

# Copyright in the networked world

## Why a copyright column?

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### Keywords

Academic libraries, Copyright, Electronic publishing, Information services

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### Abstract

Copyright is integral to everything we do in digital publishing. This new column will examine a wide range of intellectual property issues using concrete examples from current projects. Since Internet-based publishing is automatically international, the column will look at the British, European and other aspects, as well as US law. This first column deals with the question of whether a set of 1960s era Black Panther Party pamphlets are in the public domain under US copyright law. It also mentions the moral rights issues that would arise in a German context. The final section of the column reviews some of the information sources useful in answering questions of this sort.

### About the column

Why a copyright column in a journal devoted to library technology? I would have been the one asking that question a year or so ago. Then I started working on digital publishing, and discovered the wide range of intellectual property issues any form of publishing involves. At first it seemed to me that the issues were probably as straightforward as "Is this work protected?" and the answers as simple as "yes" or "no." They aren't. In fact, the copyright issues can be as new and complex as the computing code we use to do some of the things which may (or may not) cause copyright violations in the modern world of networked information.

Why the complications? Undoubtedly there are attorneys who make their money from cultivating quirks in copyright litigation. But the more interesting and important reason is the newness of the situations. Contemporary uses of information technology have outpaced the meanings of the words in the statute books. We are, in effect, living in a virtual frontier where the basic rules of behavior embodied in the law sometimes have a disagreeable odor of foreign importation because they seem written for another society in another world.

There are two ways to respond to these complications. One is the true frontiersman approach: hide in the hills and hope the sheriff never comes near your territory. The other is to learn enough about the law to know how to get the most out of it and how to help shape it. The American Library Association and library groups in other countries have lobbied actively on behalf of library-friendly copyright laws. Their efforts are important, but so are the day-to-day actions which establish the common practice and shared interpretations which the law comes to embody. This column is not for frontiersmen (or women). Its goal is to make readers aware of copyright law and important issues surrounding it.

This column is not, however, legal advice. I am not a lawyer. I lack any semblance of legal training. If you want legal advice about a copyright problem, there is no substitute for paying a good lawyer to look at it in detail. What this column provides is information and analysis. It will do so by looking at specific cases such as the one below involving Black Panther Party

publications on the Web, rather than by a more general overview of topics like the meaning of “fair use” or the implications of the new US Digital Millennium Copyright Act. Others have done those general overviews better than I ever can, and I will point to them. The really interesting questions for us as librarians come in the details of how the law affects the things we want to do.

Where will the examples come from? I certainly encounter plenty of challenging examples in my own work as Digital Services and Copyright librarian at Michigan State University (MSU). But I particularly welcome cases, questions, problems from others. Rest assured that if I think a case involves an illegal practice, I will tell you about it up front and not use it without your permission. Remember that, although this is not legal advice, it is an opportunity for public discussion of issues that matter to you and your projects. Whenever possible, I will also try to get some real experts to comment.

This column is definitely not for US issues only. Copyright in a networked world automatically has international aspects. Even the old rule of thumb about applying the copyright law of the country-of-use (Saunders, 1992, p. 18) has its fuzzy aspects when server and client are on different sides of a border or an ocean. The thrust of new copyright legislation through much of this century has been to bring greater harmony and consistency to the laws of states belonging to certain key treaty partnerships, such as the Universal Copyright Convention of 1952 or the current World Intellectual Property Organization. Nonetheless, differences remain. The gap between the Anglo-American tradition, which treats copyrights as purely economic, and European law, with its strong emphasis on inalienable “moral” rights (including the right to withdraw a work from public use), remains surprisingly large.

### **The Black Panther Party pamphlets**

The Black Panther Party (BPP) pamphlets and several similar ones come from the Radicalism Collection in Special Collections at MSU. Students in American Thought and Language (the basic freshman writing course) have long used them as source material for their term papers. They found reading them inconvenient,

however, because Special Collections’ limited hours did not coincide with the prime nocturnal paper-writing times of the average freshman. The number of hands touching them also hurt the original pamphlets. Preservation photocopying (allowed under 17 USC 108) took care of the latter problem, but not the former.

Detail is important in copyright cases, and a physical description of the pamphlets is relevant here. All were short, often only a couple of pages long, and they were either typed and duplicated or, when printed, done with the distinctive variability of an amateur press. Original distribution in some cases probably took place entirely by hand. A few items had prices on them, but mainly they appear to have been given away, not sold. After all, they were propaganda for the Black Panther Party. The goal was to get people to take them, not to reap profits from the sales. None had a copyright symbol or the words copyright and a date. In fact, many had no indication at all about the date of publication. Several had photographs or drawings. None had ISBN or ISSN numbers – they were not the kind of publication likely ever to have appeared in Books in Print.

One obvious solution to making these materials more available was to scan them and mount them on the Web in digital form. And that in turn led to a series of copyright questions. Mary Brandt Jensen suggests in her project-oriented primer that the first step in any copyright determination should be to find out whether the works are protected or not (Jensen, 1996, p. 4).

One common rule of thumb before President Clinton signed the US Copyright Extension Act in October 1998 was to check whether a work was more than 75 years old. Seventy-five years represented the magic moving threshold which Congress established for works copyrighted under the 1909 law. (The new law changes the coverage for pre-1978 works to 95 years, but is generally thought not to affect works which have already fallen into the public domain, which effectively freezes the cutoff for the next 20 years at works published before 1923.)

The pamphlets failed this test. The Black Panthers were a 1960s phenomenon. Most had not even been born in 1923. In fact we know either from information in the pamphlets or from information about their provenance that they came from the late 1960s. Under today’s

laws for post-1978 works, BPP co-founder Huey Newton's pamphlets would have copyright protection until 2059 (70 years after his death in 1989), and those by former BPP Minister of Information Eldridge Cleaver would have protection until at least 2070 (since he is still alive) (Burroughs and Vassell, 1997). This is because the current rule is the life of the author, plus 70 years. Anonymous pamphlets would be protected until at least 2060 (95 years after publication).

If this test was the only one relevant to the pamphlets, scanning Cleaver's "Credo for Rioters and Looters" [1969] and mounting it on the Web would be legal only with his permission. Scanning and mounting Newton's "Essays from the Minister of Defense" (20 June 1967) would be legal only with the permission of his heirs, assuming they could be found. And anonymous pamphlets like "Message to the Black Movement" would present an even greater challenge, because getting permission would require finding out whether any successor to the Black Panther Party exists. If this seems complicated, it is in fact simpler than the situation could be under, say, German law (Part I, Chapter V, Section 42), where, for example, Cleaver could decide that he no longer agreed with his "Credo for Rioters and Looters" and withdraw it, even if he had assigned the economic rights to some third party who would happily allow scanning and mounting on the Web (*German Industrial Property*, 1989, p. 157).

The current US law dates from 1976 and went into effect in 1978. That matters because it means that these pamphlets were written under the old 1909 copyright law, which had somewhat different rules. While Congress debated the new law, as it did over quite a number of sessions, it was careful to provide automatic extensions for works already in copyright – in effect, grandfathering them into the new system. Congress did not, however, retroactively change the status of works which fell into the public domain.

Under the 1909 law, works published in the USA had to contain a notice of copyright, either in the form of the word "copyright" and a date, or the abbreviation "copr." or the symbol ©. It also required registration with the copyright office and the deposit of two copies with the Library of Congress. The 1976 law relaxed, and

subsequent amendments have eliminated, these requirements. But under the law that was in effect when the Black Panther pamphlets were written, any work published without notification of copyright went immediately into the public domain.

This is where the description of the pamphlets matters. The pamphlets had no obvious notice of copyright. Since this clearly mattered, the procedural issue of where and how carefully to check became important, because a reasonable case could be made that pamphlets published in the 1960s without proper notice had fallen immediately into the public domain and were thus fair game for mounting on the Web. The question of "where" came up because pamphlets have no standardized location for the copyright notice, since they usually have no title page or mostly blank verso of the title page to put the notice on. It could be almost anywhere, which raised the subsequent problem of how carefully to look. It is very easy not to see something one expects not to find, and after a few pamphlets we became convinced that the Panthers had never bothered with copyright, because, after all, they were a revolutionary organization. Subsequent examination by less prejudiced eyes found less consistency. A good faith effort to find notice may be a mitigating factor in a court, but it would not mean any less of a violation of the law.

Words in the law can have particular meanings, and the definition of the word "published" matters in this case because under the 1909 law a work which was not published came under either state or common law copyright protection, and common law protection was generally unlimited. In other words, the loophole which might have put the pamphlets into the public domain for lack of copyright notice could close suddenly if an argument could be made that the informal way in which the Panthers disseminated this pamphlet did not constitute "publication" within the meaning of the law. An argument against their being published might be that the distribution system really just gave them to a small number of like-minded people, mainly from within the Party, and that such very limited, free distribution more resembled an author passing out drafts to friends than the widespread access associated with commercial publication and sale through bookstores.

Fortunately the 1976 law provides a relatively clear definition of publication:

“Publication” is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication (17 USC 101).

In this definition, what is important is not the number distributed, but that the pamphlets were offered to any member of the “public” who would take them. The Panthers clearly wanted them disseminated as broadly as possible.

This meant that the pamphlets could reasonably be considered to have entered the public domain. I make the claim cautiously, because it is important to understand that an analysis like this, even at the hands of a well-trained lawyer, offers certainty only after a suit has been brought and both sides have argued their cases and the courts have ruled. Risk management is a fact of life in legal issues. One of the advantages of Web publication is that we can easily remove the works if someone offers an argument (or a threat) that seems persuasive.

Those interested in seeing these pamphlets (and others) for themselves can find them at <<http://www.lib.msu.edu/digital/radicalism/>>

### Information sources for this case

Information sources will be a regular feature of these columns. Often the answers to intellectual property questions seem like a maze of legal citations that require a background knowledge, which no non-specialist could reproduce. But as a librarian, I am as interested in showing how to find the information as in presenting what I have found.

My own first source was a pamphlet by Robert Oakley called “Copyright and preservation: a serious problem in need of a thoughtful solution” (Oakley, 1990). Although this pamphlet is somewhat outdated, since it has not been updated with the time limits in the recently passed Copyright Extension Act of 1998, it lays out the issues with admirable clarity in its section on “The US Copyright Scheme,” which answers two key questions:

- (1) is a work protected?; and
- (2) how long does the protection last?

Readers consulting Oakley’s pamphlet can update the time limits by consulting Laura Gasaway’s chart on “When Works Pass into the Public Domain” (Gasaway, 1998). To use the chart, you need to know when the work was published (or created) and whether it had a copyright notice. The chart assumes that people know that US Federal government publications go immediately into the public domain (though there can be some exceptions for works produced jointly with non-Federal Government persons or organizations).

The statutes themselves are, of course, another basic source to consult. Copyright law is title 17 of the US Code, and several versions of the Code exist online. The Library of Congress has an authoritative version on its Website, but it is important to recognize that this too lacks updates from recently passed laws[1]. The text is up to date as of 30 September 1996, except for the 1994 Satellite Home Viewer Act. The Legal Information Institute at Cornell Law School has the US Code up to date as of the beginning of 1998[2]. The formatting at this site is more compressed, but it has the added virtue of a search engine that will scan the whole of Title 17.

The copyright law has a long list of relevant definitions in section 101, but it is by no means an exhaustive list of the definitions needed to answer intellectual property questions. A good law dictionary or, even better, an intellectual property dictionary can give valuable assistance with a vocabulary whose meanings do not always parallel common usage. Several are available, and they tend not to go out of date as quickly as the law itself. I have used the oldest of the dictionaries currently in print, the *Intellectual Property Law Dictionary* by Stephen Elias (Elias, 1985).

No one should imagine that these few sources are sufficient. Case law is an enormous body of information which is essential to an accurate understanding of the law and which can provide very opaque reading for non-lawyers. Articles like Oakley’s or discussion lists like CNI-Copyright offer invaluable interpretative resources[3].

## Significance to researchers and students

One of the important implications of the notification loophole in the 1909 law, and its validity today, is that a wide range of materials which people originally intended to be freely and widely available are in fact available for digital (or other) republication. Much of the copyright law and its various recent amendments seeks to protect economic interests. In this case, the authors of the Black Panther Party pamphlets actively wanted to get their message out to the widest possible audience. Protecting property rights in their works interested them less than it did pamphleteers from the other extreme of the political spectrum, many of whom also ignored notification and registration requirements in favor of getting their message out fast. Far from doing violence to their intentions, displaying their works on the Web in some sense helps to fulfill them.

But this is a loophole bound in time. The CNI-Copyright list recently had a discussion of how and whether an author could today intentionally dedicate a work to the public domain. The fact is that under current law, both in the USA and the UK, and in fact in most countries belonging to the World Intellectual Property Organization, copyright protection begins the moment an author puts pen to paper or hits SAVE on the computer. Works fall into the public domain essentially only through the passage of time, often a century or more.

This does not mean that future researchers will have to wait for access to more contemporary works. It means that libraries, universities, and other digital publishers will have to find the authors, seek permissions, and very likely deal with payments. This is certainly inconvenient,

and could in effect suppress some works. But a variety of solutions might ease the situation, including the kind of compulsory licensing and collecting societies that the USA, UK and Germany have all used for various purposes. That, however, is a topic for future columns.

## Notes

- 1 <http://lcweb.loc.gov/copyright/title17/>
- 2 <http://www4.law.cornell.edu/uscode/17/>
- 3 <http://www.cni.org/Hforums/cni-copyright/>

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