

CHAPTER 2

From the adulated author of antiquity to the powerful modern publisher

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A b s t r a c t

In the modern world, intellectual property regulation needs to tackle the challenges posed by new technology, new devices and new ways of consuming culture. This is not the first time that intellectual property has faced a challenge of this nature: in early modern Europe, the invention of the printing press revolutionized how cultural creativity was understood and regulated. Intellectual property regulation is central to the relationship between creator and consumer. Below we summarize changes made to intellectual property regulation since the advent of the printing press, considering the attitudes held at different historical periods and how intellectual property is legally, socially and economically conceptualized in different countries.

Keywords

Intellectual property, copyright, technological change, cultural production, access to culture.

1. Adulation of the Author¹

Copyright is an engine for social and cultural progress and for economic development. However, the concept of copyright is in a state of constant evolution and redefinition because it is a focus for many different interests. Rodríguez-Pardo (2003) observes that copyright is a concept that has changed and will continue to change over time, since it involves commercialization and creativity. There is no end to creativity, which will continue in our society and in societies to come as a response to the social and creative disquiet that exists in every period of history.

In Ancient Greek and Roman times, creators were viewed as deities and their works as divine creations. With the passage of time, this adulation continues unabated. Signs of the creations of these age-old cultures can still be found on the streets of Rome and Athens today, attracting the interest of both residents and tourists who come to pay homage to these ancient artefacts. In classical antiquity creators enjoyed a social status similar to that of celebrities today. They were recognized as the owners of their creations — a recognition that is today taken for granted and assumed without question. We have internalized the idea that artists own their work: it is part of our cultural imaginary and is rarely called into question. Nobody would expect Bruce Springsteen to give up his rights to the songs on his recent *High Hopes* album. Nobody would dare call into question the age-old status of authorship.

Creators, in return for pay, typically worked for wealthy individuals who, as patrons, funded the work of favoured artists. Without this patronage system, creators would not have been able to put food on the table or give life to the works that delighted their followers. Since they were subsidized, however, their creative processes were conditioned by the tastes of the patrons who commissioned works.

Recognition of the social value of a singular creative feat meant that artistic production acquired the aura of uniqueness. However, plagiarism — by secondary artists (the “pirates” of antiquity) who sought to achieve fame

1 All translations of citations from untranslated works are by Ailish Maher.

by making copies of original works — threatened this uniqueness. To solve this problem, ownership of works was recognized so that nobody could modify a work without the permission of the owner.

Although no legislative measures were implemented to prevent plagiarism, a list of the circumstances in which plagiarism would constitute a legal offence was produced and punishments and penalties were applied, for the first time, to people who changed or manipulated an original work. From a personal and spiritual perspective, the work belonged to the author and usurping ownership, publishing without consent and plagiarism were illegal (Izzo, 2002). Falsifying authorship or making illegal copies of a work without permission were considered to be acts deserving of punishment (Baylos, as cited in Rogel, 1984).

The principles of what we now call moral authorship rights were thus established — even though these rights only extended to the social and not the legal sphere. Despite the punishments established for plagiarists, no legal protection as such existed, as it seems that arts and letters did not enjoy legal protection in Ancient Greece and Rome. Artists lived austere and sought the protection of solvent individuals who could support them economically (Izzo, 2002). There was no recognizable legislative body to regulate these matters or the penalties imposed to redress any infringements.

The earliest agreements between authors and publishers regarding the use of a work were enacted as the first recognizable semblance of what would later become copyright. To ensure that their rights were protected, some authors transferred the power to sanction plagiarism to third parties. The Ancient Romans introduced a series of measures to underpin and define the author's status. Creators, the celebrities and stars of the period, were considered artists, no matter what discipline they worked in: “All were equally considered craftsmen, whether they created original works, or took inspiration from other works, or used forms and moulds for serial productions.” (Calabi-Limentani, 1958). The author acquired a social status that was reflected in their remuneration (*pecunia*), their reputation and prestige (*gloria*) and the transcendence of their artistic works (*religio*).

The Ancient Romans, who considered art to be central to societal development, showed a keen interest in authors and artistic production: “There was a concern with prosecution in the event of a collision between two property rights: the right to the physical object including the creative act behind it, and the intellectual right to the creation.” (Muñoz Mori, as cited in Padrós & López-Sintas, 2011). Formal recognition of the ownership of a work of art equated creation with other kinds of ownership; thus, ownership rights were extended to include ideas and the intellect as well as tangible goods. Both material and immaterial goods were thus deemed to be property in equal terms.

Authors, held in high regard in society for their honoured and privileged position, drew the adulation of admirers and of society at large and reaped the rewards in commissions from patrons. Publicity on their behalf sought to make them visible to the public. How publicity is achieved for creators may have grown in sophistication — but its objective remains the same: to persuade.

The principles of what we now refer to as author’s rights were thus first recognized in Ancient Greek and Roman times. These principles are not substantially different today except for an exponentially larger global market. Although there was no specific intention to measure and define intellectual property in antiquity, there certainly was a concern to acknowledge the status of the author, which ultimately led to the development of ways to consolidate the author’s position. Thus, steps were taken to ensure that citizens became aware of the owners of works and to foster values that honoured the author. Authors, thus rendered visible in society, became the central figure in the matter of rights and the justification for application of these rights. Very little has changed since then.

2. The Printing Press: A Paradigm Shift

The arrival of the printing press was a key historical moment in that it shifted the focus of rights from authors to the publishers who controlled the physical means of production: the printing press. Publishers therefore exercised direct control over what was published and so ultimately decided what texts would and would not be printed. Controlling the market, publishers eventually came to own and manage the economic rights over works.

By the Middle Ages the work of authors had acquired connotations of collectiveness: “the finished work was not the result of the activity of one person but of the contributions of an entire community — contributions which had no absolute material invisibility. We can therefore speak of a collective [contribution] in the modern sense of the term.” (Vega-Vega, 1990). However, with the invention of the printing press this situation rapidly changed. Artistic production came to depend on machines that, relatively rapidly, could produce thousands of copies of a single manuscript. The spiritual aura and uniqueness of works produced individually or collectively was lost, to be replaced by reproduction and personalized use.

The invention of the printing press radically redefined roles and the balance of power regarding rights. Agents who managed contracts and the economic rights to works from the Classical Era — the main concern of these earlier publishers — emerged as key figures, gaining powers that are exercised right up to the present day. The fact that many copies of a manuscript could be made by a printing press at a lower cost than by hand changed society’s perceptions of authors and their works and creativity and culture in general. The intellect lost its aura of spirituality² and creative significance.

Culture thus became yet another commodity that underwent different exploitation phases. Commodification and the ease of replication gave rise to a form of ownership governed by purely legal transactions controlled by a

2 To cite a Latin saying: *Ciencia donum Dei est, undi vendi non protest* (knowledge is a gift of God, therefore it cannot be sold).

small number of publishers. A new social model of financing and managing intellectual capital thus began to take shape (Sábada, 2008).

Content was managed in a feudal guild regime under the control of publishers. Securing ownership rights became the central objective in publishers' defence of the rights of authors. This right, known as a "privilege",³ placed legal restrictions on printing and meant that copies could not be made unless one held the ownership rights. It was also the first measure that provided that a book could not be sold at a price other than that set by the publisher. The foundations were thus laid for a regulatory system that is broadly similar to that of today's globalized market.

The privilege system meant that the publisher had regulated monopolistic rights. The fact that right holders needed to grant their permission for anyone else to publish their work privatized rights in a work for the first time by law.

As Rodríguez-Pardo (2003) has pointed out, some of these principles continue to underpin the rights market today, namely, exclusive printing rights (monopoly), a time limit on copyright protection (temporary monopoly), legal measures aimed at preventing use by third parties (legal monopoly) and, finally, the right of printers to defend themselves in the event of a third party infraction (coercive powers).

The printing press thus brought about a dramatic change in how author's rights were perceived. Cultural production came to depend on those who held exclusive control over copies and content. The aura surrounding the author and creativity was dissipated, to be replaced by commodification in a market shaped by the laws of supply and demand.

Privilege provided the framework for early rights legislation by allowing exclusive use by means of temporary licences. This core principle has survived in the national legislation of many European countries to the present day. Indeed, the application of the privilege system to other territories is the origin of the different legal intellectual property instruments in existence today.

3 There were two forms of privilege. Simple privilege allowed the holder to print a specific work. General privilege allowed the holder to adapt or translate a manuscript before printing.

The first known record of legally granted privilege in relation to a specific work and a specific time period, according to Marandola (1998), was when Johannes of Speyer was awarded, in Italy in 1469, the exclusive printing rights for the letters of Cicero and Pliny for a period of five years. Italy was thus the first country to recognize the rights of a printer to exploit an author's work.

In Germany — Johannes of Speyer's own country of origin — privilege applied in each *Land*, but regional administrations worked together to overcome geographical boundaries, setting up agreements that would ensure that rights would be upheld throughout Germanic territory. Privileges were further consolidated in 1660 when penalties were established for illegal copying.

In England, the privilege system was established in 1529 (Patterson, 1968), when Henry VIII set a limit on imports of books from overseas and established a printing patent system ("King's privileges").⁴ The Stationers' Charter was drawn up, granting privileges to the Stationers' Company and outlawing printing by anyone not registered with it. Eventually, when the interests of the Stationers' Company and the printing patent system came into conflict, the Star Chamber Decree of 1586 was passed, making it compulsory for all printers to register with the Stationers' Company. The Star Chamber Decree of 1637 further consolidated this monopoly by prohibiting the printing of any work that had not been previously registered with the Stationers' Company (Izzo, 2002).

This was the first time that a single company held all power over authorship rights on the basis of legal measures that secured the exclusivity of these same rights. The role of the Stationers' Company in England was similar to that of collecting societies later founded in other countries, such as the Società Italiana degli Autori ed Editori (SIAE) in Italy and the Sociedad General de Autores y Editores (SGAE) in Spain (founded in 1882 and 1889, respectively).

4 The patent system established two categories of rights: a general printing patent which was a licence referring to a group of works, and a printing patent which was a licence referring to a single book and lasting between six and ten years.

In Spain, the Catholic Kings, in enacting the Pragmática of 1502, established a system of privileges aimed at prohibiting the reprinting of works that were held under a printing monopoly (Baylos, as cited in Rogel, 1984). In 1558, 1569 and 1598 three further provisions were enacted to ensure that the right to set the price of a work was not violated. This control by publishers limited authors' rights to exploit and publish their own works.

Many other European countries developed privilege systems that protected the interests of publishers, with most conforming to the established pattern and implementing similar measures. This created a new balance of power underpinned by law: authors were demoted to a secondary role (as just another link in the production and distribution chain), while publishers consolidated their monopolistic position. Management societies or companies assumed a central role in a publishing business that privatized author's rights and consolidated them as yet another sector of the market economy.

Authors were no longer idolized as before, and, despite all the legal measures put in place to protect their rights, they wielded increasingly less influence regarding how their rights were managed. Publishers, meanwhile, consolidated their monopolistic position as gatekeepers, controlling what content was published.

Further legislative provisions would be founded on this initial disequilibrium that gave publishers exclusive powers regarding the selection and production of works and the rights over said works. The consequences of the legal and social construction of this market in rights remain with us today, with the main difference being that the market is far larger.

An economic perspective was thus incorporated into rights management. Ownership rights in purely economic terms became the main concern of companies that managed intellectual property — superseding the moral and economic interests of the author whenever economic interests failed to coincide. Access was key to control over works. Monopoly right holders controlled content, author access to the market and consumer access to productions. Book prices were set to maximize the profits of publishers and printers, not the revenues of authors.

The advent of the printing press is comparable to the more recent development of the Internet. In both cases, the question of access occupies centre-stage in rights management, with power deriving from control over access, whether by authors to the market or by consumers to the work. Since consumers are more interested in enjoyment than in material possession, the interests of both publishers and authors hinge on controlling access, which both parties do their utmost to ring-fence.

Thus, control over access has traditionally underpinned the development of rights legislation. Technological progress in the digital era, however, is affecting the traditional publisher's business model, as authors now have the means to directly access the market and consumers the means to access authors' works with no need for intermediation.

3. The Earliest Legislation: The Statute of Anne

The Statute of Anne, enacted in England in 1709, was the first law that established legislative and judicial control over copies of a work, thereby taking this power out of the hands of the Stationers' Company. The central objective of this legislation — which established a 14-year period that could be extended by a further 14 years if the author remained alive — was to eliminate existing monopolies and to recognize authors as owners both of their works and of the rights deriving from the same, including the right to authorize and freely select a publisher to reproduce their works.

The Statute of Anne thus revisited the issue of the rights of authors in relation to their own works. Izzo (2002) suggests that this represented the development of the new Anglo-Saxon concept of copyright, a term which first appeared in 1678 as two separate words, *copy* and *right*, referring to *right in copy* (ownership rights over the original copy) and *right to copy* (reproduction or copying rights).

During the term granted under the Statute of Anne, only authors and their chosen publishers could publish works; after the 14-year term had elapsed, authors were free to choose another publisher to represent their rights. The

Statute of Anne thus broke the publishers' monopoly, essentially rebalancing the distribution of power and restoring rights to authors by giving them a more central role. Publishers, demoted to a level beneath the author, were stripped of the powers they had acquired under the privilege system.

Despite the good intentions behind the legislation, however, publishers eventually came to manage the newly established copyright period. The Statute of Anne, intended to resolve conflict between publisher and author, in reality served to entrench the position of the publisher. The law did not explicitly strengthen the publishers' monopoly, nor was it intended to (quite the contrary), but, by recognizing copyright duration in law for the first time, it protected publishers' interests, as it enabled them to extend their control over authors' legitimate rights. The introduction of the notion of a copyright term — ostensibly to favour authors — would eventually become the grounds for defending the interests of publishers in subsequent legislation (for instance, in the US Copyright Term Extension Act, aka the Sonny Bono Act).

There was also a close-knit relationship between copyright and censorship, in that the publisher, as gatekeeper, could effectively decide what content was to be printed. Furthermore, postponement of the entry of works to the public domain limited consumer access while increasing the value of these works for publishers. In this way, publishers strengthened their control of the book market. A similar process unfolded in the music sector in the late 19th century.

Copyright legislation advanced markedly during the 18th century, particularly with the development of new laws defining copyright in terms of years. The English Copyright Act of 1814 set a term of 28 years or the natural life of the author if longer and the Copyright Amendment Act of 1842 increased the term to the life of the author plus seven years or to 42 years from the first publication of the work (whichever was longer). Extending the copyright term reinforced authors' rights and provided the perfect instrument for developing a market model. The objectives of the Statute of Anne were adequately met in that authors would receive payment for their work. However, although the reasons for extending copyright in time remain

somewhat unclear, the outcome was that protection of the economic interests of the few was ensured, that is, of publishers.

These notions regarding copyright became the basis for a global market. Saunders (1992) points out how the spirit of this copyright legislation governing the British Isles was imported to the USA and inspired its own legislation. Between 1780 and 1787 certain legal concepts of the Magna Carta were introduced in the USA, with the US Constitution of 1787 favouring recognition of a collective right. According to Sábada (2008), the US adaptation of intellectual property rights in the 19th century was “an attempt to establish compensation for artistic creation while fostering collective progress — a conditional right”. These collective rights were formulated in a way similar to the privilege system of the Germanic *Länder*. Thus, certain regional rights were guaranteed but were governed by general legislative principles. In 1790, the first Copyright Act of a federal nature, very much modelled on the Statute of Anne, unified copyright protection across the states and established the term as 14 years, plus the right to renewal for 14 further years if the author was still alive. Authors’ rights were thus exercised from a dual perspective, that is, with consideration given to the particularities of each state and to a common national doctrine.

Copyright law today in the European Union (EU) has a similar, but not identical, territorial application. EU directives make recommendations aimed at harmonizing the national legislation of the member states, each of which establishes national principles governing intellectual property. However, whereas the USA shares a cultural imaginary, the EU has to grapple with several countries with their own historical, social and cultural realities.

In 1787 the US Congress began to regulate copyright, introducing some new developments in the field of copyright law. Its remit was “to promote the progress of science and the useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries” (Article I, Section 8, Clause 8 of the US Constitution, known as the Copyright

Clause⁵). Authorship and creativity both are thus fundamental concepts in US society, as reflected in US Constitutional and copyright legislation.

The Copyright Act of 1790 set out to define certain aspects of copyright, such as the owners of the rights to possession, access and the right to copy, protected uses and protected cultural expressions. It was thus the first law to recognize and clearly define core copyright concepts. Authors — citizens and residents of the USA — “of any map, chart, book or books already printed within these United States” and their “executors, administrators or assigns” who had “purchased or legally acquired the copyright of any (...) map, chart, book or books, in order to print, reprint, publish or vend the same” acquired the “sole right and liberty of printing, reprinting, publishing and vending such map, chart, book or books, for the term of 14 years.” (Copyright Act of 1790⁶). In 1833 the rights to public performance and communication were included and in 1862 other cultural expressions, like musical creations, were included.

Thus, step by step, the concept of intellectual property was constructed, with copyright doctrine coming to define elements beyond the work itself and to include new uses and new cultural expressions. Access to works was no longer the only concern of publishers, and the powers awarded — over and above extension to the copyright term — had little to do with the work itself. Copyright gradually began to take the shape that we recognize today and was gradually extended to other creative endeavours. The proliferation of legislation continued up to the Copyright Act of 1976, which replaced and extended previous copyright legislation.

Although the US tradition in developing copyright legislation does not place the author centre-stage, it does encourage respect for the reputation and honour of authors. Nonetheless, the publisher holding most of the author’s rights ends up benefiting most from this situation.

5 <http://copyright.gov/title17/92preface.html>.

6 <http://copyright.gov/history/1790act.pdf>.

4. The French Revolution and Continental Law

The other major school of thought (and legislation) in the intellectual property field is the continental system of law. In 1776 the *Memoire à consulter, pour les libraires & imprimeurs de Lyon, Rouen, Toulouse et Nimes, concernant les privileges de librairie, et continuations d'iceux* was published in France, defining where and when published works entered the public domain (Saunders, 1992). Under this system, in which authors were free to print and sell their own works, royal privilege ceased to exist in France (Muñoz Mori, as cited in Padrós & López-Sintas, 2011).

In 1791, the new French Assembly declared that creative productions would receive the same treatment as material property. Just as happened in the Anglo-Saxon tradition, creative property came to be commercialized, just like a house or any other type of property. The French Assembly also protected authors' rights to their works during their lifetime and for five years (later ten years) following their death. These measures aimed to protect immaterial works and authors' rights and also to recognize the cultural contributions of authors. In 1792 the National Assembly took another step forward in commodifying intellectual property by including music and other works as well as rights of reproduction and public communication.

The term *droit d'auteur*, used for the first time in public documents in 1838, reflected a dual principle of proprietary rights and moral rights. Whereas copyright defined the right to copy a work and extended the powers of the publisher, the aim of the French doctrine was not solely to control access to works but also to guarantee the moral rights of the author. This approach harked back to classical values that recognized the author's ownership of a work and respected its integrity. Although the *droit d'auteur* theoretically protects the two kinds of authors' rights in equal measure, it is the proprietary (economic) rights, which, under the pressures of the market economy, are most fiercely defended. In other words, recognition of an author's moral rights did not require foregoing the development of a market in intellectual property. The *droit d'auteur* system was, in fact, a system of

privileges. Hence, given their similar origins in the privilege system, copyright and *droit d'auteur* are not so very different in conceptual terms.

5. Conclusions: Author Rights Today

Authors' rights have, over several centuries, been adapted to changing times, yet today we are experiencing a period of upheaval that can only be likened to the introduction of the printing press. Works, once material and unique, are now multimedia creations — a product of our time (Rodríguez-Pardo, 2003) — and the result of a technological revolution that is yielding innumerable novel means of expression and communication. The technological revolution has also led to new forms of commercial exploitation, most notably, digital practices that now affect how we understand and apply copyright. As in the past, we need to adapt to change, not shy away from it.

Common-law traditions are proving powerless in the face of the new technological challenges. In the desire to maintain the status quo of authors and publishers, the constitutional rights of citizens are being undermined. The Sinde Law and Lassalle Law in Spain, the Hadopi Law in France and SOPA in the USA have all proved controversial and have inspired protests by citizens calling into question the constitutionality of intellectual property legislation of this nature.

As for the continental legal tradition, although Izzo (2002) argues that this system does not award great importance to economic interests in a work, we would argue otherwise. The economic interests that inspired the system of privileges — which was the conceptual foundations for both copyright and the *droit d'auteur* — have come to contaminate and influence national intellectual property legislation in various parts of the world.

Today, economic interests hold sway in questions of authors' rights. The market responds accordingly and legislators are pressured to enact laws that are favourable to the interests of governments with interests aligned with those of commercial behemoths. The privatization of author's rights has been

a reality since the advent of printing and, if the Internet follows the same trajectory as printing, it too will succumb to the same interests.

We need to reshape this exclusively economic perspective on the rights of authors so as to adapt it to the laws of free competition and to greater diversity in management terms. We can either choose to maintain the system that came into being in response to the printing press — provided it undergoes a profound review — or we can develop a new system, more suited to the modern age, that fosters healthy competition along the lines of Creative Commons licences.

Many challenges lie ahead, however, given that different national intellectual property legislative systems have apparently acceded to staunchly supporting the intellectual property model that gradually emerged after the development of the printing press and as yet incompletely adapted to the digital era.

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