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'Who Owns the News? A History of Copyright' by Will Slauter: A Review

By *Daniel Kegan*

Modern U.S. copyright law has had a number of picky technicalities, some only clarified this year.¹

Application and enforcement differ for published and unpublished works; the criteria for "publication" in this Internet age has nebulous boundaries. The scope of copyrightable works has sequentially expanded since Britain's 1710 Statute of Anne,² limited to "books." The first copyright law in the USA, 1790, covered "books, maps, and charts," recognizing the commercial importance of the vast "western" lands. Currently USA copyright covers literary works, musical works, dramatic works, pantomimes and choreographic works, pictorial, graphic, and sculptural works, motion pictures and other audiovisual works, sound recordings, and most recently architectural works.³

Until 1978, when the Copyright Act of 1976 became effective, publication without a proper copyright notice could inject the work semi-irretrievably into the public domain.⁴ While many other jurisdictions have no copyright registration system, the US long has. Elsewhere plaintiff can wait until trial to prove its copyright ownership.

These and several other USA copyright technicalities were not created by hostile gremlins, but rather, author Will Slauter entertainingly informs us, are the product of the news and newspaper businesses in Britain, the expanding United States, and the world. By the sixteenth century, Europe and England had a commercial market for news. Political and trade information flowed via letters of diplomats and merchants, and "intelligencers" supplied elite clients with handwritten newsletters. During the seventeenth century, postal routes and courier services expanded, permitting more regular updates from other places, and creating new opportunities to sell news.⁵

State Censorship and Industry Trade Restraint

During the 16th and 17th centuries, most people lacked freedom of speech as well as lacking any right to be informed of domestic and foreign policy decisions. Handwritten notes and reports had limited distribution. Parliament members and diplomats might exchange information and sometimes leak news to achieve political ends but wider discussion of state affairs invaded the secret realm of knowledge reserved for the monarch and his counselors.⁶

Beginning with Henry VIII (r.1509-1547), Protestant reformation controversies led to increased official scrutiny of what was printed. Authorization of a government licensor before publication was required. Potential, and sometimes actual arrests for publication without a license, seditious libel, or treason then, as now, had a chilling effect.⁷

English readers sought news of the Thirty Years War (1618-1648), while James I sought to restrict criticism of his policies. The King finally, 1638, granted two Stationers (printers), Nathaniel Butter and Nicholas Bourne, a patent giving them the exclusive right to publish foreign news. They promised not to publish anything that might offend the monarchy, the church, foreign princes, or ambassadors.⁸

Before copyright and effective unfair competition laws, the second printer could cheaply reproduce a prior published work. To avoid ruinous competition among printers and booksellers, they created a single state-sanctioned guild, the Stationers' Company, granted a royal charter in 1557. The Stationers developed customs for who had the right to print and sell a given book—the right to make and sell copies.

Those customs were later recognized by royal decrees and Acts of Parliament, that the first Stationer member to enter a title in the company's "entry book of copies," also referred to as "the register," had the exclusive right to print and sell that work. Enrollment in the Register required a fee, and some books authorized by the company were not registered. At this stage, authors were not members of the Stationers' Company. typically, once an author gave or sold a manuscript to a stationer, the stationer owned the copy.⁹

Newspapers

Most events of public concern do not happen on a predictable schedule. Yet weekly or daily publications require sufficient news to fit the page. Early newspapers required both content and effective distribution. A reliable postal service, and later railroads, then the telegraph, aided distribution. Collaboration among newspaper editors supplied content.

The custom among newspapers developed to reprint content from other newspapers. Accompanying the custom were rules. Content from out of town newspapers was permissible to copy if the source was indicated. However, sometimes the source was printed as the town, not the name of the source newspaper. And sometimes a third, or fifth, or nth editor used content for which the original source was lost in the linkages.

The first commercial telegraph, patented in England 10 June 1837 by Cooke and Wheatstone provided signaling on a railway between London Paddington station and West Drayton, July 1839.¹⁰ The standard Morse code was adopted for continental Europe in 1851. The first USA telegraph line, 1844, connected Washington DC to Baltimore. Telegraph dispatches reached distant cities before physically transported newspapers, creating a free-rider problem for the originating news source.

Old news was seen as having little commercial value, but a reputation for first breaking news improved subscriber lists. Moreover, the facts of the news were generally not seen as proprietary. Pre-telegraph and pre-railroad, and recognizing the time it took for a copying printer to set type and print newspapers, restricting news was less of an issue. Having morning and evening papers raised problems. As the United States expanded to the Pacific Ocean, the custom of published news, with source attribution, being free to copy raised questions, and debates, whether publication occurred at first distribution on the East Coast or was continued until printing and distribution began on the West Coast.

Press Associations

In Britain, the reduction and repeal of the stamp duty motivated the first efforts to secure copyright for news. American newspapers had never been taxed, and their distribution through the mail had long been subsidized, which encouraged copying. Beginning around 1850, the networks of editors and contributors that had characterized newspapers in the early nineteenth century gave way to more formal business arrangements, including both cooperative associations, spreading the cost of collecting news, and for-profit agencies, charging newspapers for content. Past practice was to exchange, or copy, news before publication. Now news was exchanged before publication. Press associations had to develop rules for their members not to leak local news to outsiders before it could be published by other members, and had to stop rival agencies from selling news to rival newspapers in the same city. Exclusivity became more important.¹¹

At the telegraph line was being extended from Albany to Buffalo, several upstate New York publishers hired a "reporter," a term beginning to be used to compile paragraphs from Boston and New York newspapers and the latest news from the local legislature, and then to send the consolidated report by telegraph to the partners. The consortium, evolved into the New York State Associated Press, and the New York Associated Press (NYAP), and eventually its members joined the United Press. To limit competition, NYAP bylaws prohibited members from subscribing to rival news agencies.¹²

The NYAP restrictive bylaws encouraged rival news agencies to form. The Associated Press (AP) incorporated in Chicago, 1892, and after an adverse court judgment reincorporated in New York, 1900. The American Press Association campaigned against the "twin monopolies" of the NYAP and Western Union, the nation's dominant telegraph carrier. The NYAP told a Senate committee hearing on these issues "I claim that there is a property in news, and that property is created by the fact of our collecting it and concentrating it." NYAP was not concerned about copying news after publication, but was defending NYAP's right to decide who could join the association and thus obtain timely access to news. The NYAP leadership was not seeking protection for feature articles, but for telegraphic dispatches.¹³

Prototypical "property" is land.¹⁴ John Locke considered property right to result from one's labor.¹⁵ The extent to which "sweat of the brow" creates a property rights has been debated, and evolved, over centuries. In 1991 the US Supreme Court held effort and expenditure of resources are not protected by copyright, some minimum original creativity is required.¹⁶ Congress considered numerous copyright bills in the late nineteenth century. In 1884 it considered reform of the telegraph and a copyright bill. Opponents of the 1884 copyright bill advanced political, economic, and cultural arguments against proprietary news. Freedom of the press was envisioned as including access to news, not solely freedom of prior restraint. Rural printers depended on the right to copy. Concerns included whether news from government sources would be selectively released and restrained.¹⁷

Congress passed a copyright act in 1909. The press associations and news publishers were largely absent from the legislative process. The 1909 Act expressly stated that copyright in a periodical provided the same rights as if each part were individually copyrighted and that a single copyright notice at the head of each issue sufficed. This eliminated some uncertainty, while leaving others, such as what was copyrightable, to the courts.¹⁸

Hot News and Unfair Competition

About 1876 JJ Kiernan purchased news of foreign financial markets, publicly available in London, and distributed the news via tickers in his clients' offices. The news was private, not published in the USA. Kiernan's competitor gained access to the reports from some of Kiernan's subscribers and then transmitted the information to its own clients. Kiernan successfully argued his clients were bound by contract, and Manhattan Quotation induced a breach of trust. To explain why the ticker tapes did not constitute publication in the sense of abandonment to the public, the court referred to the rights of authors or artists in their unpublished works.¹⁹

By the late nineteenth century tickers were installed in public places, such as hotels and saloons, providing up-to-the-minute news, through arrangements with the telegraph companies. Western Union, a dominant telegraph company, had a subsidiary providing clients with market news and sports scores via tickers. National Telegraph, had a similar business, and copies some of its reports from Western Union. Western Union obtained a preliminary injunction preventing National Telegraph from copying for sixty minutes after the news appears on the tickers. National Telegraph appealed, arguing no copyright because the ticker tapes had not been registered or deposited with the Copyright Office. Western Union responded that reports of passing events was not literature. The Seventh Circuit accepted Western Union's position, establishing that the commercial value of news timeliness deserved to be protected as intangible property. This right was broader than copyright, it protected facts, but it was also of much shorter duration.²⁰

Censorship and propaganda during World War I set the context for *International News Service v. Associated Press*, **248 US 215** (1918). William Randolph Hearst owned INS and also several newspapers with AP franchises. Hearst wanted AP news for all his papers but in some cities existing members wanting exclusivity and blocked the applications. Before the USA entered the war in 1917, Hearst papers were seen as sympathetic to Germany, against US intervention, and pro-Irish. The British government, October 10, 1916, barred INS from using the transatlantic cable, claiming Hearst papers were propagating rumors and misinformation. AP obtained evidence INS obtained AP news surreptitiously, and sued using the precedent of the ticker cases. Hearst was an outspoken critic of war censorship; under the Sedition Act of 1918 his papers would be closely watched by the War Department.²¹

By framing the case in germs of unfair competition rather than the rights of authors and the public, Justice Pitney sidestepped the question whether publication constituted abandonment. He acknowledged that once news was printed or announced on bulletin boards, the public was free to use it as they wished. However, different rules applied to INS and its clients because they used the telegraph and printing presses to sell news in competition with the AP. Justice Pitney deemed news "quasi property." The 5-3 decision held AP had the exclusive right to use its news until all of its members had a chance to publish it free from local competition.²²

The Supreme Court's 5-3 *INS v. AP* decision did not stop all debate. Some felt Congress, not the courts, should create new property laws for writings and inventions.²³

The debate continues in 2019. Google is changing its search algorithm to highlight "original reporting,"

www.nytimes.com/2019/09/12/business/media/google-algorithm-original-repo... Publishers can benefit from having their original reporting more widely seen, elevating outlets known for accurate reporting.

Conclusion

Slauter concludes his history with an epilogue, *The View from the Digital Age*. He summarizes the news and copyright themes of a third of a millennium. Business, technology, and war have influenced who owns the news and copyright development. The past, once reliable, economic model of using news to attract advertising revenue is being challenged by Internet developments.

The news business has used custom, copyright, and unfair competition to defend its operations, as well as real fake news to entrap copyists.²⁴

p6. Economists call news a nonrivalrous good. One person's consumption of news does not reduce the amount available to others. Yet partly akin to bread and fuel, supply and demand do influence the price and value of news. In particular, for centuries breaking news, being the first to report news, especially commercial news of commodity and stock prices, of ships cargo landing, and ships sunk, was sought by traders and businesspersons.

Economists define public goods as both nonrivalrous and nonexcludable; they are not depleted by others use and they can be enjoyed by people who do not pay for them.

1. *Fourth Estate Public Benefit Corporation v. Wall-Street.com*, 17-571, 586 U.S. (U.S. 2019)(Issued copyright registration, not merely an application, required to initiate a copy suit for copyright infringement of a US work, 17 USC §411).

2. 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, 8 Ann. c. 21.

3. 17 U.S.C. § 102(a), Architectural Works Copyright Protection Act (AWCPA), enacted 1990 to comply with the Berne Convention for the Protection of Literary and Artistic Works, and Congressional recognition that "architecture is an art form that performs a very public, societal purpose . . . deserving of protection under the Copyright Act."

4. Uruguay Round Agreement Act, 108 Stat. 4809, 17 USC §104, provided copyright restoration procedures for some foreign works.

5. Will Slauter, *Who Owns the News? A History of Copyright* 15 (Stanford University Press 2019).

6. *Id.* at 18 n.9.

7. *Id.* at 18-19.

8. *Id.* at 35 n.67.

9. *Id.* at 20-22.

10. <https://en.wikipedia.org/wiki/Telegraphy>.

11. *Slauter, supra* note 5 at 191-92.

12. *Id.* at 193, 195, 213.

13. *Id.* at 195-97, 241.

14. https://en.wikipedia.org/wiki/Property_law.

15. John Locke, *Second Treatise* ch. 5 (1690); *Slauter, supra* note 5 at 8.

16. *Feist Publications, Inc v. Rural Telephone Service Co*, **499 U.S. 340** (1991).

17. *Slauter, supra* note 5 at 199-213.

18. Pub. L. 60-349, repealed the Copyright Act of 1790; *Slauter*, pp 223,225.

19. *Kiernan v. Manhattan Quotation Telegraph Co.*, 50 How Pr 194 (N.Y. Sup. Ct., 1876); *Slauter, supra* note 5 at 229-230.

20. *National Telegraph News Co v. Werstern Union Telegraph Co.*, **119 F. 294** (7th Cir, 1902); *Slauter, supra* note 5 at 231-33.

21. *Slauter, supra* note 5 at 235-36.

22. *Slauter, supra* note 5 at 247-48.

23. *Cheney Brothers v. Doris Silk Corp.*, **35 F.2d 279**, 280 (2d Cir., 1929, Judge Learned Hand); *Slauter, supra* note 5 at 255.

24. Journal of Commerce (New York), 2 Nov. 1831, evening edition, 2:00 pm, SAS, labeled as a fabrication; *Slauter, supra* note 5 at 111.

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