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### Title

Copyright, Monopoly Games, and Pirates

### Permalink

<https://escholarship.org/uc/item/5m04z9nc>

### ISBN

9781138638891

### Author

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### Publication Date

2018-04-01

Peer reviewed

# Copyright, Monopoly Games, and Pirates

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Author's Original Manuscript for

**The Routledge Companion to Media Education, Copyright and Fair Use, Renee Hobbs, ed. Scheduled date of publication: March 2018.**

## ABSTRACT

Copyright creates a short or long-term monopoly, with exceptions for fair use. This law applies to a very large part of media content today; its origins and classic problems lie in the book trade of the 18<sup>th</sup> century. Over three centuries in the Anglo-American world copyright has resembled a game of Monopoly where the players have repeatedly made up the rules. Publishers, not authors, have had the largest measure of control because they have been better organized and better capitalized. Authors have topped publishers in self-righteousness, but this has not done them much good. In the first century of U.S. history, for instance, foreign authors were exploited by publishers with no apologies. Courts and Congresses have revised the rules, but on purpose made them flexible and puzzling. The “fair use” of other people’s work dates back to the early years of copyright, but exercising this right beyond a few well-understood practices continues to generate challenging cases for courts. From the world of the flat-bed press to that of networked digital platforms, the only constant may be so-called “piracy” that set limits on the control of content and the power of information providers.

Keywords: *copyright, history, printing, digital, piracy*

Early in the 21<sup>st</sup> century, the novelist David Foster Wallace began a college commencement address with a joke:

There are these two young fish swimming along and they happen to meet an older fish swimming the other way, who nods at them and says ‘Morning, boys. How’s the water?’ And the two young fish swim on for a bit, and then eventually one of them looks over at the other and goes ‘What the hell is water?’

Copyright in this century makes us all young fish. We may not be aware that the texts we read, the recorded music we hear, the videos we see, are all wet with claims of copyright. Indeed, if these creative works were produced in our lifetimes, the claims that they are in copyright are likely valid. By the exception of fair use, copyright law allows us to borrow Wallace’s words on fish and to do many other things with our cultural heritage. Fair use, however, is tricky for both newcomers and veterans in the field of intellectual property. How did we end up in the murky pool of copyright? This is most easily seen if we begin with printed books, the media that started the argument and gave us the law. Arguments over “pirates” first took shape when authors such as Benjamin Franklin and Daniel Defoe were publishing. Their concept of “piracy” resembles are own, but we have expanded it in a digital age.

### **London Publishers and Pirates**

Had you visited London taverns during the testing time for the first copyright law, the *Statute of Anne* (1710), you would have heard much talk about “piracy.” This was not simply because convicted pirates from the high seas were being hung along the Thames

river nearby. “Piracy” had somehow been stretched from its traditional use for murderous thieves to a popular epithet for people who borrowed words or illustrations. “Pirate” was the ready insult for rivals by people who held a monopoly. If you wish to be the one to hold tight to what you create with copyright, the term will come easily to your lips. What turned this sharing of texts into an over-heated argument? Why couldn’t people agree (as we often do today with fair use in American law) on what was fair?

Investigators are often told to “follow the money” and it is hard to picture pirates at work where there are no treasures. But in the formative years of copyright, fortunes from publishing books were not at stake. In all formats and subject areas, publishers used flat-bed presses that required only modest investments and no upgrades. People who produced books did other types of printing as well and sold assorted goods in their small shops. Often, book publishers did not need authors as part of their diversified business. A newspaper or single sheet of paper (broadside) might simply contain government proclamations, shipping reports, or advertisements. Writers were not a drain on the publisher’s bottom line. Terry Belanger, a librarian at Columbia University, concluded after long study that “the most common form of payment between publisher and writer in the eighteenth century was no payment at all” (Rivers 1982: 21). Money did matter in building a foundation for copyright, but not as much as assertions of status and honor.

The seminal idea of intellectual property and the notion that it could be misused and branded as piracy took shape among people who witnessed the decline of royal authority and the growing role of the citizen. In his epic history of piracy in the realm of intellectual property, Adrian Johns, a historian at the University of Chicago, points out

that while the root word for this thievery was ancient, the epithet for writings was new in literary circles. Neither Classical authors nor the Elizabethans, used “piracy” to complain of the people who reprinted or otherwise misused what they created. “Piracy” was not a figure of speech that was applied to literature by William Shakespeare, John Milton, Sir Isaac Newton or the other people we now associate with a century of genius. “Piracy” as a term for stealing words or pictures came when citizens themselves became more important in a public sphere shaped by authors. Johns finds that “precisely when authorship took on a mantle of public authority, through the crafts of the printed book, its violation came to be seen as a paramount transgression” (Johns 2009: 19).

Paramount and personal, for authors denouncing the use of their words by other people did not see this as a mere slight or a cost of doing business. Daniel Defoe, the prolific author who gave us the novel *Robinson Crusoe*, denounced “Press-piracy” early in the 18<sup>th</sup> century, making even such acts as the abridgement of authors’ writings “every jot as unjust as lying with their Wives, and breaking-up their Houses.” Defoe’s rage was not persuasive. The case of *Gyles v Wilcox* (1740) would open the door to such abridgments in Anglo-American law.

### **Rights Talk Breaks Out**

Defoe believe that he had a moral right to control his writings, a conviction that was to grow in the legal tradition of continental Europe, but not in the Anglo-American world. Where books appeared in English, an author or artist who believed they had “rights” of any type to anything they created at the dawn of the 18<sup>th</sup> century was a dreamer. Since the arrival of printing in Great Britain in Gutenberg’s day, the Crown or

Parliament had sought to license who could publish and what they could publish, often keeping “rights” out of the reach of creators. The state also acted to control publications coming into the kingdom, so the rights of foreign authors were beside the point. In some cases, “letters patent” and related grants were issued in Britain, giving an individual the exclusive right to print a work and to profit from it. But this cherished monopoly was losing favor by 1700.

Authors could not yet reasonably expect to earn a living by their pen, but their ideas of entitlement were growing. Less was now said about the humble role of writers in continuing a cultural tradition or being the simple agent to pass on truths of divine origins. Religious orders, the keepers of literacy for generations before the coming of copyright, had seen their role this way. In language that would have been presumptive earlier, authors of the 18<sup>th</sup> century spoke of their works as the spark of genius given to them by their creator, as a child that they begot and cherished, and as real property, like an estate. Authors looked to the law to legitimize these deeply felt ideas. We should not look down on them for seeing things this way. With candor, a writer or artist of the 21<sup>st</sup> century will feel the same attraction to what they create. But the compelling metaphors are blinding when used to make laws. If creative work marks you as a carrier of divine wisdom, how can it be right to keep this away from others? If a work you have produced is like your child, as Defoe swore it was, why do you think you should be able to sell it? If copyright represents real property, why is it wrong to tax it each year as your home is taxed? The emotionally rich arguments for copyright can as easily be used to make copyright seem odious.

## Copyright in the Eyes of Publishers

It was not the authors who set up a working copyright order, it was their publishers. London's venerable Stationers' Company was, by habit, ready to suppress works assailing the government, but its passion was to see that its own members did not poach on the work of another bookseller. The core of this group was booksellers who fit the modern term, "publishers." Stationers' Hall, near St. Paul's Cathedral, kept a registry that became a foundation of Britain's new copyright regime. Turn a page of the Stationers' Company Register, showing who had published earlier and on what topic, and an argument about piracy could begin. Britain's first copyright law, the *Statue of Anne* (1710), supplemented the Register and set down the reference points for disputes about intellectual property that we have today.

The term "copyright" had grown out of the guild's authority over what could be in print, that is: *copied* legitimately. When the legislation that perpetuated this authority lapsed in 1695, the guild needed a new rationale to maintain its near-monopoly. Booksellers devised the argument, rarely heard earlier, that it was the author who enjoyed copyright, knowing that members of the Stationers' Company, not scribblers, would have the power to exercise this enticing property right. The strong claimed to be pleading the cause of the weak. But the strong, rather than the weak, were the beneficiaries of the *Statue of Anne*, the world's first copyright law.

Few authors of this era ever got their hands on a copyright, their own or anyone else's. There was a robust market for such rights, but in practice it excluded nearly everyone in the kingdom, save London booksellers. They numbered fewer than a hundred and had agile, smaller groups to advance their control of the book trade.



London booksellers used a term for their operations that suggested, today and at the time, a conspiracy: the *conger*. The men (and a few women) in the various congers were obsessed with “pirates” as they understood this word: (a) someone inside their circle who, without clearance, issued a title that was owned by a fellow guild member; and (b) anyone outside London who printed a title without guild permission. The booksellers thought these rights should never lapse; they grumbled and took the 28 years of control of publications that was common for titles after the *Statue of Anne*.

With the assistance of “a Good dinner and a Glass of Wine,” these entrepreneurs met often to reinforce their faith that, by the common law that was far older than the *Statue of Anne*, they controlled exclusive rights to their “stock” of Shakespeare, Milton and other classic writers. Equally important, they traded shares in the copyrights they held of the new, as yet unproven authors. Booksellers claimed perpetual rights to these as well. Their business plan was what economists later called an oligopoly. Rights were distributed and passed on through families. Emerging from the tavern, a bookseller might be the owner of as little as 1/150<sup>th</sup> of a title and file this with paper that showed fractional ownership of dozens of titles they had inherited or purchased. The enduring books of this era, from *Robinson Crusoe* to *Gulliver’s Travels*, owed as much to deals in taverns as to any muse. And they were published at a time when it was certain that they would be pirated, as we shall soon see.

Though the *Statue of Anne* had seemed to settle the point that rights had time limits, booksellers worked the courts for six decades to create what scholars call an “impenetrable fog” (Spoo 2013: 93). Copyright holders harassed and bribed people who took them to court. They petitioned Parliament for exceptions and found sympathetic

judges to conjure up a common law tradition making rights perpetual. The House of Lords finally threw out this specious feature of British law in *Donaldson v Becket* (1774), but the underlying disagreements and opaque language in copyright battles persisted in Anglo-American law. U. S. Supreme Court Justice Joseph Story famously called intellectual property “nearer than any other class of cases belonging to forensic discussions to what may be called the metaphysics of the law where the distinctions are or at least may be very subtle and refined, and sometimes, almost evanescent” (Rose 1993: 141).

We should not assign selfish motives too readily to the bookseller-publishers who pushed for copyright protection. Cooperation and coordination were necessary to make a living in their trade. In their small shops, the printing of long works, even the storage of pages ready for bindings, had to be distributed. Competition was not healthy for them. This was a devoted community; they married into one another’s families and kept bloodlines running through elected positions in Stationers’ Hall for two and a half centuries. Some kept an eye on eternity. One bookseller of the 1720s died with the wish that he be buried next to a fellow bookseller. For everyday, the fractional transactions of rights were similar to what shippers did, dividing cargo and personalized it in order to maximize recovery. Booksellers spread risk and reward by having an interest in many titles. Book pirates, they found, were best deterred by a swarm of interested parties who could blacken their name and harry them in court. For extra measure, Londoners who owned book copyrights frequently controlled newspapers.

Booksellers followed only the laws they found agreeable and gamed authorities and authors at every opportunity. For example, in order to protect their copyrights,

booksellers were supposed to deposit copies in certain libraries. When this tradition was enshrined in the *Statue of Anne*, booksellers ignored it or cheated on deposits.

### **So-called Pirates and Real Markets**

Even if the Stationers' Company had been sincere in offering authors control over the books they wrote, their pious wish would have come to little. Saleable titles that came from London presses were reproduced as it suited ink-stained pirates across the British Isles, in colonies, and in continental Europe. This was commonly done without permission or compensation, sometimes without any recognition for authors. Publishing in the English language was already "monopoly tempered by piracy" (Baldwin 2014: 131).

London printers strove to maintain their monopoly. But they were surrounded by publishers who did not follow their rules. Pirate publishing centers lay North, South, East and West-- from Glasgow, Edinburgh, and Dublin (unrivaled for English language books in the 18<sup>th</sup> century) to Amsterdam as well as to German-speaking principalities. Switzerland was most honored (and denounced) for the way it sustained the "piratical Enlightenment," that is, printers willing to produce and circulate works banned by the state or titles asking for such trouble. (It was the circulation of the book across borders that triggered alarm, not the simple act of copying the work.) The foreign publishers could rush writing into print, sometimes with ideas that authors could not get printed under the Old Regime, with proceeds that the author or original publisher would normally not get. Pirates did not wait until a book was issued, bound or unbound. Journeymen printers were bribed so that the sheets meant for the press were in pirate hands before the

entire work had been set in type. Books from this underground might not be of equal quality as the original. Sometimes they were better, incorporating elements that the original lacked. But they were always cheaper: a third to a half of what the London publishers charged (Mason 2004: 385-56).

Printing pirates spread popular reading in the same way that sea-faring pirates were good for local trade. (Getting goods from a pirate was the rough equivalent of getting goods “that fell off a truck” in modern times.) Economic historians have found that a great deal of the trade that enabled European empires to grow went on in such shadowy ways (Chet 2014). The glories of English literature, books destined to form a much honored canon, rest on the same raffish foundation.

Both in the United Kingdom and the United States, setting limits on, or even ignoring, copyright put a vast new literature in the hands of ordinary people. This happened not simply because a cheaper edition of a work became available, but also because what we today call a mash-up became possible. London booksellers had feared abridgments and anthologies for they undercut revenue from the title they monopolized and forced them to share revenue because, by their lights, everything was owned by a fellow bookseller. This was true of works that we take for granted in the public domain (and so available for anyone to print): *Pilgrim’s Progress*, *Romeo and Juliet*, and *Paradise Lost*. Opportunities for readers changed quickly at the end of the 18<sup>th</sup> century when, for example, booksellers who thought they had exclusive rights to *Aesop’s Fables*, realized they did not. Like the printers or editors who threw works together, hawkers of these varied imprints were encouraging a mash-up culture that took off as literacy rates rose. Readers were binding up shorter works for personal use, to be shared by family

members. Crucially, women and men without property, some in the humblest stations of society, joined the circle of readers, making the culture more democratic.

### **American Copyright, American Piracy**

Book pirates were fledglings in North America. Few titles that came from the colonial press were more than pamphlet size. But printers had dreams of matching the publishing pirate nests in the old world. Print piracy (or at least deception) was present at the creation of the American press. The weekly banner, “Published by Authority” on a colonial newspaper was a false flag since such designations were informal at best, no colonial government vouched for a paper. Bibliophiles have long noticed that the first Bible published in the colonies falsely claimed to be published in London, a deceptive trade practice of Yankee printers in the 18<sup>th</sup> century. Printer Benjamin Franklin capitalized on the popular novel *Pamela* from London, the copyright arrangements hard to determine, and Franklin may have published a pirated New Testament, contrary to a royal patent on the holy book. Detective work is difficult because Franklin scholars believe that he may well have used a fictional London imprint (Green and Stallybrass, 2006). James Rivington, a bookselling son of the man who held copyright, appropriately, for the first edition of the well-received *General History of the Pyrates* (1724), became notorious by pirating works owned within his own family and by sneaking pirated imprints into New York. At this safe distance from the London trade, he stumbled into more trouble as a controversial newspaper publisher.

Journalism itself was antithetical to calls that the public sphere be organized around copyright. Authors could not hold copyright in the early republic when their

works were first published in newspapers and journals. A writer's name could not be easily detected in the columns of a newspaper. By-lines were not used. Pseudonyms marked the most significant contributions, such as the widely reprinted Federalist Papers that came (without payment) from luminaries of the Revolutionary generation. What would be called plagiarism in later times was the mainstay of the early press. Columns and news articles were clipped by editors from the out-of-town papers they were first to see in the mails (many editors being postmasters). Then this text was reprinted in their paper. This borrowing was subsidized by the postal service, papers in "exchanges" requiring no postage as they circulated among editors who were hungry for copy. News was treated as a common good, the property of no one individual. Readers in the 19<sup>th</sup> century would have been astonished to see news spread any other way.

Printers who had trained as book pirates in Dublin before coming to America, such as Robert Bell and Mathew Carey, earned glory through the Revolution and beyond by publishing reprints. They were, proudly, pirates (as London colleagues defined that term). Bell, more the revolutionary in politics than Carey, looked the part, conducting business with a boisterous voice and with "a beer in one hand and a book in another" (Everton 2011: 57). Even prim and proper authors, who insisted that copyright be extended, had piratical habits. Noah Webster gave instruction on proper English spelling and writing while swiping what others had published on the subjects without acknowledgment.

This Yankee business model prompted London booksellers to develop trans-Atlantic trade practices that resembled those of storybook pirates: sail fast boats to capture a prize, in this case payments from American publishers for the earliest possible

page proofs of the new works. The American crew would then pirate, or “reprint” --the courteous phrase. The payment to the fast shipper compensated somewhat for the royalties that would never arrive. In 1823 Carey’s publishing house in Philadelphia bragged of having the “Game completely in our hands” to Sir Water Scott’s publisher. The boat carrying the great writer’s new book had won the race. “We shall have complete and entire possession of every market in the Country for a short time,” (Spoo 2013: 50) the Yankees crowed. This was a victory over “Pirates,” Carey asked the Scot to believe.

The new nation had only the flimsiest of shields for an author’s intellectual property, imaginary in the case of foreign authors and not as sturdy as it looked in the case of writers living in the new republic. The United States copyright law of 1790 (and its revisions in 1831 and in 1870) only applied to authors within the country. Charles Dickens, the most popular novelist of his day, declared himself to be “the greatest loser . . . alive.” He was probably wrong: because his works were pirated so swiftly and cheaply that he was universally known in America and his lecture fees earned him a fortune here.

Few Americans celebrated the copyright protection offered by the new nation and remarkable few authors even used it. Not more than 4% of works by American authors were copyrighted in the first decade of the law and less than 1% of these titles were renewed for another 14-year term (McGill: 199, 590 n. 44). Measures beyond copyright law to aid the book culture fell into the category of gestures. Most were ineffective, some were menacing. There was much talk about proper publishing ethics. But meetings in the new republic to discourage reprinting books without compensation whet the appetites for such piracy.

Elaborate “courtesies of the trade” among publishers were crafted to tame the marketplace. These were partly a response to the wailing from authors, both foreign and domestic. Some writers believed that the office of a leading publisher in New York was graced by a picture of an author’s skull and the early death of scribblers was part of their business plan. The side payments to British authors were part of the effort to sweeten the air with a show of justice. The discouraging of new “pirates” who would legally print a cheap edition and hurt your publishing house’s more expensive one was done this way: knock your price down to bring ruin to the new comer. American publishers dreamed of tariffs on the import of any book already published in the new country, lest the American imprint be undersold. Emulating the Stationers’ Company in the old country, American publishers vowed not to reprint what a domestic publisher had already issued. In practice they often did.

Some of the methods used by these publishers are part of our plain speech today, such as payoffs and informal understandings not to bid against one another for author’s work. Other practices resemble the technical terms used by economists such as “first-mover advantage” where an early producer dominates a market and “predatory pricing” or publishing at a loss for a short time so that competitors will flee. Other methods in the early book trade anticipate controversial features of modern business law such as non-compete agreements that prevent skilled people from leaving one firm and working at another.

American book publishers skirted piracy (they insisted) and drew a sword when needed.

Looking back, as international copyright enforcement arrived in the U.S. at the end of the 19<sup>th</sup> century, publishers took credit for giving “our young literature a chance to



grow without the blighting shadow of unnatural competition.” Legal historians have put this in the best light possible: “American copyright law made pirates of honest men, so they banded together to act honorably according to voluntary norms of fairness that took the place of law” (Spoo 2013: 42,46).

### **Self-Interest & Over-Reach**

No copyright regimen, however clearly written, can still the impulse to seek monopoly rights without limits. The London booksellers exemplified this after the *Statute of Anne*, insisting that authors swear in a contract that they were surrendering the exclusive right to publish “for ever, notwithstanding any Act or Law to the Contrary” (Mason 2008: 94). In the 18<sup>th</sup> century, only revolutionaries and pirates spoke so defiantly about authority. In a Monopoly game, the equivalent action would be to throw the rules away and tell other players to leave. A culture of over-reach runs deeply through our centuries of argument over intellectual property.

The United States in the 19<sup>th</sup> century, like China in the 21<sup>st</sup> century, became far more protective of the rights of creators when they had exhausted the benefits of piracy and needed to protect the economic interest of their own media. To the cheers of American authors and publishers who sought revenue from abroad, Mark Twain for example, this country began to accept and enforce foreign copyright in the 1890s.

The game of Monopoly did not stop. In the hands of Congress, the duration of copyright protection went in only one direction: up. Fourteen years with a further extension of another fourteen years for a living author was adopted in the first U.S. Copyright Law of 1790, the same standard set eighty years earlier in the *Statute of Anne*. Congress lengthened the protection to 28 years with a possible 14-year extension in 1831;

it legislated a 28 plus 28-year standard in 1908. A revision of the law in 1976 extended the term of protection to the life of the author plus 50 years. The Sonny Bono Copyright Term Extension Act of 1998 gave the author another 70 years of protection beyond the grave. No book published after 1923 in the United States automatically enters the public domain until 2019.

Had copyright rules of today been in place a century ago, some of the most creative minds in American culture would have been stymied by law suits. The Walt Disney organization would not have been able to so easily tap the stories for children that had circulated in the Victorian world. As the *Economist* magazine observed about the business plan of this media giant, “Disney’s enthusiasm for fierce enforcement of intellectual-property laws, and the seemingly perpetual extension of copyright laws, (is) somewhat ironic” (*Economist* 2015). What was true for early media giants was true for singular artists exploring new ground early in the past century. Ernest Hemingway would have been wise to have a lawyer to advise him about reading the manuscript of F. Scott Fitzgerald’s *The Great Gatsby* in order to produce his own, *The Sun Also Rises*. Modernists such as T. S. Elliott and Marianne Moore, with their habits of appropriating many words, published and unpublished, from other writers, would have been told it was unwise to write poetry in this way.

The second half of the 20<sup>th</sup> century was a frolic for copyright maximalists. Congress in these decades freed all creators of original works fixed in a format from the requirements to register with the government or mark “copyright” on the work they produced. This forgiveness of formalities extends back to 1923. Reproducing major

parts of any commercial book published since that time, without the permission of the holder of its copyright, can prompt calls of piracy.

The arrival of new platforms and formats for storytelling and education complicated this picture. The rise of corporate publications where an author's work was "for hire" also made copyright a tangle. But the outcome of all of the legislation and court actions was clear: works published before 1923 in the United States were public domain, open for anyone to use as they pleased. Works published through commercial channels after 1923 (or post 1923 and not published) had to be used with great caution by readers who wished to share substantial parts of them to enlighten their fellow citizens or to create new works.

The fair use of copyrighted materials without permission or payment in the United States is always limited and must be for the good of society as a whole. We see this right exercised every day in, for example, the quotations that ordinary citizens and news organizations make in order to comment on current events or in academic courses that show students how knowledge in a field has grown. The limited right requires a persuasive case that four factors have been weighed and that, on-balance, the circumstances dictate the use.

Section 107 of the U. S. Copyright Act of 1976 bridged court decisions going back many decades. What emerged was not so much a picture of fair use as a guide on how to think about the concept. A successful claim of the fair use privilege will have carefully considered four factors:

- **Use:** An educational or non-profit purpose is helpful, but not determining.

Similarly, the transformational nature of the text being appropriated is common for

fair use, but not essential. Use of works for criticism and commentary advance a key objective of fair use. But to supersede and to provide a substitute for the original has long been held not to be fair use, “such a use will be deemed in law a piracy.” (*Folsom v. Marsh*, 1841)

- **Nature:** Works of the imagination in the arts are less likely to pass muster for fair use than non-fiction. Works that are in print and available in the market are given more protection than works that have no commercial pulse.
- **Amount:** short excerpts, such as a quotation, gain more protection than more extensive borrowings from a work in copyright.
- **Market Effect:** if reproduction truly harms the author or publisher in revenue, courts have been sympathetic to these rights holders.

On purpose, this untidy way of reaching a decision avoids inflexible or even enumerated “rules.” Courts, Congress, and many creators believe that this serves justice and social progress in the long run. In the case of authors whose works are used, the fair use of earlier work under copyright may be what they themselves will need to tell a story or to educate. In print especially, what comes around, goes around.

This was true in the age of quill pens and typewriters, it is even more true as we consume and produce information in digital formats over networks.

### **Google, Search Engines and Fair Use**

Search engines of the 21<sup>st</sup> century, especially Google, inherited the onus of being “pirates.” The term was spoken as carelessly and with as much self-interest as the booksellers used the term in 18<sup>th</sup> taverns. Witness the top manager of the world’s fourth largest media company letting loose in 2015. On the announcement that Google had a

new corporate name, Alphabet Inc., Robert Thomson of News Corp said the re-branding was apt, as in the alphabet game, “P” -- for pirate (Markson 2015). Thomson had run the *Wall Street Journal*, an impossible feat without the privilege of fair use in reporting and the permission granted Google’s search engine to crawl News Corp’s web sites in order to gain public attention.

One flash point in the copyright wars of the 21<sup>st</sup> century occurred in the quietest place that most people can imagine: the library stacks where old books collect dust. No individual institution had the resources to digitize these legacy collections. Search engines did, and Google took the lead.

A series of projects led by Google began in 2005 and in a decade, transformed more than 25 million titles into digital texts. Non-profits, such as the Internet Archive (IA), the Digital Public Library of America (DPLA) and HathiTrust (where most university and other research libraries have placed digital copies of their holdings) were important in this revolution, but it was a company capitalized at more than \$400 billion (then called Google) that was key in transforming books into online treasures.

Some publishers (many of them European) and some authors (many of them American) were alarmed and brought repeated legal actions against Google and against the libraries that furnished these old books. Google and its academic partners set out to make digital copies of every book not too fragile to be scanned, but to provide “snippets” only of books that might be in copyright so that people seeking information could find out if the volume interested them. Google said it expected these users to go to libraries to borrow the works or to purchase the volume when it could be found for sale. The Authors Guild filed a class action suit that went to the root of the enterprise: no mass

digitization without permission and agreement first. An electronic corpus of books was a danger in itself, the Authors Guild argued, since content could fall into the hands of people who would commercially exploit it with the publisher and author receiving no fair payment. Indexing books (as Google described its activity) must stop until there was such an agreement.

Google reached an accommodation with the Authors Guild in 2011 by offering compensation, but this was rejected by federal Judge Denny Chin on the grounds that this one organization could not speak for all authors and that no private groups could usurp the role of Congress in setting copyright law. Fair use was at the center of further actions from the Authors Guild in federal courts. After a decade of this dust-up, the Google project was held to be protected by fair use in a unanimous ruling of the US Court of Appeals for the Second Circuit in *Author's Guild v. Google* (2015).

Where has this left the reader? There are more than a hundred institutions in North America that offer rich primary sources on 20<sup>th</sup>-century America, bound by U. S. copyright law that make these riches “orphaned.” That is, the rights holders to these materials cannot be easily determined. These libraries hold thousands of published books from the mid-20<sup>th</sup> century whose copyright status is uncertain. In primary source materials held in archives, orphans are the norm. At the Bancroft Library at the University of California, Berkeley, for example, the whereabouts and/or copyright ownership of more than half of the correspondents in its 6,000 manuscript collections is unknown. For students of conservative movements behind the rise of California Governor Ronald Reagan, or for those interested in advocacy by Latino and African-American groups at the same time, it is very difficult to determine what words can be quoted at

length and what pictures can be reproduced. No one can share discoveries of a picture or map or speech made in much of the 20<sup>th</sup> century without placing themselves at risk. A risk they would not face if they stuck to the 19<sup>th</sup> century. For most of the 20<sup>th</sup> century, copyright owners, as well as people who simply assert this right, can come forward and demand unknown, and possibly exorbitant, amounts of compensation. This is a problem that can only be solved by Congress.

### **Fresh Approaches to Copyright**

While “copyright wars” have no foreseeable end, accommodations in many subject areas are in view in North America. Thoughtful and practical work has been done in recent years to see that authors and publishers who want to share work with a larger circle of readers can do this without copyright mishaps.

This has been the work of many hands. The Association of Research Libraries (ARL) and like-minded archival groups, authors, editors, and foundations have suggested ways to break free of seemingly perpetual copyright restrictions. New organizations, of the 21<sup>st</sup> century such as Creative Commons (2001-- ) and the Authors Alliance (2014-- ), have gained considerable support in organizing authors who recognized that some of their work is best placed in the public domain when it is published, subject to conditions the authors can set.

Academic and research libraries have many more battles to fight in order to see that information is not simply put behind a high pay wall, priced out of the reach of the general public. This goal is disruptive to some extent, but it is also why public libraries were created in the first place. “Free to All” was inscribed on the portal to the Boston

Public Library when it opened in 1895 and this spirit animated the more than 1,700 libraries of smaller scope that the philanthropist Andrew Carnegie helped to build across North America in this era. Libraries then had a near monopoly on searches for information. The Internet has changed that. Insuring that access remains free, consistent with authors' rights, is the most compelling challenge for libraries today. "Open Access" is as worthy as "Free to All."

Some publishers have embraced this model for scholarly books. The University of California Press, for example has launched Luminos, an open access publishing platform for scholarly monographs. "Rights reversion" (from the publisher to the author) can benefit publishers as well, freeing them of bookkeeping and warehousing while strengthening their relationship with authors whose future work they want to publish. Failing copyright reform from Congress, these less formal approaches will multiply. Sharing our heritage of printed books and newer forms of media is too important to rest solely in the hands of courts or legislatures.

Daniel Defoe's conviction that the author has an inalienable moral right to control what they create lives on in the 21st century. European countries have a long tradition of valuing "authors rights" above access and use by readers. Many contemporary authors in both North American and abroad believe that information companies prosper at their expense, Google's or Amazon's rise being the most galling. "If authors keep being expropriated by peer-to-peer file-sharing networks and seeing their works digitally mashed-up beyond recognition," the *Economist* observed, they will fight for their moral right once again (2014). Monopoly (aka copyright) is an honorable game when it actually helps to sustain authors and publishers and takes media users fully into account; it is a



waste of time and a disservice to everyone when it is a perpetual board game with each player unable to move. This is what framers of copyright in the Anglo-American 18<sup>th</sup> century knew, and what the 21<sup>st</sup> century risks forgetting.

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