BANQUAN YU
BANQUAN MAOYI

# 版权与版权贸易双语教程

SHUANGYU JIAOCHENG

陈凤兰◎著

知识产权出版社
全国百佳图书出版单位

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# 版权与版权贸易双语教程
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# 目 录

## Part One Essentials of Copyright

# Part One Essentials of Copyright

## Chapter 1 History of Copyright

### 1.1 Definition

[1] Copyright is a set of **exclusive rights** granted to the author or creator of an original work, including the right to copy, distribute and adapt the work. Copyright does not protect ideas, only their expression. In most jurisdictions copyright arises upon fixation and does not need to be registered. Copyright owners have the exclusive **statutory right** to exercise control over copying and other exploitation of the works for a specific period of time, after which the work is said to enter the **public domain**. Uses covered under limitations and exceptions to copyright, such as **fair use**, do not require permission from the copyright owner. All other uses require permission and copyright owners can license or permanently transfer or assign their exclusive rights to others.

Initially copyright law only applied to the copying of books. Over time other uses such as translations and **derivative works** were made subject to copyright and copy-

right now covers a wide range of works, including maps, **sheet music**, dramatic works, paintings, photographs, sound recordings, motion pictures and computer programs.

The British ***Statute of Anne*** 1709, full title "An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or purchasers of such Copies, during the Times therein mentioned", was the first copyright statute. Today copyright laws are partially standardized through international and regional agreements such as the ***Berne Convention*** and ***the WIPO Copyright Treaty***. Although there are consistent among nations' copyright laws, each **jurisdiction** has separate and distinct laws and regulations covering copyright. National copyright laws on licensing, transfer and assignment of copyright still vary greatly between countries and copyrighted works are licensed on a territorial basis. Some jurisdictions also recognize **moral rights** of creators, such as the right to be credited for the work.

## 1.2 Justification

The British *Statute of Anne* was the first act to directly protect the rights of authors. Under US copyright law, the justification appears in Article I, Section 8 Clause 8 of the Constitution, known as the Copyright Clause. It empowers the United States Congress "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries". ❶

[2] According to the ***World Intellectual Property Organisation*** the purpose of copyright is twofold: "To encourage a dynamic culture, while returning value to creators so that they can lead a dignified economic existence, and to provide widespread, affordable access to content for the public". ❷ Legal scholars often approach copyright in search of a coherent ethical justification for its existence and character. This ap-

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❶ Article I, Section 8, Clause 8, United States Constitution

❷ Copyright and Related Rights". World Intellectual Property Organisation. http://www.wipo.int/copyright/en/. Retrieved 7 February 2010.

proach may seem to be backwards—it might make more sense to start with an objective and then examine the law against it—but it is widely practised. Thus, the **normative** or **ethical** theories that might naively be regarded as tests for copyright law to pass are often called "justifications" of it.

### 1.2.1 Natural Rights

Natural rights are linked to the logic of property. John Locke is often cited as an authority, although it is not clear that Locke actually viewed copyright as a natural right. **Personality rights** are the basis of German copyright law. This position regards copyrightable works to be extensions of the author's personality. The author is given certain powers to control those works on account of his or her connection to them. Ayn Rand supported copyrights and patents, noting in Capitalism: The Unknown Ideal that they are the legal implementation of the base of all **property rights**: a man's right to the product of his mind. An idea as such cannot be protected until it has been given a material form. An invention has to be embodied in a physical model before it can be patented; a story has to be written or printed. But what the patent or copyright protects is not the physical object as such, but the idea which it embodies. Although it is important to note, that a discovery cannot be patented, only an invention. She argued that the term should be limited. If it were held in perpetuity, it would lead to the opposite of the very principle on which it is based: it would lead, not to the earned reward of achievement, but to the unearned support of **parasitism**.

### 1.2.2 Economics

[3] Economists recognise that, in the absence of intellectual property protections such as copyright and patents, various types of **intangible assets** would be under-produced, because there would be no clear incentive for commercial organization to produce them. In this respect the objective of copyright law is primarily to balance the public benefits that can arise from the widespread circulation, use and reuse of a copyright work with the need to provide protection, incentive and reward to the creator

or owner of the copyright by granting a limited monopoly to exploit the copyright to that body or individual.

### 1.2.3 Consequentialist Theories

Consequentialist theories of copyright hold that we should have the laws that will produce the "best" results for society. [4] The most common consequentialist position is **utilitarianism**, which defines the "best" situations to be those in which people are in total as happy or fulfilled as possible.

A related class of theories is called **instrumentalism**; it holds that copyright law must exist for clear, coherent and necessary purposes, without being so strict as to require that it maximise some kind of "goodness" in its outcome.

Some copyright scholars believe that, regardless of contemporary advances in technology, copyright remains the fundamental way by which authors, sculptors, artists, musicians and others can fund the creation of new works, and that without a significant period of legal protection of their future income, many valuable books and artworks would not be created. They argue that the public interest is best served by repeated extension of copyright terms to encompass multiple generations beyond the copyright holder's life, as this increases the present value of the copyright, encouraging the creation for new works and making additional investments in older works (for example, the restoration of old movies) economically viable. Authors' heirs continue to profit if copyrights are enforced post-death and this provides a substantial incentive for continued fresh work even as authors age. ❶

The modern, market-driven copyright system provides authors with independent financing (through royalties). Without a feasible way to recoup investments of creative time through copyright, there would be little economic **incentive** to produce and

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❶ Scott M. Martin (September 24, 2002). "The Mythology of the Public Domain: Exploring the Myths Behind Attacks on the Duration of Copyright Protection" (PDF). *Loyola of Los Angeles Law Review* (Loyola Law Review) **36** (1): 280. ISSN 1533 - 5860. http://llr.lls.edu/volumes/v36 - issue1/martin - original1.pdf. Retrieved 2007 - 11 - 17.

works would need to be motivated by a desire for fame from already affluent authors or those able to obtain patronage (with associated constraints on independence). Proponents of copyright dispute that copyright erodes precepts for creators to be able to build on published expression pointing to concepts such as **Scènes à faire** and **Idea-expression divide**. Copyright only protects the artist's expression of his/her work and not the ideas, systems, or factual information conveyed in it and thus artists are free to get ideas from copyrighted works.

Defenders of the present system of strong copyrights argue that it has been largely successful in financing the creation and distribution of a wide variety of works, especially those requiring significant labor and capital. Moderate scholars seem to support that view while recognizing the need for exceptions and limitations, such as the fair use doctrine. Notably, a **substantial portion** of the current *U. S. Copyright Act* (sections 107 – 120) is devoted to such exceptions and limitations.

### 1.2.4 Consequentialism in the United States

Consequentialism or instrumentalism is the legal foundation of copyright law in the United States. Article One of the United States Constitution authorizes Congress to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries".

Many authors thought that this wording would actually require U. S. copyright laws to serve the purpose of promoting the progress of science and useful arts.

In the US in 2003 controversial changes implemented by the ***Sonny Bono Copyright Term Extension Act*** extending the length of copyright under U. S. copyright law by 20 years were challenged in the United States Supreme Court. However, the Court, in the case called Eldred v. Ashcroft, held, inter alia, that in placing existing and future copyrights in parity in the CTEA, Congress acted within its authority and did not **transgress** Constitutional limitations. Other jurisdictions have enacted legislation to provide for similar extensions of the copyright term.

## 1.3 History

### 1.3.1 Early European Printers' Monopoly

The origin of copyright law in most European countries lies in efforts by the church and governments to regulate and control printing, which was widely established in the 15th and 16th centuries. Before the invention of the printing press a writing, once created, could only be physically multiplied by the highly laborious and error-prone process of manual copying by scribes. Printing allowed for multiple exact copies of a work, leading to a more rapid and widespread circulation of ideas and information.

[5] While governments and the church encouraged printing in many ways, which allowed the dissemination of Bibles and government information, works of dissent and criticism could also circulate rapidly. As a consequence, governments established controls over printers across Europe, requiring them to have official licences to trade and produce books. The licenses typically gave printers the exclusive right to print particular works for a fixed period of years, and enabled the printer to prevent others from printing or importing the same work during that period. [1] The notion that the expression of dissent should be tolerated, not censured or punished by law, developed alongside the rise of printing and the press. The Areopagitica, published in 1644 under the full title Areopagitica: A speech of Mr. John Milton for the liberty of unlicensed printing to the Parliament of England, was John Milton's response to the British parliament re-introducing government licensing of printers, hence publishers. In doing so, Milton articulated the main strands of future discussions about freedom of expression. As the "menace" of printing spread, governments established centralised control mechanisms and in 1557 the British Crown thought to stem the flow of **seditious** and

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[1] MacQueen, Hector L; Charlotte Waelde and Graeme T Laurie (2007). *Contemporary Intellectual Property: Law and Policy*. Oxford University Press. pp. 34.

**heretical** books by chartering **the Stationers' Company**. The right to print was limited to the members of that guild, and thirty years later the Star Chamber was chartered to curtail the "greate enormities and abuses" of "dyvers contentyous and disorderly persons professinge the arte or mystere of pryntinge or selling of books." The right to print was restricted to two universities and to the 21 existing printers in the city of London, which had printing presses. The French crown also repressed printing, and printer Etienne Dolet was burned at the stake in 1546. As the British took control of type founding in 1637, printers fled to the Netherlands. Confrontation with authority made printers radical and rebellious, with 800 authors, printers and book dealers being incarcerated in the Bastille before it was stormed in 1789. ❶

### 1.3.2 Early British Copyright Law

In England the printers, known as stationers, formed a collective organization, known as *the Stationers' Company*. In the 16th century *the Stationers' Company* was given the power to require all lawfully printed books to be entered into its register. Only members of *the Stationers' Company* could enter books into the register. This meant that *the Stationers' Company* achieved a dominant position over publishing in 17th century England (no equivalent arrangement formed in Scotland and Ireland). The monopoly came to an end in 1694, when the English Parliament did not renew the Stationers Company's power. The newly established Parliament of Great Britain passed the first copyright statute, *the Statute of Anne*, full title "An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or purchasers of such Copies, during the Times therein mentioned". ❷

The coming into force of the Statute of Anne in April 1710 marked a historic moment in the development of copyright law. As the world's first copyright statute it granted publishers of a book legal protection of 14 years with the **commencement** of

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❶ de Sola Pool, Ithiel (1983). *Technologies of freedom*. Harvard University Press. pp. 15.

❷ MacQueen, Hector L; Charlotte Waelde and Graeme T Laurie (2007). *Contemporary Intellectual Property: Law and Policy*. Oxford University Press. pp. 34.

the statute. It also granted 21 years of protection for any book already in print. [6] Unlike the monopoly granted to *the Stationers' Company previously*, *the Statute of Anne* was concerned with the reading public, the continued production of useful literature, and the advancement and spread of education. To encourage "learned men to compose and write useful books" the statute guaranteed the finite right to print and reprint those works. It established a pragmatic bargain involving authors, the booksellers and the public. [1] *The Statute of Anne* ended the old system whereby only literature that met the **censorship** standards administered by the booksellers could appear in print. The statute furthermore created a public domain for literature, as previously all literature belonged to the booksellers forever.

### 1.3.3 Common Law Copyright

When the statutory copyright term provided for by *the Statute of Anne* began to expire in 1731 London booksellers thought to defend their dominant position by seeking **injunctions** from the Court of Chancery for works by authors that fell outside the statute's protection. At the same time the London booksellers lobbied parliament to extend the copyright term provided by *the Statute of Anne*. Eventually, in a case known as Midwinter v. Hamilton (1743 – 1748), the London booksellers turned to common law and starting a 30 year period known as the battle of the booksellers. The London booksellers argued that the *Statute of Anne* only supplemented and supported a pre-existing **common law** copyright. The dispute was argued out in a number of notable cases, including Millar v Kincaid (1749 – 1751), Tonson v Collins (1761 – 1762), [2] and Donaldson v Beckett (1774). Donaldson v Beckett eventually established that copyright was a "creature of statute", and that the rights and responsibilities in copyright were determined by legislation. The Lords clearly voted against **perpetual copy-**

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[1] Ronan, Deazley (2006). *Rethinking copyright: history, theory, language*. Edward Elgar Publishing. pp. 13.

[2] Ronan, Deazley (2006). *Rethinking copyright: history, theory, language*. Edward Elgar Publishing. pp. 14.

right and by confirming that the **copyright term**--that is the length of time a work is in copyright--did expire according to statute the Lords also confirmed that a large number of works and books first published in Britain were in the public domain, either because the copyright term granted by statute had expired, or because they were first published before *the Statute of Anne* was enacted in 1709. This opened the market for cheap reprints of works from Shakespeare, John Milton and Geoffrey Chaucer, works now considered classics. The expansion of the public domain in books broke the dominance of the London booksellers and allowed for competition, with the number of London booksellers and publishers rising threefold from 111 to 308 between 1772 and 1802. ❶

### 1.3.4 Early French Copyright Law

In pre-revolutionary France all books needed to be approved by official censors and authors and publishers had to obtain a **royal privilege** before a book could be published. Royal privileges were exclusive and usually granted for six years, with the possibility of **renewal**. Over time it was established that the owner of a royal privilege has the sole right to obtain a renewal indefinitely. In 1761 the Royal Council awarded a royal privilege to the heirs of an author rather than the author's publisher, sparking a national debate on the nature of literary property similar to that taking place in Britain during the battle of the booksellers.

In 1777 a series of **royal decrees** reformed the royal privileges. The duration of privileges were set at a minimum duration of 10 years or the life of the author, which ever was longer. If the author obtained a privilege and did not transfer or sell it on, he could publish and sell copies of the book himself, and pass the privilege on to his heirs, who enjoyed an exclusive right into perpetuity. If the privilege was sold to a publisher, the exclusive right would only last the specified duration. The royal decrees

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❶ Van Horn Melton, James (2001). *The rise of the public in Enlightenment Europe*. Cambridge University Press. pp. 140 - 141.

prohibited the renewal of privileges and once the privilege had expired anyone could obtain a "permission simple" to print or sell copies of the work. Hence the public domain in books whose privilege had expired was expressly recognized. After the French Revolution a dispute over **Comédie-Française** being granted the exclusive right to the public performance of all dramatic works erupted and in 1791 the National Assembly abolished the privilege. Anyone was allowed to establish a public theatre and the National Assembly declared that the works of any author who had died more than five years ago were public property. In the same degree the National Assembly granted authors the exclusive right to authorize the public performance of their works during their lifetime, and extended that right to the authors' **heirs** and **assignees** for five years after the author's death. The National Assembly took the view that a published work was by its nature a public property, and that an author's rights are recognized as an exception to this principle, to compensate an author for his work. In 1793 a new law was passed giving authors, composers, and artists the exclusive right to sell and distribute their works, and the right was extended to their heirs and assigns for 10 years after the author's death. [7] The National Assembly placed this law firmly on a natural right footing, calling the law the "Declaration of the Rights of Genius" and so evoking the famous Declaration of the Rights of Man and of the Citizen. However, author's rights were subject to the condition of depositing copies of the work with the Bibliothèque Nationale and 19th Century commentators characterised the 1793 law as utilitarian and "a charitable grant from society". ❶

### 1.3.5 Early US Copyright Law

*The Statute of Anne* did not apply to the American colonies. The colonies' economy was largely **agrarian**, hence copyright law was not a priority, resulting in only three private copyright acts being passed in America prior to 1783. Two of the acts

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❶ Peter K, Yu (2007). *Intellectual Property and Information Wealth: Copyright and related rights*. Greenwood Publishing Group. pp. 141 – 142.