
 - reasons for use 79–80
 - regulation of 81–82
- collective work 27–28, 30, 102–103
- Colonial Copyright Act of 1847 (UK) 6
- common law copyright 4
- competition commissions 84–85
- copying
 - and moral rights 51
 - and plagiarism 50–52
 - in education and research 53–54
- Copyright Act (South Africa) 131
- Copyright Act of 1790 (US) 7, 8, 33, 65, 115
- Copyright Act of 1911 (UK) 6, 30
- Copyright Amendment Act of 1842 (Talfourd Act; UK) 6
- copyright
 - as a fundamental right 57, 140
 - as an incentive for creativity 140
 - before the printing press 1–2
 - copyright board 69, 84, 85
 - Copyright, Designs and Patents Act of 1988 (UK) 83
 - copyright holders
 - academic exception 35–36
 - and contracts 35
 - awkward cases 34–35
 - author of a work 33, 58, 100
 - author as independent agent 34, 79–80
 - author’s employer 33–34
 - official works 36
 - copyright in Britain 4–6, 35, 82
 - in artistic works 5
 - Statute of Anne of 1710 3, 4, 82
 - copyright in France and the *droit d’auteur* 7–8, 131
 - copyright in the British Empire 6
 - copyright in the United States 6–7, 20–21, 29, 34, 35, 43, 44, 57, 60, 65, 68, 84, 115, 121, 126
 - copyright licences 49, 73–76
 - blanket licence to copy 64, 74–76, 85, 111, 116–117, 141
 - general licence 74
 - grand rights licence for dramatic works 75
 - individual licences 73–74
 - licence to use music 75, 83
 - licences for performers’ rights 76
 - master rights licence 75

- copyright works
 - fixed work 30–31, 50, 60, 133, 136
 - literary or artistic work 25–28, 29, 31, 33, 40, 63, 101, 102, 131, 132, 143
 - original work 25, 27, 28, 29–30, 33, 37, 40, 42, 43–44, 52, 53, 68, 90, 103, 129
 - published work 31–32
 - registered work 32–33
- copyright-related rights. See neighbouring rights
- Copyright Term Extension Act of 1998 (Sonny Bono Act; US) 58
- Creative Commons
 - attribution 96, 97, 98, 101, 103
 - CCplus 105
 - changing or withdrawing a licence 104
 - jurisdiction 98
 - licence generator 97–98, 100, 101, 103
 - licences 96–98
 - mixing licences 104–105
 - modifications allowed 100–101
 - no modifications allowed 101–103
 - restriction on commercial use 98–100
 - rights 96
 - share alike 96, 97, 98, 103, 107
- Cybercrime Convention 113, 114–115
- database protection 37–38
- Defoe, Daniel 3–4
- derivative work 27, 28, 40–41, 64–65, 79, 96, 101, 104–105, 107, 108
- developed countries 16, 23, 69
- developing countries 14, 16, 17, 19, 23, 69–70, 134
- Dickens, Charles 6, 8, 46
- digital and non-digital copying 111
- Digital Millennium Copyright Act of 1998 (US) 115, 117
- digital rights management
 - alternatives to 116–117
 - and privacy 115, 116
 - and users' rights in copyright works 116
- Cybercrime Convention of 2001 113, 114–115
- domestic protection 115
- hardware 112
- international protection 113
- phonograms (sound recordings) 114
- problems with 115
- software 112
- technology 112–113
- weaknesses in 112–113
- WIPO Copyright Treaty of 1996 113–114, 115, 123, 126
- Disney, Walt 58
- Disraeli, Benjamin 9
- Doha Round 19
- Dostoevsky, Fyodor 9
- droit d'auteur* 7, 131
- droit de suite* 43–44, 49
- droit voisins*. See neighbouring rights
- Eldred v Ashcroft* 58

- employers 33–34, 59
- employment-related work 33–34
- Engravers Copyright Act of 1734 (UK) 5
- ephemeral recordings 62
- exceptions and limitations 22, 137
- exhaustion. *See* first sale
- fair dealing 51, 61, 64, 65, 66, 74, 116
- fair practice 60–61, 63
- Feist Publications v Rural Telephone Service* 29
- first sale 68, 77, 125–126, 142
- fixation 30–31, 133
- Fluegelman, Andrew 92
- foreign authors and artists 36, 37
- formalities, registration 32, 49
- fundamental rights 57, 139–140
- General Agreement on Tariffs and Trade (GATT) 20
- Ginsparg, Paul 54
- Google Library Project 66
- Gutenberg, Johannes 2
- hard-work test 29
- Hawking, Stephen 53
- history 1–10
- Hogarth, William
- holders' rights 39–54, 68, 136
- Hugo, Victor 8–9
- ideas
 - and patent 120, 121, 123
 - copyright in 30, 36, 51
 - theft of 52–54
- Imperial Copyright Act (UK) 6
- independent agent 34
- information sharing. *See* access to knowledge
- integrated circuits
 - and Washington Treaty on Intellectual Property in Respect of Integrated Circuits of 1989 17–18, 126
- International Agreements on Copyright-Related Rights (Neighbouring Rights) 17
- international copyright agreements 11–23
- International Court of Justice 12
- International Office and WIPO 21
- international recognition of copyright
 - in the Berne Convention 8–9
 - in the United States 20
- ISBN (International Standard Book Number) 32–33
- ISSN (International Standard Serial Number) 32–33
- ISTC (International Standard Text Code) 32–33
- iTunes 112
- Johansen, Jon Lech (DVD John) 112
- journalists 3, 34–35
- Lessig, Lawrence 95
- letters patent 2, 7
- licence pollution 106–107
- Licensing Act of 1662 (UK) 3–4
- literary or artistic works 25–28, 31, 33, 40, 63, 101, 102, 131, 132, 143
- litterae patentes*. *See* letters patent and patents

- Locke, John 3, 4, 27
- Macmillan & Co v Cooper* 30
- moral rights 7–8, 18, 42–44, 47, 49, 51, 53, 59–60, 114
- music 26, 27, 31, 40, 42, 44, 46, 50, 73, 76, 101
- digital rights management and 111, 112, 113, 116, 117
- licence to use 75
- limits to holders' rights 68
- traditional 129, 132, 133, 137
- neighbouring rights 17
- non-software open licences 95, 106
- non-substantial part, use of 67–68
- official works 36
- open licences 87–109, 141
- originality 28, 29, 30, 37, 38
- orphan works 69
- Paine, Thomas 6–7
- Paris Act of 1971 14, 18, 114
- Paris Convention of 1883 21, 121
- Patent Cooperation Treaty of 1970 121–122
- patents 2, 9–10, 32, 36, 107, 119, 120–125, 127, 129–130
- and copyright 120–121
- early patents 9–10
- software patents 119, 122, 123–125
- Patents Act of 1978 (South Africa) 123
- peer review 54, 109
- Performances and Phonograms Treaty of 1996 17, 60, 114–115
- performers and producers 50, 60, 76
- personal and institutional copying 77
- personal images, rights in 308
- Philip and Mary 3
- Phonograms Convention (Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms) 17
- plagiarism 50, 51–52
- Pope, Alexander 5
- pre-print archives 54
- printing presses
- and copyright 1, 2, 10, 40, 140
- before copyright in Britain 2–4
- before copyright in Europe 2
- protecting the copyright industry 141–142
- protection for foreign authors and artists 20, 36, 37, 81
- public domain 57, 58, 59, 96, 97
- public policy 68
- published works 54, 62, 79, 102, 136
- reform 23, 139–143
- registration 7, 32, 131
- stationers 3, 4
- remedies 44–47
- award of damages 46
- class actions 44
- common law actions 47
- criminal penalties 46–47
- order to stop infringing 45
- protecting copyright rights with technology 47
- protecting moral rights 47
- seizing infringing copies 2, 44–45

- rights
 - droit de suite* or special protection for authors of original works of art and manuscripts 43–44, 49
 - linking, framing and thumbnails 66–67
 - moral rights 7–8, 18, 42–43, 47, 49, 51, 53, 59–60, 114
 - right to make copies of (reproduce) the work 40, 50
 - right to make derivative works 27, 40–41
 - right to perform a copyright work in public 42
 - right to sell or distribute copies of a work (secondary copyright) 41
- Rome Convention (International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations) 17, 20
- sculpture, copyright in 6, 26
- section 301 report 21
- Semiconductor Chip Protection Act of 1984 (US) 126
- Sherman Antitrust Act of 1890 (US) 84
- software as a literary work 119–120
- software licences, other types of 90
- software open licences 87–88
 - advantages and disadvantages 92–95
 - BSD licences 88
 - freeware and shareware 92
 - GNU licences 89–90
 - open source initiative 90, 91–92
 - origins of 87–88
 - types of 88–90
- software patents 120–122
 - advantages of 122
 - future of 125–127, 142
 - non-examination systems 124–125
 - opposition to 123
 - wording of domestic legislation 126
- software protection 119–127
- Sonny Bono Act. See Copyright Term Extension Act of 1998
- special users' rights
 - in copyright works 60–61
 - in ephemeral recordings 63–64
 - informing the public 99
 - legal and political works 61
 - teaching 63, 74, 99, 107
 - three-step test 16, 18, 63–64, 66, 76, 122, 137
- Stallman, Richard 89, 123
- standing committee 22
- stationers 2–3, 4, 5
- stationers' charter 2–3
- Stationers' Company 2–3, 4
- Statute of Anne of 1710 (UK) 2, 3, 4–5, 7, 8, 10, 13, 32, 44, 82, 83
- Statute of Monopolies 9
- student use. See academic exception
- symbol 32
- Talfourd Act. See Copyright Amendment Act of 1842
- Talfourd, Thomas 6

- technological protection measures 113
- term
 - calculating 31–32, 59, 136
 - for copyright works 18, 58–59, 133
 - for moral rights 59–60
 - for performers’ and producers’ rights 60
 - for works made by employees and works made “for hire” 33–34, 58, 59
 - from date of publication 59, 136
 - from death of the author 7, 58, 59, 135–136
- theft of ideas 53–54
- Tolstoy, Leo 9
- Trade Act of 1974 (US) 21
- Trade Marks Act of 2002 (New Zealand) 131
- traditional knowledge
 - authorship of 134–135
 - copyright and patent 129
 - copyright in 132–137
 - corporate ownership of 135
 - fixation of copyright in 133
 - international protection of 131–132
 - joint authorship and copyright 134–135
 - literary or artistic works related to 132
 - national protection of 131
 - original works related to 133
 - outside western Europe 130
- transferring copyright rights 47–48
 - assignment 47, 48
 - exclusive licence 48–49
 - inheritance 49
 - operation of law 49
 - simple licence 49
- tribunals 50, 79, 82–84, 85
- TRIPS 11, 15, 16, 21, 23, 45, 46, 50, 58, 64, 69, 70, 113, 119, 127
 - agreements 18–19
 - section 5 122
 - TRIPS-plus agreements 19–20
- Twain, Mark 8
- UNESCO 15–16, 21, 131
- United International Bureaux for the Protection of Intellectual Property (BIRPI). See BIRPI
- Universal Copyright Convention 15–16, 19, 32, 36
- users in developing countries 69
 - Berne Convention Appendix 69
 - TRIPS 70
 - WIPO development agenda 70
- users’ rights 57–70
 - not based on the Berne Convention 67–68
 - limits to holders’ rights in a musical work 68
 - right of exhaustion or first sale 68
 - using a non-substantial part 67
 - works against public policy 68
- Van Gogh, Vincent 43–44
- Vienna Convention on the Law of Treaties 11
- Vienna Typeface Agreement of 1973 18

Introducing Copyright

- Visual Artists Rights Act of 1990 (US) 60
- World Intellectual Property Organization (WIPO)
Copyright Treaty 15, 17, 22, 28, 30, 113–115, 123, 126
Development Agenda 22, 69, 70
standing committee 22
- WPPT (WIPO Performances and Phonograms Treaty) 17
- World Trade Organization (WTO) 16–17, 18, 19, 20, 21, 22, 50, 70, 127
- world trade talks, Uruguay Round.
See TRIPS
- Wycherley, William 5

Introducing Copyright

Computers and the Internet have transformed the way we produce and distribute information and entertainment. And copyright is struggling to keep pace with these changes.

The authors of all kinds of works, from the humble email to blockbuster films, rely on copyright to protect what they produce. But authors and those who use their work are often unclear about what copyright allows and what it prohibits.

This book was written for those who want to learn about copyright in the 21st century. It explains copyright protection and what it means for copyright holders and copyright users. It also introduces readers to contemporary topics: digital rights management, open licences, software patents and copyright protection for works of traditional knowledge. A final chapter tries to predict how technology will change the publishing and entertainment industries that depend on copyright.

The book assumes no special knowledge and avoids technical language as much as possible.

Julien Hofman, the author, is Emeritus Associate Professor at the University of Cape Town.

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Commonwealth of Learning is an intergovernmental organisation set up by Commonwealth Heads of Government. Its purpose is to encourage the development and sharing of knowledge, resources and technology about open learning and distance education.



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