Librarian's Lobby
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What is Copyright? Part 2

Since writing part 1 of this series I have been humbled by the massive amount of research that others have done in the area of history of copyright. Copyright protections developed over a long period time starting in about 1489 and continuing to the most recent copyright laws. However, all the laws left areas that unclear or ambiguous. There are many grey areas of copyright and intellectual property protection.

Public domain

Public domain is the designation for works not protected by copyright. Public domain works include: 1) Works for which the copyright has expired, lost or never acquired; 2) Works not eligible for copyright (e.g. works written by a government agency); 3) Works designated by the author as public domain; 4) Works without tangible forms (e.g. ideas, words spoken in private); or 5) Common knowledge or facts (e.g. a recipe for chocolate milk or French toast). Titles of books can not be copyrighted, but under some conditions that can be trademarked. While the individual facts or data points may be in the public domain, the data base and its access software may be protected.[1]

Authors before the beginning printing did not see a need to protect their intellectual property. Josephus used the uncredited accounts and descriptions of events to write his histories, but we can't find fault because he did not write with the same rules of scholarly citation that we use. In the Talmud rabbis frequently said something in the name of their teacher or rabbi. They also quote the Bible. This is a way of adding credence to the statements; standing on the shoulders of giants.

Intellectual Property

Until recently people didn't understand intellectual property in the same way as physical property. For example: if someone steals John's wallet, John doesn't have anymore. It someone steals John's words, John still has them. No one thought copying of ideas was a problem. Once printed and published many works were considered in the public domain[2]. When money was associated with intellectual property, authors, creators, and inventors wanted protection.

Several streams of legal protections developed. The commercial rights of businesses were protected from ancient times. See part 1 where I mention two cases from the Talmud. In medieval times the guilds protected their members. Since printing didn't exist before the 1450's

[1] For example MARC catalog records are in the public domain, but vendors such as OCLC and Library of Congress may charge for data base services.

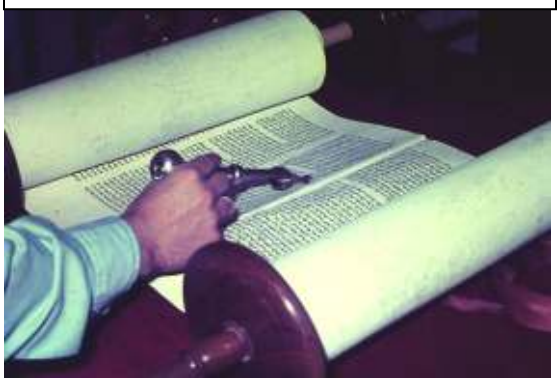
[2] For a fuller explanation of public domain and advise on how to use public domain materials see: *The Public Domain: How to Find & Use Copyright-Free Writings, Music, Art & More* / By Stephen Fishman. 5th ed. Berkeley, CA, Nolo, 2010. Some chapters are available online from Google Books.

no guilds developed. Patents were granted for a limited period for processes and technology. Trademarks are words, phases, or graphics that are associated with a business. The beginnings of copyright were for the business and commercial rights. The second stream protected authors and creators of works. This author protection was not fully developed until the 19th century. Before then, authors had not control of their words and derivative works.

Protections for intellectual property and the right to print and publish materials are similar, but sometimes competing philosophies or protection. Intellectual property rights reside with the author or creator while the commercial rights for the production and sale are protections for the printer and publisher. Both aspects of protection recognize the right to be compensated for the fruits of one's labor. Copyright protections developed very slowly and at first only protected the printer/publisher.

Before the printing press in order to "publish" a work, one needed an army of scribes. To give you some idea of the costs involved let's examine the production of a modern manuscript. A Torah scroll that is used in the synagogue must be written by the hand of a trained scribe. The scroll has more than 10,000 lines and could take 850-900 hours to create and get it ready for the end users. The cost of a scroll with its wooden holders and cover varies from about $25,000 to $80,000. A printed book with the vocalized Hebrew text of the Torah, an English translation and commentaries costs about $30, which is probably less than an hour of preparation time. The printed book is about 1/850th (.001176%) of the cost of the hand written scroll. Is it any wonder that printed books and periodicals soon became the first mass media?

Reading from an open Torah scroll.



Shakespeare copied many of the plots of his plays from history or other people's work. He has been accused of copying long sections of earlier works and inserting them into his plays. His plays while in their original production had a fluid text. None of his contemporaries thought he was guilty of plagiarism. On the flip side; many of our common phrases find their roots in Shakespeare and no one thinks twice about using them. If you say, "True is it that we have seen better days," do you think of the play, *As You Like It* Act 2 scene 7? However, if one says, "To be or not to be," most people know this from *Hamlet.*

Common law derives its force from the consent or public policy of the people. Since common law is based on the decisions of the court, it is also called case law. These decisions amplify, define, and interpret statutory law. Common law is sometimes thought of as the "unwritten law," but court decisions in state and federal courts are published in decision reporters (e.g. *Illinois Decisions* and *Northeastern Reporter*) and Jewish law decisions are published as books of responsa. Common law remains in effect until a legislative body passes a law making the rule null and void

or another court decision overrules a previous decision.[3] Most countries that were colonies of Great Britain (including the U.S., Canada, and Australia) adapted the English common law.[4]

Plagiarism is the uncited copying of someone else's work. A pirated work is copied and sold without permission of the author, creator or original publisher. A pirated work does not deny the author. Since in the 19th century American works were not protected by copyright in other countries, British publishers printed and sold pirated copies of American works and American publishers pirated British works. This was legal. Copyright is limited by time and place. The need to cite an author's work is forever.

For a work to be considered copyrightable the creator must have intent to create a new work. For example[5]; Case A. A girl has a doll protected by copyright such as "Barbie." Her brother takes a hammer and crushes the skull. The girl throws the doll into the trash amid the other broken toys parts, papers and debris. Case B. An artist takes a "Barbie" doll crushes the skull and uses the crushed body with some common household trash to create a sculpture. In case A, the girl had no intent to create anything new. This is not a copyrightable event. In Case B the artist has the intent to create a new work. The new work is copyrightable.

Case C. A printed copy of classic work accidentally had two chapters missing. Case D An editor revises, abridges, and comments on Tolsky's *War and Peace.* Case C is not copyright because there was no intent to abridge. The editor in Case D has intent for a new creative work and the result is copyrightable.

On August 28, 1963, from the steps of the Lincoln Memorial during the March on Washington for Jobs and Freedom, Martin Luther King delivered his moving and historic, "I have a dream" speech. King was a master of rhetoric and delivery. Parts this speech were delivered at other times and places. The end of the speech departed from the prepared text and became something list a Baptist sermon. [6] He includes Biblical references and allusions. Under the 1909 copyright law in effect then, speeches were in the public domain, but not performances or published speeches. Spoken words were not considered tangible and not protected by statutory copyright. Because Dr. King distributed copies of his prepared remarks at the time of the delivery and the delivered version was different, the copyright status of the speech was disputed.[7]

In 1994, CBS, Inc. produced a historical documentary series entitled "The 20th Century with Mike Wallace." One segment was devoted to "Martin Luther King, Jr. and the 1968 march on Washington. The speech was recorded by CBS. Other radio and TV networks also broadcast

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[3] For example a case may be appealed to a high court or a new court ruling of the same court may, based on new laws or circumstances, over turn an earlier ruling. Some Supreme Court cases radically changed the way we do things. The web site http://www.lectlaw.com/tcas.htm Historic Court Decisions has a list of case that are historically significant. Included are Marbury v. Madision, (1803), Dred Scott v. Sandford, (1857) and Miranda v. Arizona (1966).

[4] Louisiana and Quebec are two exceptions. Since they were settled by French settlers, they adopted the French Napoleonic Code.

[5] The ideas for these cases come from "Copyright In The Dead Sea Scrolls : Authorship and Originality" by David Nimmer (Houston Law Review 38:1, Summer 2001. Retrieved from: http://www.houstonlawreview.org/archive/downloads/38-1_pdf/HLR38P1.pdf)

[6] See: "I Have a Dream" http://en.wikipedia.org/wiki/I_Have_a_Dream for more details.

[7] See: Estate of Martin Luther King, Jr., Inc. v. CBS, Inc. (194 F.3d 1211 (11th Cir. 1999)) http://en.wikipedia.org/wiki/Estate_of_Martin_Luther_King,_Jr.,_Inc._v._CBS,_Inc.

and recorded the speech. That episode contained extensive footage of the speech; CBS never sought permission to use the speech or offer to pay royalties. Dr. King did register the speech and the Copyright office issued a registration of copyright on October 2, 1963. For the next twenty years King and his estate had copyright protection and did license its use.

The Estate entered into litigation. CBS obtained summary judgment for dismissal from the district court. The Estate appealed to the U.S. Court of Appeals 11th District. The Copyright Law of 1909 was the source of analysis for this case because that was the law when the speech was given and Dr. King obtained copyright registration. According to the 1909 statute common law copyright existed from the moment of creation until general publication, when works had to fulfill the statutory requirements. The Court of Appeals reversed the District Court and sent the case back to the lower court. The Court held that a public performance of a speech is not the same as publication. The Courts did not rule on all the issues because the parties settled. This case demonstrated that delivering a speech is a performance. No matter what the size of the audience a performance is not considered publication.

The case of Walter v. Lane ([1900] AC 539) was seminal case in the rights of an author for copyright of his own work. Reporters from *The [London] Times* newspaper took down shorthand notes of a series of speeches given by the Earl of Roseberry. The notes were transcribed, edited, and later printed in the newspaper as verbatim speeches. The Respondent in the case published a book including these speeches, taken substantially from the reports of those speeches in *The Times*. The court was asked whether the reporters of the speech could be considered "authors" under the terms of the Literary Copyright Act of 1842. After several court cases The House of Lords, said the rights to the speech reside with the author.

How does strong copyright protection benefit to society? Which of the divergent viewpoints of copyright benefit the reading public? Protection should reward effort, capital risk, and creative effort. Since publishers who put up the money for publication, they get a much larger share of the book's sale than the author. The contrasting viewpoint is that the work must be new and show creative intent i.e. the copyright belongs to the author or creator. The law of the United Kingdom roughly follows the publisher's viewpoint; in the United States the law roughly follows the second. In the end the reading public who funds or purchases the works pays the bills. In theory if the public gets value for their payments they will buy more books and other protected works, then both the publishers and the authors can succeed. Without fair remuneration, the authors will quit creating and the publishers will go out of business.

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