

# Copyright is an Impediment to the Free Flow of Ideas <sup>(1)</sup>

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## Résumé

Sur un ton humoristique, les auteurs avouent être des voleurs... d'idées.

À quoi riment les lois sur le droit d'auteur demandent-ils ? À l'origine, ce ne sont pas les droits des créateurs que le souverain ou l'État voulait protéger, mais bien les privilèges des éditeurs. Et d'où vient qu'on ait ainsi accordé à ces derniers le droit exclusif de publier ? C'est que dès l'invention de l'imprimerie, les hommes de pouvoir ont bien vu la menace que représentait pour eux la dissémination des idées : le calcul qu'ils ont fait a profité aux imprimeurs. Le phénomène n'est pas étranger à l'existence des permis de radiodiffusion / télévision existant de nos jours dans nos États démocratiques ; et l'histoire se répète comme on l'observe aujourd'hui quant à la régulation du réseau Internet. Quand les éditeurs se rendirent compte qu'ils ne pouvaient plus avoir la main haute sur tout ce qui se publiait, ils ont pris prétexte du droit des créateurs pour protéger leurs propres intérêts. Ni l'éthique ni l'esthétique ne motivaient les éditeurs, mais bien leurs seuls intérêts commerciaux, légitimes au demeurant.

Deux factions s'opposent aujourd'hui quant à la question du droit des auteurs à l'ère numérique. La vieille garde se bat pour préserver à peu de choses près le *statu quo* tandis que ses vis-à-vis proclament la mort du droit d'auteur tel qu'il a existé. Et quel modèle nouveau préconisent ces derniers ? En fait, ils ne s'opposent pas à toute forme de protection pour ceux qui traditionnellement en ont bénéficié, mais songent à des mécanismes nouveaux ..., de sorte que la vieille garde n'a pas à s'en faire outre mesure. Le fond du problème est ailleurs soutiennent MM. Benyekhlef et Tresvant : même si les avocats plaideront que ce ne sont pas les idées, mais bien la forme particulière qu'un créateur a choisie pour les exprimer qu'on protège par les lois sur le droit d'auteur, cela ne change rien. Dès qu'une idée est exprimée et fixée d'une certaine manière, il devient plus difficile de l'exprimer à nouveau puisqu'une partie du champ virtuel qu'elle pouvait occuper est déjà conquise, à bon droit selon le droit actuel. Il faut en conclure que le droit d'auteur nouveau, comme le droit d'auteur traditionnel, est une entrave à la libre circulation des idées.

## Synopsis

It is on a humoristic note that the authors of this paper admit to stealing... ideas.

What is the basis of copyright laws? Originally, these laws weren't created to protect the rights of authors, but rather those of their publishers. And where do these rights come from? With the invention of the printing press, those in power understood that the free flow of ideas was a dangerous thing, and publishers profited from that situation. This phenomenon is not very different from what has been happening in the television arena, and history is once more repeating itself in regards to the Internet. When publishers realized that they could no longer control what was being published, they used authors' rights as a pretext of protecting their own interests. Neither ethics nor aesthetics motivated the publishers, money was, and still is, their main concern.

Two opposing factions are presently considering the notion of copyright in the digital World. The old guard is fighting for the *status quo*, while its opponents claim the death of copyright as we knew it, and the emergence of the use of technology to protect works. The old guard therefore should not worry. The real problem, according to the authors, resides in the fact that even if we claim that copyright protects the expression of ideas and not the ideas themselves, as soon as an idea is expressed in a certain way, it becomes more difficult to express it otherwise. One must therefore come to the conclusion that copyright remains a threat to the free flow of ideas.

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## **The alpha and omega of ideas or shall the first be the last**

1. We are a couple of thieves. Yet, most people would not fathom the thought, for we do not steal physical things; we steal ideas. But contrary to appearances, that suffices to make us thieves of the worst kind. Because if our crime is committed with enough grace and laced with finesse, it will remain unnoticed. Indeed, no one will ever know that we have stolen. No one, but ourselves... And even then, we might think that creativity was at work. Clinging to that notion, we are not alone.
2. Would it be wrong to say that James Cameron is a thief ? And, should we call Akira Kurosawa a bloody thief? Clearly, they borrowed from Shakespeare. Is not Titanic a variation on the Romeo and Juliet theme? Are not Ran and Throne of Blood literally copied on King Lear and Hamlet?
3. If these two directors are thieves, can't we argue the same about their victim? No one would dispute the fact that William Shakespeare — just like Racine or Molière — was inspired by old Spanish dawn serenades and Italian plays to create his “masterpieces”.
4. Of course Shakespeare did not like being called names. And to those who accused him of being a plagiarizer he answered bluntly and with supreme panache: all I have done is transform a whore into a woman of virtue.
5. And what about this pathetic romance called *Love Story*? We all heard of someone who was in love with a dying person. So, is the first one to die the copyright holder of the theme? Does Eric Seagal have a monopoly on expressing distress, death and a love ending on a sad note? Bla, bla, bla... After Adam and Eve, no storyteller could express the ideas of love and disaster, yet still deserve to be called honest.
6. In other words to equate authors to thieves is nothing more than to elevate copyright to the rank of virtue. Which, in turn, is a triumph of hypocrisy. To claim the paternity of an idea is no small feat. Likewise, for their assembly.
7. However, in the eyes of the law, not all thieves are perceived as such. Those who reproduce the expression of ideas plagiarize; those who reproduce ideas are artists. Hypocrisy, hypocrisy, hypocrisy! Our modern conception of copyright has created two realms in the underworld. Now there are honest thieves and dishonest ones.
8. And the true sadness of this situation lies in the fact that copyright is not an invention destined or aiming to protect the individual's right to create. There is no need for such protection. Artists will always create and creation has nothing to do with ownership. Historically, copyright was invented as a privilege bestowed upon publishers to ensure that their commercial endeavours be profitable. No more, no less.

## **Privilege, monopoly and exclusivity : a travesty of the artist's right to create**

9. With the advent of the printing press, the sovereign granted to some a privilege destined to become paramount in our so called modern day information society: the exclusive right to publish. The reason for this is simple. The state felt threatened by this new tool, able to disseminate like never before, ideas inimical to the powers in place.

10. So, what else is new? The 1950's saw the invention of television perceived in a similar fashion by the new rulers of the democratic state. The unsurpassed ability of television to reach and touch the masses was — and still is — scary to the newly established powers. Hence, it is not surprising to see that the licencing scheme applicable to TV is akin to that of the 15<sup>th</sup> century destined to control the printing press. And history stutters once again. It repeats foolish and illusory attempts at seeking to control and monitor ideafloes, this time within Internet.

11. It would take a few centuries for the authors to finally wake up. And the rising call came from Beaumarchais and Diderot. These authors wanted to share in the profits with the publishers. They claimed an absolute right of ownership over their work. But French revolutionaries, like Condorcet and Sieyès, could not conceive of literary ownership. Unjust in its essence, such a claim sought to go against the fact that ideas belonged to all; such a concept was, is and remains a hurdle to progress by allowing an individual to control a body of knowledge that has to be shared.

12. Granting a monopoly to the publishers was not only for the good pleasure of the sovereign, it also stemmed from the need to control and censor the press. In England, the Stationers' Company was given a charter in 1557 by which Philip and Mary incorporated the stationers to provide a suitable remedy against seditious and heretical material printed by schismatical persons. The constitution and make-up of the Stationers' Company was similar to that of other companies (like the Grocers, the Goldsmiths, etc.), but its monopoly was more complete. We must add that its powers were similar, in principle, to the powers usually granted to companies for the regulation of their respective trade.

13. But, rapidly, the Stationers were given larger powers by the Sovereign in order to have them serve as policemen of ideas through their control of the press. History shows us that copyright began as a publisher's right which functioned in the interest of the publisher, with no concern for the author.

14. The copyright granted to publishers was thus essentially a trade-regulation device functioning in their interest, but also in the interest of the government. And when these privileges were relaxed, the publishers used the authors in order to preserve their copyright by reaffirming the custom according to which many authors assign their rights to the publisher.

15. Copyright can then be envisioned as a market mechanism whose main purpose is to protect the rights of the publisher. Copyright was developed as a private concept by a private group. The fact that modern authors enjoy a certain degree of protection does not

alter the fundamental nature of copyright. Its essence is rooted in history. Today, as before, the author is a commodity for which the publisher is ready to pay a price. In exchange, the author accepts, in general, to relinquish his rights. Thus, the publisher is a kind of parasite. A necessary — some would argue — parasite, but a parasite nonetheless.

16. Publishers will protect the integrity of a piece not for moral or artistic reasons but for purely commercial motives. Such motives are not to be condemned. However, the veil of purity in which they are draped must be torn down. Business is business after all. But let's call it by its name; business not art. Copyright is a tool for producers. And they will stop at nothing in order to protect their trove. Derivative rights of all sorts are in favour amongst producers. As long as they are granted some form of ownership on some part of something, they like it. As a result, the extent of possible ownership rights arising out of any work is flabbergasting.

17. And, the motivation behind this attitude is simple: profit motive. Who cares about defending artists anyway? But the irony of it all lies in the real effects of such behaviour: limiting the free flow of ideas and hampering the development of new artistic forms.

### **Legal and digital**

18. In the recent past, legal scholars have devoted a lot of time to what has been called the conundrum of “copyright in the digital era”. And the exchanges have sometimes been quite heated; a war of words opposing two factions displaying irreconcilable views.

19. The “Old guard” is fighting for the survival of copyright in its present form. For the proponents of this thesis, minor changes will suffice to adapt copyright to the information age. Why? Simply because they hold the view that the traditional franchise of the copyright holder — a bundle of exclusive rights — is not only a viable option, but the best one, regardless of the realm in which it is applied.

20. The thesis is justified in a number of ways. Some argue about how one must control the fruit of one's creations, others cling to the notion that without copyright the product of creative endeavours will not be distributed and no one will benefit from it. Of course, to prevent the well of ideas from drying up in all corners of the planet copyright must be afforded complete, total and utter protection. In their scheme of things, anyone from the surfer to the access provider is liable for a violation of copyright. Can you guess who they are?

21. Their opponents claim that “copyright is dead”. Devised for the universe of the printing press, its coherence has been slowly eroded as new technologies apt to support copyrighted works have evolved. The information highway is simply the last step in the slow demise of copyright. It is an innovation that will mark the end of copyright as we know it, defeated in its traditional model for it can no longer be adapted and remain viable.

22. Of course, the Old Guard is screaming bloody murder. According to its members, the “digital copyright revolution” would be no less than the dawn of a gloomy era for ideas

and art. The spiritual and cultural life of humanity would be dangerously hampered by the slightest modification of copyright. Our human collective soul is threatened by such “radical” views.

23. That being said, what is it exactly that the new kids on the block suggest to replace copyright? What is that dangerous revolution denounced by traditional copyright holders? Interestingly enough, the proponents of a new copyright model do not argue for the end of protection; rather, they support a new form of protection. Physical protection of contents through encryption or tagging mechanisms and the development of a mutual trust relationship between members of the public and the copyright holder are amongst the tools suggested to protect copyright in the new information society. Options that are viable and adapted to the Last Frontier. Thus, the Old Guard should be reassured... the new model is not be that revolutionnary after all.

24. And, herein lie the limitations of the ideals defended by the belligerents on both sides of the conflict. Criticising the traditional model and justifying its downfall because of the inadequacies of copyright in cyberspace misses the point. The fact that copyright is an institution that can or cannot survive in a new environment is absolutely neutral in terms of whether or not copyright is justifiable and just as an institution. Likewise, the fact that copyright could be adapted to the digital age in no way influences debates seeking to determine whether or not this institution must be perpetuated.

25. Of course, lawyers would argue that is not the ideas that are protected, but their expression. And that is correct as far as the law stands today. Copyright protects ideas expressed in a certain way, shape or form; in fact, it grants exclusive rights upon such expressions. Does that really change anything? No, for the subject of the protection is still an idea. As soon as an idea is expressed and fixed in a certain way, it then becomes more difficult for others to express it. For part of the realm of its expressability has been removed from the public domain and bestowed upon the right holder.

26. What do creators want? Simply, to create. They have feelings, emotions and ideas that must be expressed. In other words, they want to share their view of the Universe with their fellow men. Not sell it, not rent it, not lend it, not licence it: share it. And, as it stands, copyright is inimical to the idea of sharing.

27. In the course of history, it might have been true that without publishers sharing would have been practically impossible. But, was not that anymore than a market imperfection — let’s call it transportation cost — which is disappearing in this day and age?

28. Furthermore, let’s not forget that copyright was devised as a private licence to gag preventing the sharing of ideas. And, to this day, it is used as a tool of censorship. The Church of Scientology comes to mind, doesn’t it?

29. So let us not lose sight of the origins of copyright. We are still awaiting for the explanation of copyright’s transfiguration into this noble and wonderful creature, essential to creative processes. But, in the meantime, we are forced to conclude that the institution,

whether in its old shape or new form, remains an impediment to the free flow of ideas, because sifting such flows through the filter of limited expressability prevents unexpressed manifestations of ideas from emerging.

### **The dual character of Art and money or keys to their amalgamation**

30. Let us not be misunderstood. Appropriating one's entire creation and calling it your own is an unspeakable act. Yet, creating with the raw materials present in the world — be they manmade or a product of nature — is no more than creation in its purest form. A creation stemming from sensibility to one's environment.

31. So, what is art? Art is a composite of reminiscences, *coups de coeur*, influences, shocks; the addition of presupposed ideas shaping and structuring the essence of any "démarche artistique". The artist is no more than the sum of his own experiences; no more than a relay station conveying a message that is already out there. The illusion of novelty stems not from the true original character of the idea but from the legal framework in which artistic creation is confined. Art is money and Money can sometimes be art. But for the sake of all, let us not make it a commodity.

### **Notes**

1 This text was originally published in 1998 in the Scroll electronic journal owned by the Behaviour group. This pamphlet has however not lost its meaning, especially in light of Lawrence Lessig's new book: "*The Future of Ideas: The Fate of the Commons in a Connected World*". We hope that this text may modestly contribute to the debate surrounding the never ending privatization of knowledge and ideas.

Ce texte a été diffusé pour la première fois en 1998 dans la revue électronique *Scroll* du groupe Behaviour. Ce pamphlet conserve toute son actualité en particulier à la lumière du dernier ouvrage de Lawrence Lessig : « *The Future of Ideas: The Fate of the Commons in a Connected World* ». Nous espérons que ce texte puisse contribuer modestement au débat entourant la privatisation toujours croissante des savoirs et des idées.

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