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Cox on Copyright — Copyright in the Global Village

by John Cox (Managing Director, Carfax Publishing Company)

The use and abuse of copyright is an enduring topic of irritation, speculation and conversation between authors, publishers, librarians and readers. Moreover, the community to which scholarly communications are addressed is a truly global one, and the international dimension of copyright merely adds to complexity.

Let us start from first principles. Copyright is a form of legal protection granted to authors of original literary, dramatic, musical, artistic and other intellectual works. Copyright is a property right, accruing to the author of the work. It is a right to prevent others from reproducing that work without permission. It is an exclusive right, which enables the author to issue copies of his work to the public, but also to license others to do so, or indeed refuse to permit others to make copies. It is a property right that can be traded.

The history of copyright can be traced back to the invention of printing. Modern copyright law has its origins in England in the 17th century when the English Crown controlled the licensing of authors, printers, and publishers. In continental Europe, during the nineteenth century, copyright law developed in many countries simply as a way of protecting authors' rights. English copyright law had, by this time, evolved into a system of property rights that accrued to the creator

of the work, with the **Statute of Anne in 1709** marking the turning point as the first modern copyright law. Gradually, these two philosophically different approaches have come together to form the basis of copyright law in most countries of the world.

Most countries have laws that now reflect a balance between intellectual property owners and users that is best enshrined in **Article 27 of the Universal Declaration of Human Rights**: on the one hand, that everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share scientific achievement and its benefits, but on the other hand that everyone has the right to the protection of the moral and material

interests resulting from any scientific, literary, or artistic production of which he is the author.

However, national copyright law is of little use unless it can be enforced in other countries. The problems that arise in the absence of reciprocal protection is demonstrated vividly by the U.S. experience. The first **United States Federal Copyright Act, of 1790**, protected US citizens and residents, but afforded no comfort to foreign works. Without such protection, US printers pirated foreign publications and sold them at much lower prices than would have been possible if copyright law had prohibited this practice. But the same was happening in reverse in many overseas countries. In the 19th century, great American writers like Mark Twain were pirated just as vigorously outside the US, as for instance, the great English novelists were in the US. The perverse result was that royalty free — and pirated — British works were preferred by American consumers to good American — but copyright protected and more expensive — authors.

In **1891**, the **Chace Act** gave the first protection to foreign works in the USA. Such protection was limited, and still de-

tion of **Literary and Artistic Works, of 1886**, and the **Universal Copyright Convention of 1952**. UCC was created as a bridge between the United States, which was unwilling to join the Berne Convention, and the rest of the Western Alliance. The USA joined the Berne Convention in **1988**, and enacted the **Berne Implementation Act of 1988**. Berne is now the most important of these conventions. It has been the subject of continual revision since its original enactment, most notably in the **Stockholm version of 1967** and the **Paris version of 1971**. It aims to ensure that all parties to the Convention — over 90 countries — give the same protection to works originating in other countries as it does to its own. It is based on three principles — of mutual protection of foreign works and their

authors; of minimum standards for the duration and scope of copyright; and automatic protection with no registration. Under the Berne Convention, copyright subsists for the life of the author plus fifty years. This is longer than the UCC period of life plus 25 years, but is now the accepted norm.

The Berne Convention is administered by the **World Intellectual Property Organisation (WIPO)**, which was set up by the **United Nations in 1974**. WIPO has over 120 member countries. As well as inventions, industrial designs, and trademarks and copyright, WIPO is concerned with the repression of unfair competition. WIPO's responsibilities include the maintenance and revision of Berne to ensure that it reflects modern technology, e.g.

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"Modern telecommunications know no national boundaries."

pended on manufacturing in the USA if protection was to be extended for works published in significant quantities. This "manufacturing provision" was abolished only in the **Copyright Revision Act of 1976**.

At the end of the 19th century it was clear that, if authors and their works were to be properly protected from piracy, international reciprocity was necessary. International law was needed to regulate the traffic in copyright material that it developed in the 19th century as publishing expanded in the aftermath of the industrialisation of the Western world.

The principal conventions regulating the international observance of copyright: the **Berne Convention for the Protec-**

Baum Footnotes

⁽¹⁾ 17 U.S.C. § 106 sets out five exclusive rights held by the copyright owner: the right to reproduce the work, the right to prepare derivative works, the right to distribute the work, the right to publicly perform the work, and the right to publicly display the work. 17 U.S.C. § 106 (1988 & Supp. V 1993).

⁽²⁾ 17 U.S.C. § 107 (1988 & Supp. V 1993). Reproduction by libraries and archives is another exception to the copyright owner's exclusive rights (17 U.S.C. § 108 (1988 & Supp. V 1993)).

⁽³⁾ Section 107 of the Copyright Act identifies four illustrative factors to be considered in determining if a use is a fair use. The statutory language does not limit consideration to these four factors but the courts have tended to concentrate on the statutory elements. The four factors are:

- (1) the purpose and character of the use,
- (2) the nature of the work,
- (3) the amount and substantiality of portion used in relation to the work as a whole, and,
- (4) the effect of the use upon the potential market for or value of the work.

17 U.S.C. § 107 (1988 & Supp. V 1993).
⁽⁴⁾ Minimum guidelines were also developed for interlibrary loan under § 108(g)(2) of the Copyright Act. 17 U.S.C. § 108(g)(2) (1988).

⁽⁵⁾ American Geophysical Union v. Texaco, Inc., 802 F. Supp. 1 (S.D.N.Y. 1992).

⁽⁶⁾ In Pasha Publications v. Enmark Gas, 22 U.S.P.Q. 2d 1076 (D.N.D. 1992), the company had subscribed to one copy of the newsletter, Gas Daily. The company copied it cover-to-cover and faxed the entire newsletter to company employees in other locations on a regular basis. The court held that the multiple copying and transmission of the newsletter was not a fair use.

⁽⁷⁾ Victoria Sind-Flor, "West Moves to Protect Opinions; Infringement Prosecuted," Nat'l L. J., Dec. 27, 1993, at 3.

⁽⁸⁾ Id.
⁽⁹⁾ Peter H. Lewis, "Student Accused of Running Network for Pirated Software," N. Y. Times, Apr. 9, 1994, § 1, at 1.

⁽¹⁰⁾ Junda Woo, "Copyright Laws Enter the Fight Against Electronic Bulletin Board," Wall St. J., Sept. 27, 1994, at B11.

⁽¹¹⁾ Information Infrastructure Task Force, Green Paper: Intellectual Property and the National Information Infrastructure, A Preliminary Draft of the Report of the Working Group on Intellectual Property Rights (July 1994).

⁽¹²⁾ Two of the recommended changes are the addition of "transmission" as a means of distributing copyrighted works and a prohibition on devices that are intended to override or defeat methods for preventing unauthorized uses of copyrighted works (e.g., programs which bypass copy protection on software).

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tion is rapidly transmitted around the globe with no accountability or copyright safeguards.

Publishers of CD-ROM products and online databases have resolved some of their concerns by retaining ownership and merely licensing their products, effectively removing them from the realm of copyright and fair use. The license agreements may forbid download and transfer of data and other uses which can reduce the economic value of the product. CD-ROMs and online database licenses generally limit access and prohibit downloading or use of the data for creation of new resources without permission. Access may be monitored to count the number of uses or the frequency of printing or downloading to establish royalty charges.

Other publishers are finding answers in litigation and criminal prosecutions. **West Publishing Company** has filed infringement suits against document delivery companies which fax case reports to clients. ⁽⁷⁾ **Mead Data Central** (LEXIS/NEXIS) settled a suit with a defendant in Georgia and prevented the use of MDC's case reports in the defendant's CD-ROM products. ⁽⁸⁾ In April, a Federal grand jury indicted an MIT student on one felony count of conspiring to commit wire fraud for operating a bulletin board from which people copied software programs. ⁽⁹⁾ In August, another bulletin board operator was indicted on charges of criminal violation of copyright laws and wire fraud. ⁽¹⁰⁾

The issues of copyright in the electronic environment are being discussed at the national level. In July, the **Working Group on Intellectual Property Rights of the Information Infrastructure Task Force** (IITF) issued a draft report ⁽¹¹⁾ on intellectual property and the National Information Infrastructure (NII).

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software, film and video, and network publishing. It holds conferences and seeks submissions from governments, trade and professional associations, and charges that might be necessary.

As a result, reflecting copyright legislation in the USA and elsewhere, Berne

The draft report made several recommendations for amendments ⁽¹²⁾ to copyright law to adapt to the changes in information exchange resulting from widespread availability of publications in electronic form. These recommendations are the subject of much debate among concerned groups, including publishers and librarians.

While the Working Group's report did not recommend changes in the fair use or library exceptions to the copyright owner's exclusive rights, the report did recommend that a conference be held to discuss fair use for digital works and online services. On September 21, 1994, the Information Infrastructure Task Force Working Group on Intellectual Property Rights held a conference to develop fair use guidelines for libraries and schools for copyrighted works transmitted via the National Information Infrastructure (NII). The IITF Working Group's hearings and conferences have produced potential solutions and a point of discussion for the evolution of copyright law.

The goal of copyright law is to balance the copyright owner's economic interests and society's interests in providing access to information. Fair use has provided a mechanism to promote research, comment and criticism while safeguarding the copyright owner. The balance may be shifting with the possible reduction in fair use copying for researchers in commercial enterprises based on the Texaco fair use analysis. With the advent of electronic publishing and the NII, answers must be found to fair use questions to ensure access while protecting copyright owners. The balancing of interests anticipated in the Constitution continues to require a delicate assessment of rights and responsibilities for users and producers of copyrighted information. ☛

See page 16 for a profile of Marsha Baum

ably prejudice the legitimate interests of the author; in other words, it recognises fair use, where both of these provisos apply.

It should come as no surprise that anomalies remain. The treatment of copyright in different countries because of local legal or administrative conventions does vary. Anomalies arise in the case of moral rights, and in the case of differing treatment of Government publications.

In the United States there is no copyright on Government publications. In the UK works made or published "by or under the control" of the Crown or of a Government Department are owned by the Crown and described as "**Crown Copyright**". This is probably a hangover from the origins of UK copyright when the Crown developed it as a system of licensing and control. Crown Copyright applies to Acts of Parliament, White Papers and other Government publications. As a result of the Berne Convention, Crown Copyright must be respected in, for instance, the USA even though US Government publications are in the public domain. The Berne Convention requires the protection of Crown Copyright in the United States for fifty years from publication.

Nevertheless, this sounds worse than it is. The Crown rarely enforces its copyright, except in the case of commercial publication, for instance by HMSO, the official UK government publisher. If a library in the United States observes HMSO's library guidelines, there should be no problem. These guidelines allow the reproduction of up to thirty percent of Bills, Acts of Parliament and statutory instruments, any amounts taken from Hansard, and five percent of select Committee reports within six months of publication, and any thereafter. Non-Parliamentary publications will be treated like any other copyright work.

There also arise copyright problems in relation to publications by international organisations. Most of these publications, being published in one or other Berne Convention country, will automatically enjoy the copyright protection of that country. It is generally accepted that publications of the **United Nations, OECD, Council of Europe** and other international

organizations are protected for fifty years from publication.

The other area of difficulty is moral rights. Under the law of most countries in Europe, including the UK, copyright legislation protects the moral rights of the author. Such rights can be waived by the author, but cannot be transferred to any-

"The university community is ... not as informed ... about copyright as it should be."

one else. They ensure the right of the author to be identified with his work, and the right not to have that work distorted in any way. Moral rights merely codify what should be good practice within the publishing and research communities. Nevertheless, it remains open to question how they may effectively be enforced in countries that do not recognise moral rights specifically, such as the USA.

As we begin to understand the potential improvements telecommunication technology can bring to scholarly communication, the efficacy of copyright protection has become a matter of aggressive debate. Publishers, as the intellectual property owners, are rightly worried that this technology will undermine the base of their publishing activities, and are becoming more aggressive about protecting rights under the existing law. At the same time, the library community wants to exploit the technology to its full potential and sees publishers as being, at best, obstructive, and, at worst, irrelevant. And there are some that argue that the librarian is becoming irrelevant as a mediator in an electronic environment where access, searchability and speed of retrieval can be facilitated by software on the network. These issues will only be solved by discussion. They will inevitably involve compromise. All I can do is offer some factors to consider in this debate:

- The role of the publisher in the scholarly information community is frequently undervalued. Publishers do more than "smarten" the contents. They invest in and manage the editorial boards who select, organise and review research information. They have technical and managerial skills and funds that will not easily be

replaced from within the university and research community itself.

- Most of the models being considered for new copyright management involve university or individual faculty taking on the management and control of copyright. But there is little general demand for this among the authors themselves. The university community is, in general, not as informed and professional about copyright as it should be. Faculty themselves wish simply to publish their papers in the most appropriate and prestigious journal, giving them status and a recognition of the value of the work that has been written up. It is not entirely clear that university faculty can be treated as employees whose work might be considered as having been produced in the course of their employment and therefore the copyright of their employer, the university. Custom and practice, established over many years — and academic contracts of employment — would need to be overturned if universities are to assert ownership over copyright as many have already done in the case of patents.

- The definition of fair use needs to be re-addressed. In an environment where resource sharing, file transfer over the Internet, and the rapid growth in interlibrary loans, are becoming a feature of the landscape, the effect of "fair use" on the market for any copyrighted work must now be open to question. If the economic basis of publishing is undermined, publishing itself will be jeopardised, very much to the disadvantage of the scholarly community it serves.

Modern telecommunications know no national boundaries. The principle of equal and reciprocal treatment enshrined in the Berne Convention will become ever more important in the cyberworld.

WIPO is concerned about updating the Berne Convention to take account of modern technology. There are clearly practical difficulties in addressing intellectual property rights protection in network publishing. Nevertheless, it is clear that, for the foreseeable future, the basic principles that underline copyright will remain. What we have to do is to hammer out the rules and regulations under which we can all live harmoniously in the global village. ☞

"... the effect of 'fair use' on the market for any copyrighted work must now be open to question."