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Copyright is not keeping up with our runaway culture

/ philosophical essay /

Today's culture is best characterized as a simmering pot of different ingredients and spices all thrown together to interact – relatively slowly at first, but becoming ever faster by the minute. The historic pace of cultural transformation can be compared in a way to a graph showing changes to worldwide population. In the last 70 years world population has increased by larger amount than in many thousands of years preceding. Arguably our culture has seen transformations comparable to this growth in their speed and impact. After all more people mean more ideas, more works, more copying, more individuals trying to find their place in their own (and maybe foreign) cultures.

Copyright, which is the legal right to control all use of an original work, such as a book, play, film, or piece of music, for a particular period of time[1], has *not* been around "forever" contrary to what many others would say. Yes, it has been a widely and, at times, violently debated issue since I, myself, can remember, however there has to be a clear beginning to copyright phenomena in our culture (that is, of course, Western) that we can pinpoint.

Unlike a patent, copyright only protects the produced version of an idea, not the idea itself. Copyright does nothing to prevent the idea from being further communicated and incorporated into different productions without explicit permission of the author. It is therefore irrelevant whether the author of the original expression of the idea even conveyed the idea or not. In the case of Fred Fisher, Inc. v. Dillingham the court saw a case of two men, "each a

1 http://dictionary.cambridge.org/us/dictionary/english/copyright

perfectionist", who mapped the same territory independently of one another. The maps of course turned out to be identical in every possible way, except maybe colour scheme. The court however ruled that each of the parties may obtain exclusive right to make copies of their own map, and in granting them this they would not be infringing on the other's copyright.[2] This was the case because in certain fields of intellectual work, e.g. aforementioned map making, the element of creative, personal selection and arrangement may be reduced to a very limited gradient.

While the society in the United States of America in particular have been long-standing protectors of copyright and embrace it readily, for many if not most of the people living in north-eastern half of Eurasian continent, especially outside the Western culture, concept of copyright is still hard to grasp. This is also the case with the former Soviet Republics where ownership rights were not so long ago limited due to socialism. To the uninitiated reader the question of interrelations of ownership and copyright may require some explanation.

The labour theory of property established by the 17th century English philosopher John Locke is a natural law theory asserting that individual property is appropriated as a result of expending one's own labour upon an unowned natural resource. He justified it by saying that persons own themselves and therefore their own labour, and joining their labour with an object, the object becomes the property of that person.[3] We can extend from Locke that surely if joining one's labour with an object leads to private property, then labour (which, again, is owned by the individual) alone may also amount to private property even if immaterial.

Of course, it is still important to make distinction between abstract ideas and their expressions. Before the age of readily available technology to duplicate expressions of ideas, copyright was of no great concern since duplicating an original work took disproportionate amount of time and, ironically, work. Still we see that there was some limited concern – indeed copyright disputes can be seen

2 http://digital-law-online.info/lpdi1.0/quotes/fn1-46.htm
3 http://www.earlymoderntexts.com/assets/pdfs/locke1689a.pdf

appearing as early as year 560 in Ireland, when Saint Columba copied a Latin Psalter (a book) owned by Saint Finnian without permission his permission. Finnian tried to settle the matter amicably at first, but had to resort to "legal technique" in the end. Finnian requested that the King of Ireland intervene. The King ruled in Finnian's favour stating: *to every cow belong its calf, so to every book belong its copy.*[4]

With the advent of Gutenberg's printing press around 1440 the number of individual books in Europe sky-rocketed from mere thousands to millions, seeing more than a tenfold increase. Europe was becoming a region of book-loving, or rather Bible-loving and scripture-loving, individuals. The invention of the printing press was indeed largely motivated by society's interest in the Bible, and in turn promoted even more interest in it. (Which, interestingly enough, eventually presented the church with a challenge – now everyone could be their own pastor, every home could be a church. Though it did take 200 more years for George Fox to establish this idea in practice.) Easy availability of tools to produce and duplicate printed works slowly prompted authors to look for effective measures of protecting their property. In his book of 1603 *The Wonderfull yeare* Thomas Dekker resorts to humour to call upon this problem. He writes:

> *Banish these Word-pirates, (you sacred mistresses of learning) into the gulfe of Barbarisme: doome them euerlastingly to liue among dunces: let them not once lick their lips at the Thespian bowle, but onely be glad (and thanke Apollo for it too) if hereafter (as hitherto they haue alwayes) they may quench their poeticall thirst with small beere.*[5]

While humorous, it still conveys author's agitation really well. This quote also highlights the origin of the word "pirate" as applied to people infringing on copyright of others. However there is a stark difference between then and now. Nowadays rather than using this word plainly mockingly or with humour, the word is being used strategically instead. The goal of this strategic communication is to elicit strong negative feelings from the society towards the pirate and

4 https://archive.org/details/celticchurchinir00herorich
5 http://www.luminarium.org/renascence-editions/yeare.html

compassion towards the copyright holder. Nowadays we also have powerful well financed organizations – that believe this is an all or nothing war – fighting for copyright holders. But more on that later.

A hundred years after Decker's book – in 1710 – The Statute of Anne is enacted. It is considered to be world's first written copyright law clearly stating that the author of a work is the owner of copyright to said work and laying out specific rules and protection measures.[6] The rules do no bear much resemblance to modern copyright system. Notably copyright protection was not automatic – works had to be deposited to copyright libraries and registered before authors were granted copyright. There was no protection for works in progress or unpublished works. Protection provided by the Statute was retroactive and all pre-existing works were protected until 1731. For new works the length of protection was 14 years with possibility to extend the copyright for 14 more years once, if and only if the author survived that long. Indeed the average life expectancy at the time was 37 years[7] (to be fair child mortality had a grave impact on this number) and this cultural aspect clearly played a role when defining the length of copyright. It could be argued that initially copyright covered most of the author's lifetime. If we presuppose that meaningful and impactful works cannot be created by an author before they reach, say, 12 years of their life (which of course is a simplification), then protection of 28 years would protect their work until they're 40, which is way past the average at the time. All things considered the Statute of Anne was welcomed warmly and supported by all parties as a sane well-balanced regulation, that takes into account both rights of the author and rights of other members of the society to become future authors by learning and deriving from the works of their predecessors. Truly standing on the shoulder's of giants.

This state of tranquil peace did not last. With the first copyrights expiring, greed took the upper hand and the authors and publishers (including some powerful organisations) in turn conspired to get their copyrights prolonged. They

6 http://www.iprightsoffice.org/copyright_history/
7 http://www.nber.org/aginghealth/spring06/w11963.html

argued that copyright is perpetual, even claiming that it is a natural right, thus effectively abandoning the Statute of Anne. After much debate and English courts finding that copyright is indeed a natural right and that *it is just, that an author should reap the pecuniary profits of his own ingenuity and labour*[8], the matter was settled by reinforcing that Statute of Anne as it stands, judging 28 years to be a reasonable copyright term that serves the goal of preventing the creation of monopoly on thought. It can be seen that authors' claim for infinite copyright failed Lockean proviso test – by stockpiling and copyrighting every thought, it could be argued, that no more thoughts would be left for others to copyright.

Later culture through its continuous evolution changed again – travel was becoming more commonplace and by the end of the 19th century diplomatic relations became a reality. So the need for a system to protect copyright internationally grew. After nearly 30-year long negotiations the Berne Convention for the Protection of Literary and Artistic Works was signed in 1886 and remains in force to this day, providing the basis for international copyright law.[9] Interestingly enough a large influencer and, dare I say, copyright visionary – the United States of America – decided to pursue copyright protection strictly on the national level, only joining the Convention one hundred (and two) years later, thus in fact missing out on the opportunity to effectively lobby for their way of doing things. How Un-American!

At first Berne Convention provided copyright protection for the duration of 10 years. What happened next the reader will find very familiar. Approaching the 10 year point after adoption of the Convention, copyright holders lobbied once again for a lifetime copyright. Well, surprisingly enough this time around it worked! In 1896 the first Paris Revision to the Berne Convention was agreed upon and the 10 years limit lifted, stating instead that author holds copyright to their work for as long as the work exists, however they have an obligation during the first 10 years – to publish translations of their work into all languages they want

8 https://books.google.lv/books?id=1120pKVvvHsC&pg=RA2-PT259
9 https://www.law.cornell.edu/treaties/berne/overview.html

to hold copyright for.[10] After that deadline only the languages author have published in are protected.

In 1948 a different term was decided upon. Depending on the interpretation at that time on the question if a dead author loses their copyright, two could argue that this limit was either lowered or increased. The copyright term was now set to 50 years after the death of the author, with the possibility for signatory parties, i.e. individual countries, to extend it further.

Time limitation is but one of important aspects of copyright law. Have the cumbersome inconveniences of the Statute of Anne been fixed in the Berne Convention? Yes, mostly. Berne Convention protects copyright automatically without registration and it applies to both published and unpublished work as well as work in progress.[11] This is a modern document in every way. The current version of the Convention also ensures some balance, giving back to society and making sure that rights of others are not overly limited. Third parties have thus gained:

> *the right to translate, the right to make adaptations and arrangements of the work, the right to perform in public dramatic, dramatico-musical and musical works, the right to recite literary works in public, the right to communicate to the public the performance of such works, the right to broadcast (with exceptions), the right to make reproductions in any manner or form (with exceptions), the right to use the work as a basis for an audiovisual work, and the right to reproduce, distribute, perform in public or communicate to the public that audiovisual work.*[12]

Truth be told the Berne Convention with all its updates, while modern, was still not quite a snug fit for the 21st century – the digital age – that is why in 1996 World International Property Organization created the WIPO Copyright Treaty, which deals with copyright in the digital environment and functions in addition to and under the Berne Convention.

10 http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=278700
11 http://global.oup.com/booksites/content/9780198259466/15550015
12 http://www.wipo.int/treaties/en/ip/berne/summary_berne.html

Has the discussion about the copyright term been subdued? Not at all! One might carelessly think that with Berne Convention setting copyright term at author's lifetime plus 50 years, the discussion is finished, however a careful reader will notice that this is not true. 50 years after death is just bare minimum. Countries all over the world apply a wide variety of copyright terms ranging from 25 to 100 years after author's death. Many states and indeed some unions, e.g. the European Union, have decided on a longer-than-minimum copyright term. The European Union's internal debate on finding a compromise between 50 and 95 years settled in 2011 on 70 years after death of the author. So why are we still having these discussions about length?

Authors have unalienable moral copyright, the most important part being the right to demand to be recognized as an author for their work, however economic copyright in modern times is often sold over to corporations, which are basically immortal (and immoral) and are there to make cold hard cash. Walt Disney is a prime example often called upon and blamed for extending the term of copyright protection[13]. Under current copyright law copyright protection for *Mickey Mouse*, the brainchild of long-gone Walt Disney, will expire in 2023, so it still remains to be seen, if the The Walt Disney Company will again do (as it always has) something about their official mascot going into the public domain. Cowardly as if trying to avoid running into trouble a thought creeps onto the centre of the stage that is consciousness. There is something wrong with copyright!

During the time that copyright has been with us a legal concept the length of copyright has quadrupled from 28 years to approximately 120, but world population has risen tenfold. It is due time to reevaluate the Lockean proviso. In the 18th century courts found that perpetual copyright would infringe on the rights of other members of society and reaffirmed the principle that 28 years (less than a lifetime, but more than half of a lifetime at the time) is a good balance. It can be argued that because of this change today's society has 40 times

13 https://artlawjournal.com/mickey-mouse-keeps-changing-copyright-law/

less intellectual real estate to appropriate than 400 years ago. Appropriations of more and more intellectual real estate for longer and longer periods puts younger and younger people in less and less advantageous position. In the Western culture and indeed most capitalist economies this has of course happened with appropriation of the actual landmass too.

Derivative works pose a problem as well. While parody and caricature are legally allowed in many nations, copyright law is at times used as a reason to persecute political opponents or cultural rivals who have gathered the courage to appeal to the masses using these techniques.[14]

Even more has happened in the few past decades. Challenges that came and are still coming to light with the widespread adoption of computers, the internet, and cloud-based services have not been fully addressed in current pan-national global copyright law. Copyright regulations are not able to follow the ever-flowing fusion of cultures that internet has facilitated. Libraries for printed works, audio and video recordings are legal, but libraries for sharing software is not. Internet memes are illegal; and yet they are here to stay. We are encouraged to have a sharing economy of physical property, but not one of intellectual property. How did it come to this?

Traditionally the consumers of intellectual property were not part of the debates reforming copyright. All changes were usually initiated by the copyright holders arguing between themselves and carried out by the governing bodies. Today however the situation has positively evolved. We have numerous different movements fighting to reform or even abolish copyright.

The Pirate Party is perhaps the best known. It was first established in Sweden in 2006 to work on copyright and patent law reform[15] locally and has since expanded their policy focus and attracted the attention of people abroad who have formed their own independent parties with similar policy goals. Their

14 https://www.legalzoom.com/articles/2-live-crew-weird-al-yankovic-and-the-supreme-court-on-parody
15 https://pp-international.net/

largest political success to date is gaining 15% support and 10 seats in the national Icelandic parliamentary elections in 2016.

There are also some non-partisan non-governmental non-profit volunteer lobbyist organizations, like QuestionCopyright.org, whose mission is to provide advocacy and practical education to help cultural producers embrace open distribution.[16]

Finally it is also heart-warming to see that policy makers are embracing the support and differing views that the community can provide. Pan-European dialogue on Internet governance (EuroDIG) is an open platform for informal and inclusive discussions on public policy issues related to Internet Governance.[17] This year's EuroDIG meeting in Tallinn included a special track titled *Copyfighters – Youth for a modern copyright reform*, where the younger generation tried to arrive at suggestions for the future of copyright that would allow people to share cultural works and foster exchange of knowledge, while respecting the human rights of both creators and the general public.[18]

I, for one, believe that copyright reform is long time coming and welcome even the slightest change in the right direction. The great authors of the Classical Greece, Late Roman Republic, Middle Ages, the Renaissance were allowed to stand on the shoulders of giants and they did. Even though we do too, why mustn't we?

16 http://questioncopyright.org/about
17 https://www.eurodig.org/index.php?id=74
18 https://www.eurodig.org/index.php?id=716