Readig for Scientific Information
Management, LTH, Copyright Lecture

1.2 COPYRIGHT: ITS SCOPE AND RATIONALE

1.2.1 Why Have Copyright?

Most of us take copyright for granted. We may choose to ignore it when we photocopy materials, duplicate software or perform works protected by copyright. But when pressed most lawyers and business people would at least acknowledge that the law ought to grant authors property rights in their works. Surely authors should have the right to prevent the ‘theft’ of their works and their creativity ought to be rewarded?

1.2.2 The Case against Copyright and Proposals for Reform

Some argue that copyright ought not to exist or at least it should be severely limited in its application. The ‘open source’ or ‘copyleft’ movement discussed later in this book is one example of this. We all stand on the shoulders of giants—if all copying were outlawed how would society advance? A novel or a painting is self-evidently not the same as a piece of real property, to be subject to access and possession to the exclusion of all others. Once made available to the public surely all products of the human intellect should be available to everyone for their use, edification and enjoyment? The great US jurist and Supreme Court Justice Louis Brandeis memorably argued against the privatisation of knowledge and for an ‘intellectual commons’ in the landmark US case International News Service v Associated Press:

The general rule of law is, that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas become, after voluntary communication to others, free as the air to common use.

Concerns have been raised in certain quarters that the effect of strengthening copyright law in recent years to address the digital agenda will be to seriously and unjustifiably restrict the dissemination of speech, information, learning and culture while not providing any decisive incentives to the creator. On this analysis copyright law needs to be reassessed in light of its premises and pared back to a right of much more limited scope and duration.

Such a wholesale reassessment of copyright law is in the author’s view unlikely, at least in the short to medium term. For example, the European Commission launched a consultation in 2004 on its Staff Working Paper ‘On the Review of the Legal Framework in the Field of Copyright and Related Rights’. The Working Paper indicated that the Commission’s view was that current EU copyright legislation was generally effective and consistent, but would benefit from fine-tuning in certain areas. In 2008 the European Commission published a Green Paper on copyright, but the scope of areas under consideration for review is relatively limited. In the words of the Commission:

In its review of the Single Market the Commission highlighted the need to promote free movement of knowledge and innovation as the ‘Fifth freedom’ in the single market. The Green Paper will now focus on how research, science and educational materials are disseminated to the public and whether knowledge is circulating freely in the internal market. The consultation document will also look at the issue of whether the current copyright framework is sufficiently robust to protect knowledge products and whether authors and publishers are sufficiently encouraged to create and disseminate electronic versions of these products.

This consultation is targeted at everyone who wants to advance their knowledge and educational levels by using the Internet. Wide dissemination of knowledge contributes to more inclusive and cohesive societies, fosters equal opportunities in line with the priorities of the renewed Social Agenda.

With this Green Paper, the Commission plans to have a structured debate on the

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3 248 US 215, 250 (1918).
long-term future of copyright policy in the knowledge intensive areas. In particular, the Green Paper is an attempt to structure the copyright debate as it relates to scientific publishing, the digital preservation of Europe's cultural heritage, orphan works [ie works where the copyright owner cannot be traced], consumer access to protected works [ie works protected by DRM] and the special needs for the disabled to participate in the information society. The Green Paper points to future challenges in the fields of scientific and scholarly publishing, search engines and special derogations for libraries, researchers and disabled people. The Green Paper focuses not only on the dissemination of knowledge for research, science and education but also on the current legal framework in the area of copyright and the possibilities it can currently offer to a variety of users (social institutions, museums, search engines, disabled people, teaching establishments).

On 6 December 2006 the UK Treasury published the findings of the Gowers Review, a review of the UK IP system, and certain recommendations were made which if followed up on will make limited changes to UK copyright law, but at the time of writing it is not clear how far and how quickly the law may change here.  

1.2.3 Limits on Copyright: The Idea/Expression Dichotomy and Fair Use/Fair Dealing

In any event, whatever the criticisms of the copyright system, copyright does not protect ideas as such. The courts have developed the so-called 'idea/expression' dichotomy to help set the boundary between what is in the 'public domain', and so common to others to freely copy and exploit, and what can be proprietary and 'privatised'.

So copyright is said to only protect the expression of ideas, not ideas themselves. Take a famous painting such as The Bathers by the neo-impressionist painter Seurat. Anyone is free to copy the idea or style behind the picture (a river scene depicted using small coloured spots of paint: pointillism). But if it were in copyright the painting itself would be protected from being copied whether by photography or some other means.

Of course this all sounds simple enough, but what if someone copies a piece of software not by literally copying the code but by writing a new program which nevertheless replicates the features and functions of the existing software? As we shall see later such examples challenge the idea/expression dichotomy. In such a case it is difficult not to argue that what has been copied are 'ideas' but nevertheless that in certain cases the law ought to protect them.

Both the common law and latterly the legislature have also recognised that not all copying and exploitation of copyright works ought to be treated as infringements of copyright. In the UK there are currently certain 'fair dealing' exceptions to copyright, such as the right to copy materials for private study and research, for criticism and review, and for news reporting, although the Gowers review has made suggestions for additional exceptions. In the US the courts have developed a broader 'fair use' defence to copyright infringement and this was enshrined in statute in the 1976 Copyright Act. As we shall see in this book these defences are being tested to the limit in the digital environment: is it fair: use, for example, to copy millions of Internet images in order to operate an Internet 'visual search engine'? Or to operate an Internet music service such as MP3.com so that users can listen to their CDs whenever they want to without necessarily having direct access to them? Indeed, will the very concepts of fair use and fair dealing survive in the digital economy?

1.2.4 Justifying Copyright

Copyright can be justified on several grounds. These are no mere philosophical speculations. The two major world copyright systems—the Anglo-American 'copyright' system and the continental 'authors' rights' system—stand on different philosophical bases. To make sense of copyright law it is necessary to understand what these bases are and their implications for protecting digital products.

In the UK and the US copyright is frequently justified on the basis of some or all of the following:

(a) there would be no incentive for authors to create or innovate unless in return they are granted the exclusive rights to exploit their works: innovation is good for both economic and public policy reasons and therefore we ought to have copyright;
(b) the efforts (labour) of the creative artist deserve to be rewarded in their own right, regardless of any economic benefits;
(c) the fruits of intellectual labour should be classed as property in just the same way that the products of industry or agriculture are property;
(d) it is unjust to reap where others have sown ('unjust enrichment');
(e) by reference to the Bible and the Ten Commandments ('Thou shalt not steal').

For example, in the UK database rights case, British Horseracing Board v William Hill, the judge looked back to the express purpose behind database

1.2.5 Originality and Copyright

In the UK a frequent justification for copyright protection cited by the courts is the unjust enrichment argument. For example, this was referred to by the House of Lords in a leading copyright case, *Designers Guild Limited v Russell Williams (Textiles) Limited*:

The law of copyright rests on a very clear principle: that anyone who by his or her own skill and labour creates an original work of whatever character shall, for a limited period, enjoy an exclusive right to copy that work. No one else may for a season reap what the copyright owner has sown...

So the law ought to protect any independent skill and effort ('originality') by an author in creating their works. This is also a variant of the so-called 'sweat of the brow' justification for copyright. The work need not be 'original' or creative in any novel sense—it simply has to have involved some, even a very modest, amount of effort to create and not be slavishly copied from something else.

In contrast, countries such as France and Germany have traditionally protected the works of authors on the basis they embody or bear the stamp of the author's personality. As a number of European Directives discussed later in this book put it, works which 'constitute the author's own intellectual creation' are entitled to copyright protection. So for certain classes of work, software, databases, photographs and so on, the standard of originality appears higher in the continental system than in the UK system, although moves made by the European Commission to harmonise copyright across the EU are diminishing such differences.

14 *Per* Lord Bingham of Cornhill at 2418A.

1.2.6 Moral Rights

One lasting influence of the continental approach to treating works as sacrosanct and embodying the 'spirit' of the author/creator has been the development of moral rights. In addition to the 'economic rights' underlying copyright which may be freely transferred ('assigned') or licensed, such as the right to copy and distribute copyright protected works, authors also have the moral right to be identified when their works are exploited and to object to derogatory treatment of their works. So the author of a photograph, regardless of whether he owns the copyright in it (ie the economic rights), may have the right to be identified when the photograph is exhibited or reproduced; he may also have the right to object should the photograph be poorly reproduced. Moral rights have also recently been extended to performers.

Unlike the economic rights, moral rights cannot be assigned and not all countries will permit them to be waived either, which is what the UK permits. Moral rights are often ignored in the digital world but, as we shall see later in this book, there is no reason why they do not apply to digital works.

1.2.7 Copyright and other Intellectual Property (IP) Rights

Copyright simply protects against copying and dealing in illegal copies. If the allegedly infringing work was created without reference to the earlier work then there can be no copyright infringement; if two people write substantially similar software programs independently from each other then there can be no copyright infringement. In contrast, if one of the pieces of software was patented then the other could still infringe the patent. Patents create absolute monopoly rights; copyright does not.

Copyright must also be distinguished from laws which protect against unfair competition, such as the English law tort of passing off, or laws which protect brands, such as trade mark law. For example, copying a copyright-protected logo by placing it on a website can amount to copyright infringement even if the logo is not being used as a trade mark and so there is no trade mark infringement or passing off.

These other intellectual property rights are not the subject of this book. Nevertheless rights owners need to bear them in mind where the copyright claim may be weak and where the other IP rights offer additional protection.
1.3 THE INTERNATIONAL ASPECT OF COPYRIGHT

1.3.1 Background

There is no such thing as an 'international copyright': copyright is a national property right. It was only in the late nineteenth century when the international piracy of books and other printed materials became a pressing problem that the major industrialised nations got together to grant authors and publishers from other countries the same rights and remedies their own authors and publishers received. This so-called principle of 'national treatment' underpins the international copyright system.

The first major international convention to establish the principle of national treatment was the Berne Convention, which dates back to 1886. It has been revised on a number of occasions but remains the leading international treaty. The US only agreed to the Berne Convention in 1989. Before that the US had pressed for countries to sign up to the Universal Copyright Convention ('UCC') either instead of, or most frequently in addition to, Berne. The challenges of digitisation resulted in the two latest international copyright treaties: the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, both of December 1996.

The international copyright system is notoriously complex. Readers who require a fuller treatment of this area are referred to the specialist texts in this area. Nevertheless when faced with a digital copyright problem with an international dimension it is worth bearing in mind the following very rough 'rules of thumb':

(a) the law where the work is created (ie its country of origin) is likely to be relevant when determining who owns the copyright in the work or who the author is;
(b) the law where the infringing acts are taking place is likely to be relevant to the questions of the subsistence and infringement of copyright in the work; and
(c) which courts will hear and resolve any international copyright dispute is likely to be addressed by reference to a number of international conventions dealing with jurisdiction and the enforcement of judgments, including the 1968 Brussels and the 1988 Lugano Conventions on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters and the Brussels I Regulation (Council Regulation (EC) 44/2001).