

Reproduced with permission from BNA's Patent, Trademark & Copyright Journal, 87 PTCJ 916, 2/21/14. Copyright © 2014 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

COPYRIGHTS

The authors question whether modifying copyright law while keeping the Berne Convention “foundation” is appropriate when technology has simultaneously changed our assumptions and offers better approaches.

Before Reforming Copyright Law, Look at the Why of the Current Law



By LEE A. HOLLAR AND MARK C. HOLLAR

The first copyright laws were concerned with the unauthorized reproduction of the expression contained in physical works. Even the latest revision to U.S. copyright law, the Copyright Act of 1976, has a strong underlying orientation to works fixed in a tangible medium of expression.¹

Since that latest revision, technology has given us the Internet and the ability to transmit large amounts of information almost instantaneously over high-speed net-

¹ “Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” 17 U.S.C. 102(a).

works. Although this process involves fixing copies of a work in a variety of places (computer memories, network router), it is sometimes unclear who made (or caused to be made) the reproduction when it occurs automatically as part of a larger process. Is the copy of a data packet made in a router as it is being received made by the network provider that operates the router, or by the user who originally sent the data packet? Is that copy sufficiently permanent to be considered “fixed”?

These are not just academic questions to be discussed by law professors and students in law reviews. Instead, it determines what things are infringements and, perhaps more importantly, who is liable for that infringement.

Looking at Revisions

Because existing copyright law is oriented towards fixed copies, is not a clear fit for today's digital and networked world. It seems like just about everybody is looking at how it might be changed to address today's realities.²

² For example, see *Commerce Dept.'s Internet Policy Task Force Report Suggests Copyright Licensing Reform*, 86 PAT., TRADEMARK & COPYRIGHT J. 675, Aug. 2, 2013 (86 PTCJ 675, 8/2/13); *House Judiciary Subcommittee Holds First Hearing on Comprehensive Copyright Reform*, 86 PAT., TRADEMARK & COPYRIGHT J. 166, May 24, 2013 (86 PTCJ 166, 5/24/13); *Report Pro-*

Everybody seems constrained by the Berne Convention, which the United States joined in 1988, and the comparable requirements in the TRIPS agreement³ to the World Trade Organization treaty. However, it may make sense to work to revise this foundation to current copyright law to fit past (and, hopefully, future) advances in technology rather than to remain tied to the century-old Procrustean bed of the Berne Convention.

In the meantime, there are a number of areas where the United States can encourage an updated copyright system to illustrate its viability. For example, currently users invoking the notice-and-takedown provisions of the Digital Millennium Copyright Act only need to indicate that a work is copyrighted, not that the copyright has been registered.⁴ Since the notice-and-takedown system supplements the copyright protection required by Berne, having a registration requirement would not be contrary to Berne, and would encourage the registration of commercially-valuable works while limiting takedown of those works with little commercial value.

This would be similar to the requirement for registration of a work first published in the United States before an infringement lawsuit is filed.⁵ This could become a requirement for all works where the owner wishes to use a “small claims” procedure being recommended by the Copyright Office.⁶ Because such a procedure would only supplement the current means of enforcing, again there should be little problem with Berne.

An Example From Tax Law

To show the problems that can result from trying to adapt something that made good sense at the time it was first introduced but causes widespread problems as technology advanced, consider the retail sales tax.

At the time these taxes were introduced, they were perhaps as close to an ideal tax as there could be. They were easy to determine, even when they were being used to fund a number of separate governmental entities like cities and schools, because you could figure out the combined rate based on the location of a retail store and then provide the store with a table or, with modern computerized cash registers, the rate to use. They were simple to administer, with the retail store periodically sending in a payment based on its sales, which could easily be audited to assure compliance. And they were hard to avoid, with a backup “use tax” used to collect a comparable payment from purchases of a big-ticket item in another state, thereby discouraging crossing borders to a neighboring state to avoid the tax. For example, registering a car, often the most expensive item that could be purchased elsewhere to save the tax, required showing payment of the sales or use tax.

However, as easy as the sales tax was to compute and administer when it was first adopted, the advent of the

commercial Internet has made it an untenable institution, paralleling the current situation with copyright law. Because collection is often based on something unrelated to the transaction, such as whether the seller has a warehouse in the state where the purchaser lives, the seller only sporadically collects the tax. It is difficult for the seller to determine the tax rate to use because there are thousands of different rates across the country (the idea of a single rate for each state has been suggested, but that complicates the tax payments to individual governmental entities in that state). Additionally, purchases from a seller in another state are the norm, rather than the exception, especially when the non-collection of sales tax (knowing that most purchasers do not pay the use tax) gives the purchaser a price advantage over local stores.

For years, states and the federal government have been looking for good ways to adapt the sales tax to modern times, without much success. The problem is with the fundamental nature of the sales tax, not in finding a way to implement it in today’s world.

You also need to consider how the law, or changes in law, may redirect technology, especially on the part of those who want to take advantage or get around it. Some Internet stores attracted customers because they did not add sales tax to their price. And while the DMCA was based on not only current technology, but a guess which way it could evolve, the take-down rules for online storage providers may have led to the popularity of “file sharing” systems such as Napster, even if large scale content servers may provide a faster and more reliable way of distributing music or videos.

Going to the Berne Fundamentals

Just as the problem with the sales tax is that its fundamental assumptions are becoming a poor fit in today’s world, so to are the fundamental assumptions upon which Berne Convention was formed. We should examine the assumptions that formed the basis for the Berne Convention to see if they still make sense. Building a new copyright “house” on top of a flawed “foundation” will only lead to future problems that will be even harder to fix.

Although most people think of the Berne Convention as removing formalities (such as the need for a particular notice and for registration with the government), that was not the case with its original 1886 version. Instead, it preserved the existing formalities requirements while providing that if the requirement for copyright were met in one country, the other countries would protect the work as though it had met their requirements. This often meant publication, notice and registration in the originating country, although how strictly that was enforced and the form of notice differed from country to country.

This arrangement did not work well because in 1909, the parties amended the Berne Convention to remove any requirement for complying with formalities in the originating country in order to have protection in other countries. It also changed the term of protection from a fixed duration after publication to the life of the author plus 50 years. It is not difficult to see reasons for such a change, especially in light of the technology (or lack thereof) at the time.

poses *‘Meaningful Reforms’ to Copyright System*, 80 PAT., TRADEMARK & COPYRIGHT J. 725, Oct. 1, 2010 (80 PTCJ 725, 10/1/10); and *Pallante Urges Lawmakers to Begin Work on Comprehensive New Copyright Legislation*, 85 PAT., TRADEMARK & COPYRIGHT J. 703, March 22, 2013 (85 PTCJ 703, 3/22/13).

³ Agreement on Trade-Related Aspects of Intellectual Property Rights.

⁴ 17 U.S.C. § 512(c)(3)(A)(ii).

⁵ 17 U.S.C. § 411.

⁶ See *Copyright Office Recommends Creation Of Tribunal to Address Small Copyright Claims*, 86 PAT., TRADEMARK & COPYRIGHT J. 1121, Oct. 4, 2013 (86 PTCJ 1121, 10/4/13).

Term of Protection

Without the formalities requirement of publication with notice, copyright now protected both published and unpublished works. Not only could there be a problem determining when a copyright expired when a work was published in different countries at different dates, but including unpublished works now made using a publication date impossible. As one commentator noted, "One reason why a term of years running from the author's death has been so widely adopted as a formula for fixing the length of copyright is that the publication-plus calculus can lead to disputes over when and whether publication actually occurred."⁷

Using an author's date of death for setting the period of protection works well as long as it can be easily determined. This was usually possible for publications where international copyright protection mattered the most—those worth republishing in a foreign country. While it might be possible to determine when *A Tale of Two Cities* was first published in England by reviewing its original copyright registration kept at Stationers' Hall, it is far easier to determine that Charles Dickens died on June 9, 1870. This is especially true considering that Dickens originally published the book in 31 weekly installments in a literary periodical.

But if an author is not clearly identified or not well known, as is the case for many of today's works like Internet musings that are automatically protected by copyright when they are posted, it may be difficult (if not impossible) to determine whether the author is still alive or the date of his or her death.

This problem was recognized by Congress when it passed the Copyright Act of 1976, but the solution they came up with is one of the stranger copyright provisions. It presumes that an author will die 50 years after he creates a work or 25 years after it is first published, whichever comes first.⁸ An author may provide a statement to the Copyright Office saying that he is still alive,⁹ which will rebut the presumption.

In the report that accompanied the Copyright Act of 1976, Congress noted that these provisions "furnish an answer to the practical problems of how to discover the death rates of obscure or unknown authors."¹⁰ Because it will not be until 2073 until these provisions have any effect, it is impossible to predict how the burden of periodically notifying the Copyright Office you are alive compares to the burden of registering a copyright when a work is created, or how many copyright owners will inform the Copyright Office of an author's death.

Another problem stemming from having a copyright term based on the death of the longest living author, rather than when it is published or registered, is that copyrights for a series of related works can expire out of sequence. For example, X writes a book and then permits Y to create a screenplay based on the book. If Y dies before X, the copyright on the screenplay will expire before the copyright on the book, so the screenplay does not enter the public domain at the expiration of its copyright. To determine when a movie really enters the public domain, you have to know when every author of

every work used in the movie (screenplay, music, works of art in the background) died, an unreasonable task even if all the underlying works were listed in the credits.

Registration

Instead of the date of publication, the date of the first copyright registration could be used. That would have been a problem, since some Berne Convention members already were not requiring registration for protection. But even if all the members had a registration office, it would be necessary to determine where the work was registered. For a well-known author like Charles Dickens, one could guess that he registered the work in England. But sometimes, a work is first published in country different from an author's home (the Irish writer James Joyce's *Ulysses* was first published in installments in the United States and then as book in Paris), it would be necessary to write to all the copyright registries asking if they had information on the publication date.

Obviously, without electronic communications or even airmail letters, such correspondence would be slow and expensive, and it is easy to see why the Berne Convention revisions did not take that approach. But what if there was a single registration office for the whole world? Setting the term at a specific number of years after the registration, rather than after publication, would address the problem of determining the duration of a copyright for an unpublished work.

This would require communicating with that registration office both at the time of registration and to determine whether a work was registered and when its protection ends. At the time Berne was implemented, this was impracticable not only because of monetary and logistical constraints, but because an organization fit to handle the task did not exist. A commentator on the history of formalities noted that "Leading up to the 1908 Berlin revision, consideration was given to having registration at the International Bureau of the Berne Union." That option "was considered impractical because it would place too much of an administration burden on the Bureau. . . . The Bureau deemed itself unfit to embark on this task."¹¹

Today, the same Internet technology that is causing problems with copyright can provide the solution to determining when a copyright expires. Building a worldwide copyright registration database system capable of accepting registrations from a Web form and then allowing public search of the information is not that difficult. The U.S. Copyright Office has such a system for works being registered in the United States, and a similar system could be implemented to handle works worldwide. If it was undesirable to have a single country operate such a database, a communications protocol could be developed so that registration systems for different countries or regions could communicate with each other, producing a virtual database covering all the registrations in the world.

Even if you did not want to change from a life-of-author copyright term, having a registration database would solve a number of problems. It could serve the role played by the present system of notifying the Copy-

⁷ Robert Spoo, *Without Copyrights: Piracy, Publication, and the Public Domain*, Oxford University Press, 2013, pp. 272-273.

⁸ 17 U.S.C. § 302(e).

⁹ 17 U.S.C. § 302(d).

¹⁰ H.R. Rep. No. 94-1178, at 138.

¹¹ Stef van Gompel, *Formalities in Copyright Law: An Analysis of their History, Rationales and Possible Future*, Wolter Kluwer, 2011, pp. 143-144.

right Office of the death or continued life of an author. If the registration includes links or other references to the registration for the underlying works, a search to determine their current status (and therefore the effective status of the work) could be greatly simplified.

Works Protected

The Berne Convention makes no differentiation between published and unpublished works, as does the Copyright Act of 1976. Prior to the act, U.S. copyright law protected only published works, while unpublished works were protected under state misappropriation law or “common law copyright,” if at all. But the 1908 revision of the Berne Convention, which eliminated publication and formalities as a requirement for protection, affected published and unpublished works differently because of reproduction technology at the time.

Until the electrostatic printer, first widely available from Xerox in 1959, there were no simple, inexpensive ways of reproducing only a copy or two of an unpublished work. If the work was written on a typewriter, carbon paper allowed only a very limited number of poor quality copies to be made. Alternatively, a messy photographic or thermal imaging process could be used. Reproduction of more than a few copies required the typesetting and printing of the work, and was generally limited to published works where those costs could be (hopefully) recouped, either by the copyright owner or an infringer. So, the Berne provisions essentially covered only high-value works. For unpublished works, Berne primarily covered their public performance or provided the author with a right of first publication.

Today, because the cost of reproduction and distribution on the Internet is minimal, many published works are of little or no (and for some, maybe even negative) value. Nonetheless, something as hastily scribbled as a blog entry or a message board post is protected as if it were a bestselling novel or a blockbuster movie produced at great expense. Since copyright automatically comes into existence at creation of the work, the author does not even decide whether the work should be protected.

In fact, there is no provision in the current copyright statutes for disclaiming copyright if one wanted to.¹² Creative Commons¹³ provides a number of licenses that can be attached to a work to govern its future use, but their “No Rights Reserved” license only provides that the author will not sue for any infringement, not that the work is in the public domain. In any case, few of the low value works available on the Internet have a Creative Commons license of any type.

Unneeded Special Provisions?

Before the widespread availability of electronic commerce, it was difficult to license a work or part of a

¹² In contrast, 35 U.S.C. § 253 provides a way to disclaim all or part of a patent.

¹³ <http://creativecommons.org/>.

work except in special instances, such as the broadcast rights for a song or the performance right for a play, where organizations had been set up to handle such licensing. Many situations that would otherwise require licensing to avoid infringement are now covered by a complex set of statutory exceptions and licenses.¹⁴ Each is very specific, covers only particular types of works, and can result in confusion when somebody sees a use that is permitted in a particular instance and generalizes that use to different (and impermissible) instance. For example, one section¹⁵ allows the photographing of a copyrighted architectural work from a public place, but there is no similar provision for photographing a copyrighted sculpture that might be in front of the building.

Many people discussing the problems with copyright in the Internet age have suggested some sort of online licensing mechanism as an alternative to the control a copyright owner now has over the use of a work, particularly in the creation of a new work.¹⁶ But they seldom suggest the elimination of any of the current special provisions when it becomes easy to license (and pay for) the use of another’s work. For example, one of the exceptions allows a college to show portions, or even entire films, in a film class where they are charging hundreds of dollars in tuition without any royalty payment to the films’ copyright owners. This makes little sense when online licensing at reasonable prices is available.

Conclusion

Rather than try to adapt current copyright law to better fit today’s technology, the assumptions that went into its formulation should be reexamined. The Berne Convention’s term of protection based on the date of an author’s death, lack of formalities, and automatic protection of even unpublished works may have been the best approach a hundred years ago, but better approaches are now available.

Of course, technology will continue to change, but worldwide, high-speed communications and the ability to store and retrieve information in large databases will remain, perhaps becoming even more ubiquitous and less expensive. While maintaining a central database for all copyrights may not have been feasible at the time Berne was introduced, such technology is widely available today and already implemented for a similar use, albeit not on as wide a scale.

¹⁴ 17 U.S.C. §§ 108-122. In particular, 17 U.S.C. § 110 contains 10 different subsections addressing a variety of situations ranging from classroom instruction to agricultural fairs, churches and veterans’ organizations.

¹⁵ 17 U.S.C. § 120.

¹⁶ See, e.g., William Patry, *How to Fix Copyright*, Oxford University Press, 2011.

