June 1993

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Recommended Citation

Secor, Glen (1993) "Legally Speaking/ It's a Bird, It's a Plane, It's Copyright!," *Against the Grain*: Vol. 5: Iss. 3, Article 10.
DOI: <https://doi.org/10.7771/2380-176X.1341>

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Legally Speaking

by **Glen Secor** (Yankee Book Peddler, Inc.
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It's a Bird, It's a Plane, It's Copyright!

There is a growing debate among those involved in the scholarly communication process as to who should own the copyright in published academic works. The publisher? The author? The university? Some combination of the three?

This discussion is often framed in very pragmatic, absolute terms. For instance, I have frequently heard it said that permissions would be difficult or impossible to obtain if those seeking rights had to track down every author or illustrator. This argument is usually followed with the conclusion that only the publisher can efficiently manage permissions, and therefore the publisher should (must) hold the copyright to scholarly monographs and journal articles. Period. End of discussion.

My intention here is not to pick on publishers or those who think that publishers should hold the copyright to scholarly works. I have also heard it said that universities should step in and claim copyright ownership under the work-for-hire doctrine, for this is the only way that the academy can defend itself against greedy commercial publishers.

While neither of these arguments is completely without merit, they suffer from a common flaw: They begin at the end, instead of the beginning. You see, in order to answer the question of who should own the copyright, we should first consider the fundamental goals of copyright and scholarly communication.

As has been noted previously in this space, the Constitution of the United States (art. I, sec. 8, cl. 8) empowers Congress "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." This clause reminds us of the purpose of copyright in society: to promote the progress of science and useful arts. It does not, however, tell us whether society is best served by having the author, publisher, or university hold the copyright.

The Massachusetts legislature, in the preamble to the Massachusetts Copyright Act of 1783, elaborated even further upon the purpose of copyright. That preamble begins, "Whereas the improvement of knowledge, the progress of civilization, the public weal of the community, and the advancement of human happiness, greatly depend on the efforts of learned

and ingenious persons in the various arts and sciences . . ." Wow! This quote, like the copyright clause of the U.S. Constitution, shows us that copyright is intended to advance the interests of society, not the economic or moral interests of any particular group of persons.

As such, is not the purpose of copyright eminently compatible with, if not essentially the same as, the purpose of scholarly communication? If so, should copyright not be a facilitating mechanism in the scholarly communication process, rather than the obstacle it is often perceived to be?

We need to focus first upon the process of scholarly communication and how it should work. Who should own the copyright and how permissions should be obtained are secondary, as copyright is but a mean to a given end. For instance, the role of the university as provider and user of scholarly communication needs to be settled. Simply having universities seize copyrights in academic writings, as some have suggested and as the law probably allows, solves little and could even be counterproductive if that is not the appropriate role for the university.

Yet, this suggestion is understandable in light of the academy's frustration at being able to purchase less and less of its own intellectual output. A more productive strategy, as outlined by Ann Okerson in her excellent article, *Back to academia? The case for American universities to publish their own research* (Logos 2/2), might be for universities to publish more of their own scholarly output, rather than having to buy it back from commercial publishers. While some of the positions taken by Ann in her article are open to debate, it is hard to argue with her description of the problem. The purposes of copyright and scholarly communication are frustrated by the status quo, as more and more scholarly writing is available to fewer and fewer people. If the publishing and pricing practices of the leading commercial publishers are contributing to this problem, then perhaps the universities should take a more active publishing role.

I am not advocating this approach over any other, but am merely trying to illustrate the fundamental nature of the inquiry. Who owns the copyright is less important, at least for now, than how the scholarly communication process works.

That process is starting to show serious cracks, but it would be a mistake to seize upon copyright as an economic weapon to fix our problems. First decide who should be the publisher, what the format of publication should be, how the published information should be shared, etc., then worry about who owns the copyright.

Many people are looking to technology to answer these questions for us, or at least to steer us toward the answers. That may happen, but I think that certain issues relating to the commerce of scholarly communication remain no matter how the technology develops. And while I do not support all of Ann Okerson's conclusions, at least not without further debate, I agree with her premise that the universities have tremendous power and flexibility in defining their role as the principal suppliers and consumers of scholarly writings.

Once roles are defined and the process is fixed, we will find the tool of copyright to be more than flexible enough to adapt to any new system. One example of this flexibility is the system of statutory, collective licenses utilized by some Nordic countries. Where our reproduction rights organization (RRO), the Copyright Clearance Center (CCC), invites only voluntary participation and pays royalties to individual rights holders, Kopinor, the Norwegian RRO, operates on the basis of statutory (mandatory) licenses and distributes royalties collectively. These distributions are made to 21 member associations, including publishers' and authors' guilds, and are split evenly between these publisher and author groups.

I am not advocating this approach either, but will explore it further in an upcoming column. In the meantime, I hold it out as another possible solution to the current breakdown in scholarly communication. It is an alternative to a system in which the publisher holds the copyright, and is thus the source for all permissions and royalties. It might allow for the more equitable sharing of costs and access to scholarly communication. We should consider this and any other workable models, for it is arguable that our current methods are *not* maximizing society's progress in the sciences and useful arts. ☞