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There has rarely been a time when copyright has been subject to such scrutiny – at national, multinational and international level – as in the last twenty years, and that scrutiny has undoubtedly had some impact on all the creative industries and their ability to trade in the intellectual properties which they represent. Publishers are no exception.

For many years, copyright was perhaps all too often taken for granted as the framework which enables publishers to contract with their authors and to trade in the onward sale of rights in a variety of forms – publisher to publisher for the sale of territorial rights and translation rights and also between publishers and other licensees such as newspapers and magazines, film and television organisations, merchandising companies as well as an increasing number of partners in the field of technology. It has encompassed different philosophies – for example, the Anglo-Saxon view under common law that copyright is in effect a property right, versus the continental concept of the droit d’auteur which sees the results of creativity as part of the creator’s human rights. There have also been concepts of copyright influenced by political regimes, as in many socialist and former socialist countries where copyright law accords wider powers to the state than would be considered acceptable in democratic countries.

The United Kingdom has long prided itself as having the first formal copyright law in the world – the Statute of Anne which came into force in 1710, making this year the three hundredth anniversary of copyright in this country. It is however arguable that, as with so many other inventions, the Chinese were referring to the concept of copyright as long ago as the twelfth century. Copyright has served the United Kingdom and most other countries in the world well over a long period of time. Why then is it under such scrutiny, and indeed attack, in recent times? It has undergone regular revision over the years, extending the term of protection...
granted and the range of rights which are protected, the latter a logical result of a range of developing technologies which have included film, radio, television, the photocopying machine and its successors and more recently the rise of the Internet. It has also undoubtedly been affected by political factors, be it the requirement for certain levels of harmony in legislation in the European Union or the need for member countries of the World Trade Organization to comply with the requirements of TRIPS, the WTO agreement on Trade-Related Aspects of Intellectual Property Rights. It would also be foolish to deny that copyright has been the subject of powerful lobbying from major commercial interests, perhaps most visibly the film industry and new players from the technology field.

What have been the main developments in copyright over the last twenty years? In some ways they have been positive, in that almost every country in the world has its own domestic copyright legislation covering the creative works of its own nationals, and the majority have strengthened that legislation in recent years to take account of technological developments. There are now very few countries left which remain outside membership of at least one of the international copyright conventions – at the time of writing, only Taiwan (because of its complex diplomatic status), Afghanistan, Myanmar, Iran, Iraq, Angola, Burundi, Eritrea, Ethiopia, Mozambique, Sierra Leone, Somalia, Uganda and one former Soviet Republic, Turkmenistan, remain outside the copyright community. Whilst membership of a convention does not of course guarantee total copyright compliance in the country concerned, at least a framework exists which facilitates action if copyright in a work from a fellow member state is infringed.

The Berne Convention dates from 1886 and the Universal Copyright Convention from 1952. The need to update the conventions to take into account the plethora of technical developments which had taken place led to the 1996 Diplomatic Conference in Geneva, the outcome of which was the World Intellectual Property Organization (WIPO) Copyright Treaty (WCT) as well as the WIPO Performances and Phonograms Treaty. The WCT established that rightsholders had a new exclusive right of communication to the public, including communication by electronic means; there were also provisions for each contracting state to provide for limitations and exceptions to the right of reproduction, provided that these meet the requirements of the so-called Berne “three-step test”: that the exceptions are special cases, that they do not conflict with the normal commercial exploitation of the work and that they do not prejudice the legitimate interests of the rightsholder. The Treaty did not come into force until 2002 when it had been ratified by thirty states. It represented a major step in upgrading the international requirements for copyright compliance to take into account the new technologies, and in particular the Internet. By early 2010 over seventy countries had ratified the WCT, including the United States after it had implemented its own 1998 Digital Millennium Copyright Act; interestingly, all the most recent member states of the European Union have ratified the WCT, but the original fifteen member states, including the United Kingdom, have not yet done so; when they do so, they will enter en bloc.

The term of copyright has generally been on the increase – Russia, as the major successor state to the old Soviet Union, extended its term from twenty-five years post mortem auctoris to fifty years (enabling it to join the Berne Convention) and then to seventy years. The requirement for harmonisation within the European Union led to a 1993 EU Directive for harmonisation of the term of copyright within the region – in practice, a move from fifty years to seventy years post mortem auctoris for most countries, bringing them into line with the period already applying in Germany. This development was not without its problems, particularly in the United Kingdom where the works of a number of major authors such as Virginia Woolf, H.G. Wells, D.H. Lawrence and Arthur Conan Doyle came back into copyright, with publishers then required to pay for the onward use of their works for the rest of the period of revived copyright.

The United States had long had a particularly complex system of copyright protection, with a requirement to register works with the Library of Congress and to reregister them in order to secure a second twenty-eight year term of protection from publication. The Berne Convention Implementation Act of 1988 removed the absolute requirement...