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As I See It! — Thinking About the System of Balances in Copyright Law

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The copyright law that we are familiar with today has its origins in the invention of printing in the fifteenth century. Before printing, books and manuscripts were copied by hand at great expense, and so unauthorized copying had not been a problem. The economic rights of the author or sponsor of a work, the moral rights of the author or the concerns of governments, ever watchful of sedition, over uncontrolled distribution of ideas, had not arisen as issues for the law.

The invention of printing changed all that. The first printed books may have used typography that mimicked the hand-produced manuscript, but printing technology changed things for ever. The resulting “massification” of book production and distribution presented the opportunity to earn money from widespread publication, and a challenge to those in authority who saw it as their role to control the flow of information to the populace:

- In Britain, the **Tudor** and **Stuart** monarchs were concerned by uncontrolled copying of works, and sought to control printers through a system of licensing, culminating in the **Licensing Act 1662**. This involved the deposit of a copy of each published book with the **Stationers Company** — the first manifestation of legal deposit.
- In France and other European states, uncontrolled copying was seen as a threat to the rights of the author — and benefactor, whose patronage was essential to literary work. The economic rights of the author and benefactor, and the moral rights of the author not to have the work attributed to someone else, or to have it distorted, were the principal considerations.

The first recognizable modern copyright law was established in Britain in the **Statute of Anne**, 1710. This was one of the consequences of the **English Civil War** of the 1640s — Britain’s own revolution, long before the **French** and **American Revolutions** — which was fought over the Crown’s unfettered right to govern. The English printers’ licensing regime decayed, and the nascent publishing and printing industries faced a flood of unregulated books from Scotland and from elsewhere. The **Statute of Anne** was the result, covering not only England and Wales but Scotland as well. Its significance was that it created an exclusive property right vested in the author — not the publisher or printer — for a period of 28 years, after which those rights expired. Moreover, it created a public monopoly right, rather than a private monopoly granted to a Guild member by the **Stationers Company**. This right was a right to property, which could be traded, by licensing or outright sale.

The modern history of copyright is the history of constant evolution since that early and rather primitive start. Throughout the nineteenth and twentieth centuries, protection has been extended from printed works such as books and maps to dramatic works, photographs, music, moving film, architecture, computer software, databases and

Websites. The law has generally proved adept at incorporating the products of new technology as and when they have appeared.

The **Statute of Anne** did not extend to the North American colonies, where illicit printing became an important industry after 1760. By the time of the American **Declaration of Independence**, unremunerated reprinting of British and other books was well established. In the nineteenth century, the USA was the principal pirate nation, much to the chagrin of **Dickens**. Imports of US-printed books into Britain were consequently banned, much to the chagrin of **Mark Twain**. Clearly a copyright system had to be internationalized.

In the eighteenth century a forerunner of international compliance was brought about by Prussian legislation to protect the works of both German and foreign authors, which was accepted by most other states in pre-unified Germany. Towards the end of the nineteenth century, the **Berne Convention** of 1886 created a system of mutual international recognition of copyright. It established the notion that copyright is vested automatically in the author as soon as the work is “fixed” on the page. Our system of copyright law is based on **Berne**, and on the treaties and protocols that have been agreed under its auspices, including the **WIPO Copyright Treaty**.

The role of the United States in the evolution of copyright is striking. Throughout the colonial period, book piracy in the USA was rife. After the **Declaration of Independence**, the **Constitution** of 1787 provided for copyright protection “to Promote the Progress of Science and the Useful Arts...” so that authors could benefit from their creativity. However, the first **US Copyright Act**, that of 1790, limited copyright protection to American citizens; works of foreign citizens were considered to be in the public domain until the dying days of the late nineteenth century.

When foreigners were granted copyright protection in 1891, this protection was beset by conditions. The most notable of these was that books and periodicals by non-US authors would only be protected if they had been printed in the USA. This infamous “manufacturing clause” linking copyright to trade protection for a US industry was long seen as hypocrisy — an implausible combination of legalized theft of foreign works combined with blatant protectionism of US industry. But it lasted until 1986, when it expired following a **GATT** ruling that it was in violation of the US’s **GATT** obligations. The USA adhered to the **Berne Convention** only in 1989, long after most other countries. Today, as the film and software industries are dominated by US firms, the US is most assiduous at protecting copyright. It is ironic that the pirate has become a policeman!

Copyright has always been intended to strike a balance between the exclusive right of the author — the right to say “no” — and the interests of society in facilitating the free flow and use of information. In the USA this is called “fair use;”

in the UK and Canada, it is called “fair dealing.” It provides exceptions, in the wider social interest, to the author’s exclusive right. It is even provided for in Article 27 of the **Universal Declaration of Human Rights** of 1948:

- Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
- 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.

In the USA, fair use is the legal limited use of copyright material without permission from the rights holders, such as use for scholarship or review. In assessing whether a use is fair or not, the **US Copyright Act 1976** sets out four tests: the nature of the work being used, the purpose of the use (e.g., commercial, or non-profit educational, the amount of the work used, and the economic impact of such use on the rights holder).

Most other countries have copyright exceptions that operate to provide exceptions to the rights holder’s monopoly. In the UK, fair dealing has been under review; in the **Gowers Report** in 2006, it was made clear that fair dealing should be reviewed in order to ensure that the law does not interfere with legitimate activity and should reflect the capabilities of digital technology: fair dealing should include format shifting, distance learning, and caricature and parody. It recommended that the purpose for which a copy is required should be brought into the concept of fair dealing, which would bring UK law closer to that of the USA.

In one respect US copyright law still lacks the protection afforded by most major jurisdictions to authors: moral rights. There is no money involved in moral rights. They belong to the author, but cannot be assigned to anyone else. They are the rights of “attribution” — i.e., to be identified as the author — and “integrity” — i.e., to prevent alteration or distortion of the work. These rights are long established in France and Germany, but became part of UK law only in 1988. In the USA, copyright law does not recognize moral rights except in the case of visual art. Yet they are no more than good publishing practise.

The digital environment has clearly changed the balance between the rights of copyright owners and the wider interests of society. But there is nothing new in this. Digital is different only in the sense that the processes of publication, transmission, downloading, redistribution and manipulation are different, and much easier and quicker. In recognizing this, a balanced copyright system must require the rights holder’s explicit permission for systematic copying or copying for commercial purposes (even by a not-for-profit organization), and set limits on the amount of a work that can be copied under fair use.

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Copyright is the bedrock on which book and journal publishing, Hollywood and the music and software industries are based. Publishers are rightly concerned about threats to their businesses posed by limitless copying and digital distribution. And the major intellectual exporters, the USA and Europe, are not about to abandon their intellectual property interests. Rather they will seek to rebalance that author/producer interest with the user interest.

The genius of the concept of copyright is that it has been endlessly adapted to new technologies as they have appeared: photography, film, radio and television, computer programs, and now the Internet. Just in case we believe that "digital is different", it is worth remembering that each of these technologies caused controversy at first, but have become part of the commercial furniture. The same will happen with digital technology and the Internet. When music and drama became copy-rightable, a fee-based system for performing works was invented. It is not beyond the wit of man to see something analogous in the digital world. 🌱

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sideration when choosing an eBook vendor; but they should not drive the decision at the expense of everything else. No MARC records, poor MARC records, and multiple search silos limit content discovery, negating much of the value of an eBook collection. Server downtime equals no access at all. Slow or clunky technology leads to patron frustration. If a publisher pulls its titles from the hosting platform, there is a loss of access. If the aggregator or publisher fails, libraries relying on them will likely be facing many hours of work reestablishing access to the collections they've purchased.

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A good relationship with a distributor who is facilitating but not hosting eBooks will not protect the library from issues arising at the eBook source. Furthermore, since distribution arrangements can fall apart over time, basing the decision to limit the playing field to eBook aggregators available within the library's print vendor database may also prove to be misguided and result in regrets down the line.

It makes more long-term sense for libraries looking to streamline monographic orders to let their workflows be dictated by their choice of eBook vendor rather than by their choice of print vendor, even though this may necessitate reworking approval plans and learning new systems. At this point in time, there is relatively little difference among print vendors. Though each company has its own strengths, the books they ship are exactly the same, and once a book

is acquired, the relationship between vendor and library ends. This is not true with eBooks. The stakes are higher, the issues are more complex, and the differences among suppliers are immense. It would be unwise to minimize these differences merely to preserve workflows.

Fortunately, technology has progressed to a point that with a little bit of effort; print and eBook purchasing can be coordinated even when there are multiple suppliers involved. It is important that libraries evaluate their options carefully as they begin to develop eBook collections and the workflows that support them. 🌱

Column Editor's Note: This is the first in a two part series. Stay tuned for Part 2 in an upcoming issue of *ATG*. — BN

Future Tense — Weeding: The Time Is Now

by **Rick Lugg** and **Ruth Fischer** (R2 Consulting LLC, 63 Woodwell's Garrison, Contoocook, NH 03229; Phone: 603-746-5991; Fax: 603-746-6052) <rick@r2consulting.org> www.r2consulting.org

On a recent flight from Manchester to Chicago, it occurred to me that I must have been the only person in the world who had chosen **Stanley J. Slote's** 1997 classic *Weeding Library Collections: Library Weeding Methods* for airplane reading. I can't imagine why. Who would choose **Dick Francis** or even **P.J. O'Rourke** over a work that begins with this choice 1787 epigraph from the **Reverend Reginald Heber**: "A small collection of well chosen books is sufficient for the entertainment and instruction of any man, and all else are useless Lumber." Although the work is somewhat dated ("The Book Card Method" occupies an entire chapter) it remains an excellent and practical book in its articulation of the benefits of weeding. My pleasure in it is heightened by the fact that my copy, purchased through **abebooks** (now a province in **Greater Amazonia**), was actually withdrawn and discarded from **Sterling Municipal Library** in Baytown, Texas. Every book its reader indeed.

Weeding has been much on our minds lately. In virtually all of the 80+ libraries with which **R2** has worked closely, overcrowded stacks and storage facilities pose a significant problem. They press on the conscience like that extra ten pounds we'd like to shed, or those files we really should back up. Deep down, most librarians of a certain age recall the 1968 **Kent Study** at the **University of Pittsburgh**, which discovered that 40% of the books in academic libraries never circulate — not even once. We uneasily realize that this number is probably much higher 40 years later, when so much content is available in electronic form. We cringe slightly at the size of our print reference and government documents collections, knowing these serve fewer users every year. We begin, with some misgivings, to store or withdraw those bound journal volumes to which we have purchased electronic backfile access. And, as we seek to provide the learning commons, collaborative study spaces, writing centers, and even cafes

that please most users, we confront important questions regarding both the current and residual value of our print collections.

Consider a few specific scenarios we have encountered in just the past couple of years:

- Shelves in the **Davidson College Library** are more than 90% full, and books loom over browsers in towering stacks that require liberal distribution of foot stools throughout the library. At present, the library has neither compact shelving nor offsite storage, though these are under consideration. The library also issues hardhats to visiting consultants. (OK, not really.)
- The **Millar Library** at **Portland State University** has created an exemplary "Collection Containment Plan" that revolves around a concept of "sustainable collection development." Because stacks are

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