Librarian's Lobby
By Daniel D. Stuhlman
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What is Copyright? Part 1

Recently a librarian queried a listserv about what to do with the library's cassette tape collection. Since few readers want to use cassette tapes, librarians want to have a media that will circulate. A company answered saying that they offer a fee based service that would copy cassette tapes to CDs. I stated that this copying could violate copyright law. Many librarians gave answers that indicated they never read anything authoritative about the law. The answer from the company claimed this was within fair use. I was bothered about this discussion enough that I want to shed some light on issues of the purpose and history of copyright and why we care should.

In the next few columns I will explore copyright issues, history, and philosophy. Many questions for further investigation and thought will be raised. Copyright law is part of Title 17 of U.S. Code. The full copyright law of the United States may be found on the Copyright Office web site: http://www.copyright.gov/. The site has links to the full text of the law, publications explaining aspects of the law, forms, and links to search copyrights. In addition to the letter of the law, the Librarian of Congress has an obligation to make rule interpretations. Many aspects of the law are written to comply with parts of the international copyright treaty under the Berne Convention for the Protection of Literary and Artistic Works. The Berne Convention dates from 1886 but the U.S. didn't join the convention until 1988.

I am not a lawyer and I write this only as an interested librarian and scholar. In preparation of this article, I talked to a lawyer who is on our faculty. He was not aware of the 1978 changes in copyright law that did away with "common law copyright." I heard from a librarian in Australia who told me that Australian law and practice concerning use of materials in schools differs greatly from American practice. The Australian government has an arrangement with publishers to purchase licenses that allows schools to more easily use copyrighted materials. (See the first comment for a further explanation.) There is no way in a series of short articles I could cover all aspects of copyright. There articles will relate some of the history and philosophy of the issues. For a ruling you will have to ask an attorney knowledgeable in the law and its application.

Definition

Copyright is the set laws and interpretations granting some form of exclusive rights to the owner, author, or creator of an original work. The rights include the right to publish, copy, distribute, adapt, and reformat to another media, the work. These rights can be licensed, transferred and/or assigned by means of a contact or agreement. The rights cover both the intellectual rights and the physical manifestations or expressions of the work. The term of the exclusive right is limited by law.

Berne Convention

The term of copyright and the automatic copyright protection are part of the Berne Convention. For many years the United States refused to be part of the Berne Convention. There was a fundamental difference between the Anglo-Saxon and French concept of copyright. In English law

copyright protected the economic rights of the author; in French law creative rights are protected. Under the French version, copyright protection is automatic upon creation because this protects the creative and intellectual rights. In English law registration was required to show that the work is protected for economic purposes. A notice of copyright was required in British and American law to claim copyright. Before international copyright agreements, works had to have separate copyright claims for every country. National copyright laws protected only works created within that country. That meant that British works printed in the United States did not compensate the authors or original publishers. This was considered piracy by such authors as Charles Dickens and Benjamin Disraeli. Starting in 1837 they fought against this sanctioned literary piracy. Professor Philip V. Allingham discusses the tug of war between authors and printers[1] which led to bilateral agreements and led to the 1891 manufacturing clause of the Platt-Simmonds Act granted reciprocal rights to publishers to obtain U.S. Copyright protection. After a U.S. copyright was obtained, it was illegal to import a foreign edition. The authors and publishers were satisfied, but the U.S. public had to pay more for books.[2]

The full text of the Berne Convention is here: http://www.wipo.int/treaties/en/ip/berne/index.html The Copyright Office has a publication discussing the international copyright relations of the U.S. called, **International Copyright Relations of the United States** http://www.copyright.gov/circs/circ38a.pdf. This publication lists the countries and the treaties involved. Some of the treaties are part of the international agreements and some are bilateral. There are a few countries (e.g. Iran, Iraq and Afghanistan) without any copyright relations.

Privilege and Property. Essays on the History of Copyright / edited by : Ronan Deazley, Martin Kretschmer and Lionel Bently, (Open Book Publishers, 2010) discusses the history of copyright law. The law has its roots in a wide range of norms and practices.

When the printing press was invented, copying became easier.[3] Printing and publishing were new business concepts. In 1469, the German master printer Johannes of Speyer [4] obtained a five-year exclusive privilege to print in Venice and its dominions. In the Netherlands early copyright privileges were based on the royal desire to control and censure what could and could not be published.

Speyer's monopoly on printing in Venice was hardly distinguishable from other commercial licenses granted in Venice. Printing was viewed on the same level as other technological

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[1] Nineteenth-Century British and American Copyright Law, http://www.victorianweb.org/misc/pvabio.html , by Philip V. Allingham. Mark Twain was so annoyed with Canadian printers printing his works without paying royalties, that he attempted to establish temporary residency in Canada. He also was annoyed at American printers who favored British authors of American authors because they could be distributed without paying royalties.

[2] This remained the law until 1954 with two liberalizations. One allowed for the importation of foreign language materials and the other allowed a limited U.S. copyright for 5 years and 1500 copies of the book. Over the objections of printers and publishers, the U.S. joined the Universal Copyright Convention (UCC) in 1954.

[3] An excellent source of primary documents on the history of copyright in Italy, Germany, France, Britain, and the United States is **Primary Sources on Copyright (1450-1900)**,http://www.copyrighthistory.org/htdocs/index.html published by Faculty of Law, University of Cambridge,England, UK.

[4] For the full English translation of the text visit: http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/showTranslation/%22i_1469%22/start/%22yes%22

advances of the Renaissance. This was a business transaction and the Venice government had no connection to intellectual rights or property. However, this became an important first step to establishment of state granted copyrights.

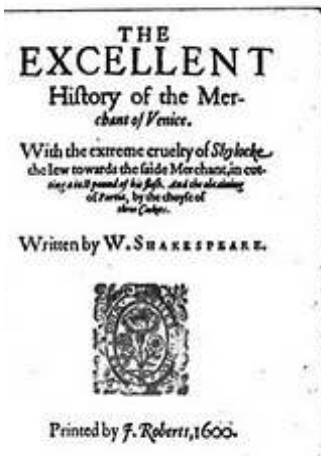
There are aspects of Jewish law dating from the Talmud that could relate to commercial protection. In Baba Batra 21b there are two cases where commercial rights are protected. The first is the setting up of a hand mill and the second concern the rights of a fisherman.

"Rav Huna said: If a resident of an alley sets up a hand mill and another resident of the alley wants to set up one next to him, the first has the right to stop him, because he can say to him, 'You are interfering with my livelihood.'

May we say that this view is supported by the following: 'Fishing nets must be kept away from [the hiding-place of] a fish [which has been spotted by another fisherman] the full length of the fish's swim.' ... Fish are different, because they look about for food."[5] [5]

The rabbis of the Talmud recognized that merchants have a right to a protected territory, but also every business is not the treated the same.

The printers and publishers in the 15th, 16th and 17th centuries did not have legal copyright protection from central governments. Shakespeare never owned the copyright to his works. Below is a copy of the title page of the **Merchant of Venice**, printed by J. Roberts in 1600. The verso of the title page is blank and no where does the author or publisher claim any copyright. J. Roberts does not even claim to be a publisher.



THE
EXCELLENT
History of the Mer-
chant of Venice.

With the extreme cruelty of Shylocke the Iew towards the saide Merchant, in cutting a iust pound of his flesh: And the obtaining of Portia, by the choyce of three Caskets.

Written by W. SHAKESPEARE.

Printed by I. Roberts, 1600.

[5] Just to give you an idea of how complex the issue of copyright is, David Nimmer, a lawyer in Los Angeles and adjunct law professor at UCLA edited, *Nimmer on Copyright*, an eleven volume set. His father wrote the first edition of set in 1963. He has written five books dealing with copyright and intellectual property. Copyright law must be in the genes. Nimmer wrote a 44 page article, "In the Shadow of the Emperor: The Hatam Sofer's Copyright Rulings" which appeared in *The Torah uMaddah Journal* in 2008-09. Available online: http://www.yutorah.org/lectures/lecture.cfm/745799/_David_Nimmer/02._In_the_Shadow_of_the_Emperor:_The_Hatam_Sofer%E2%80%99s_Copyright_Rulings in which he quotes these sources and other responsa dealing with an 1807 case in Roedelheim, Germany concerning the printing of a *Mahzor.* This article does require further discussion.

PRIVILEGIE

Hebrew Bible from Amsterdam. Printed in 1687. The next page headed "Privilegie" grants the printer, Joseph Athias, a ten year right to print the book. The privilege is granted by the State of West Vriesland, not the central government.

There are several conflicting beliefs or opinions regarding intellectual property and its dissemination. Authors, printers, publishers, general readers, scholars, libraries, historians, and the state are all parties to both the philosophical conflict and the need for resolution and clarity. In the scholarly world, monopoly on knowledge impedes understanding and wisdom. In the commercial world publishers want to make money and authors should benefit from the fruits of their labor conflicts. Commerce sometimes conflicts with the gathering and spreading of scholarship. Part of this dispute was settled in the 1774 Donaldson v. Becket case before the House of Lords. The case established that law could set a period for the exclusive right to print, publish and republish for an author. More on the history of this intellectual conflict will be explored in further columns. Right now there are many more questions than answers.

Daniel D. Stuhlman is president of **Stuhlman Management Consultants,** Chicago, IL, a firm helping organizations turn knowledge into wisdom. We are looking for new clients and opportunities. Visit the web site at Stuhlman.info to learn more about knowledge management and what our firm can do for you. Previous issues of Librarian's Lobby can be found at: http://home.earthlink.net/~DDStuhlman/liblob.htm. E-mail author. Last revised November 16, 2010