Copyright: What, Why, When, Whence?

A day is coming, when, in the eye of the law, literary property will be as sacred as whisky, or any other of the necessaries of life.¹

Mark Twain

A tale of two copyrights

Charles Dickens lived in a world without copyright, part of the time. When Dickens was in the United Kingdom, copyright in his books protected him from copiers. But the United States, in those days, did not recognize copyright for foreign authors, so there Dickens could only watch as others freely published his books. Dickens lamented “the exquisite justice of never deriving sixpence from an enormous American sale of all my books.”

To make money in the United States, Dickens had to go beyond book publishing. He did sell some books because some readers will always prefer the authorized edition, even if it costs more. Dickens also gave wildly popular public readings of his works, for a fee. He published his page-turner novels in chapters, which gave him a first-mover advantage. Eager readers waited at the port for each Dickens chapter rather than waiting longer for the cheaper, unauthorized version. His contemporaries Gilbert and Sullivan also struggled against copiers in the American market. To strike first, they staged premieres of The Pirates of Penzance close together in London and New York.

We now live in a world with more copyright.² Not only does the United States recognize copyright for foreign authors, but copyright is broader than in Dickens’s times. Early copyright—for 28 years—applied only to books, maps, and charts. Now copyright applies to most creative works and may last for more than 100 years. We also live in a world with more copyright infringement. More things are copyrighted, and digital technology makes copying easy. The Internet is a global copy machine.³ Accordingly, many of today’s authors continue Dickens’s strategies. Publishers rely on copyright, when it works, but, in addition, musicians and comedians sell tickets to performances, authors sell their work piecemeal, and movies open worldwide to get the jump on copiers.
What is copyright?

Theater student Ada writes a play, Denial of Service. She automatically owns the play’s copyright. Others could infringe Ada’s copyright by making copies of the play, adapting the play such as by making a movie, distributing copies to the public, performing the play publicly without her permission, or displaying copies to the public—although the display option is better for works like paintings. Copyright could be “Copyadaptdistributeperformdisplay,” and instead of ©, CADP®. The owner of the copyright in a book, a song, a movie, or a photo may sue infringers to get a court order to pay money and perhaps to cease the activity.

Copyright gives the legal right to prevent others from all of the following activities: copying, adapting, distributing, performing, and displaying.

Making copies of the work

Only the owner of the copyright in Harry Potter and the Philosopher’s Stone can legally make copies of the book. Hence, copyright. Others could infringe the copyright by making a copy of a chapter or any part of the book; writing a book closely copying the plot and characters, even if no part is copied word for word; Xeroxing the book (copying in another form); scanning the book; and so forth.

Copyright has exploded in the digital age. First, electronic copies are easily made and easily passed along. Second, works in digital form, such as software, a digital photo, a book in PDF, or a song in MP3, must be copied in order to be used. To run software or play music or display a photo, a computer makes a temporary copy in its working memory. Consequently, simply
using a work in digital form may infringe the copyright. This is a sea change: reading a physical book or looking at a painting does not involve making a copy, other than perhaps a mental copy.

Questions

1. How many ways could you make a copy of *Harry Potter*?
2. Booker copies four chapters from another author into a textbook, carefully giving full credit. Copyright infringement?
3. Wordwerf copies a poodle photo off a website for the cover of his book. The photo was freely available on the Web. Copyright infringement?

Answers

1. Well, you could copy it in longhand; Xerox it; scan it; take a picture of each page with a pinhole camera; save the text in PDF, ASCII, Braille, or Morse code; save a copy on a hard disk, flash drive, or cloud drive; quill it on parchment; or encode it in DNA. Consider some of the synonyms for *copy* found on thesaurus.com and the like: carbon copy, cast, clone, counterfeit, ditto, facsimile, forgery, hard copy, image, impression, imprint, likeness, microfiche, mimeograph, miniature, mirror, model, pattern, photocopy, photograph, photostat, print, replica, reprint, reproduction, rubbing, simulacrum, simulation, tracing, transcript.

   You could also copy the book less closely, such as by copying the characters and story, but not word for word.

   No doubt you can think of more ways to copy. We copy a lot, so the subject of copyright comes up a lot.

   What if you memorized the book? That’s making a copy in a sense—but not in the sense of copyright law. Otherwise we would be infringing copyrights constantly. The law is not a hobgoblin for logical consistency.

2. Yes, this would be an example of infringement. Only the author has the right to make copies, whether or not proper attribution is given.

3. This is copying, and so it is likely infringement. The very point of copyright is to encourage authors to make their works public by giving them legal control over copying.

Adapting the work

The *Hitchhiker’s Guide to the Galaxy*, HHGG for short, is a good example of a work that has been extensively adapted. A radio program begat HHGG the novel, and the novel begat a four-book trilogy, which begat HHGG the movie, along with HHGG audiobooks, translations, the HHGG game for the Commodore 64 computer, and, according to a Hungarian phrasebook, *Galaxis útikalauz stopposoknak*. The adaptations have outlived the author, Douglas Adams. His estate hired a kindred spirit, Eion Coifer, to write *And Another Thing*. 
The movie industry likewise thrives on adaptations. There’s an Oscar for the Best Adapted Screenplay, usually from a book. Sequels are common. At the time of this writing, Madagascar 3, Men in Black 3, The Hobbit, an adaptation of a book and prequel of movies, and The Avengers (ditto) are out there. Broadway’s biggest box office is in musicals adapted from movies: The Lion King, Spamalot, The Producers. Arthur Conan Doyle reluctantly resurrected Sherlock Holmes to keep a lucrative series going.

To use Harry Potter as our example again, others could infringe the copyright if, without permission, they made an Icelandic translation, Harry Potter og viskusteinninn, or an American translation, Harry Potter and the Sorcerer’s Stone (changing “barking” to “off his rocker” and “Sellotape” to “Scotch tape”), a Broadway musical, a movie, a ballet, an audiobook, a video game, or The Annotated Harry Potter.

The adaptation right gives the author some control over the artistic fate of her work. J. K. Rowling chose to stop after Harry Potter and the Deathly Hallows. One who wrote Harry Potter Goes to CalTech could nevertheless
infringe. By the same token, the breadth of the adaptation right makes some wonder whether copyright goes too far.\(^5\)

Having legal control over adaptations may affect how an author creates. J. K. Rowling, in writing the first *Harry Potter*, knew that only she would have the right to write sequels or have movies made. A subtle one: the “Bergman effect”: when films are subtitled, only so many words per second may be shown. Swedish film director “Ingmar Bergman made two quite different kinds of films—jolly comedies with lots of words for Swedish consumption, and tight-lipped, moody dramas for the rest of the world.”\(^6\) The wordy comedies did not need subtitles for domestic audiences, while the laconic dramas could be subtitled for the world.

**Questions**

1. What adaptations were or could be adapted from the following?
   Feel free to speculate if you are not familiar with the work:
   - *The Hunger Games*, the novel
   - *Windows 7*, the computer operating system
   - *Madagascar*, the movie
   - *Angry Birds*, the video game

2. What's the oddest adaptation you can think of?

3. Shania Twain is thrilled to sell the copyright to her first novel, *A Is for Alphabet*, to Elastic Books. Encouraged, she starts the sequel, *B Is for Binary*. She also dreams of selling the movie rights to the books. Any problem?

4. What if copyright did not cover adaptations?

**Answers**

1. Following are the adaptations that were or could have been made:
   - *The Hunger Games* was adapted into a movie, translations, and sequels. One could also adapt it into a play, an annotated edition, or a game (video or board).
   - *Windows 7* was adapted into *Windows 8*—and itself is one of a line of adaptations going back to *MS-DOS*.
   - *Madagascar* was followed by sequels, and no doubt video games, books, and violin sonatas.
   - *Angry Birds* was adapted into many more games, but also a movie, showing adaptation can flow any direction. It could likewise be adapted into any of these forms: sonnet, musical, or annotated scholar’s edition.

2. Many possibilities exist here. *Pirates of the Caribbean*, a ride at Disneyland, was adapted into a movie, which then, of course, had sequels. Pierce Anthony’s *Total Recall* novelized the movie *Total Recall*, which was based on Philip K. Dick’s story, *We Can Remember It for You Wholesale*.

   George Seurat’s painting *A Sunday Afternoon on the Island of La Grande Jatte* (1884) was adapted into a musical, *Sunday in the Park with George*, by Sondheim and Levine.
Anything can be made into a musical. But not a patent, yet. Here’s a possibility:

3. Problem: Elastic Books, now the owner of the copyright in *A Is for Alphabet*, has the right to adapt the book, such as making a sequel or a movie, or an Icelandic translation, *A er fyrir Stafróf*. Twain could infringe if she proceeds without Elastic’s permission. Elastic may well agree, for a percentage. But Twain would have been wiser, had she but known, to sell only part of her rights.

Copyrights have been sold cheap. The authors of *Superman* sold the copyright for $130 in 1937. *Superman* and its many adaptations made hundreds of millions of dollars. Some 75 years later the author’s estates were able to get the remaining rights back.

4. Would authors behave differently? J. K. Rowling would still have written *Harry Potter*, but perhaps differently if she had no right to make sequels and movies. She could have put it all in one big book, or wrapped everything up in the first. With no derivative right, she could not have prevented others from writing *Harry Potter 2* or making a *Harry Potter* movie—but audiences would likely prefer...
J. K. Rowling’s version, just as they prefer a genuine Monet even though the originals are no longer under copyright.

If copyright did not cover adaptations, it also would limit the author’s artistic control. Art Spiegelman has staunchly declined to allow a movie to be made from his graphic novel *Maus*, saying: “I don’t understand why everybody in this culture seems to believe it’s not real until it’s turned into a movie.” If he did not have the adaptation right, anyone could make a movie from *Maus*. Opinions vary on whether authors should have this control or whether others should have freedom to build on the work. What do you think?

**Distributing copies of the work to the public**


Under “First Sale” Doctrine, Amazon May Distribute Copies of *Harry Potter*

The distribution right makes it easier to show infringement. Were copyright limited to the right to make copies, a person simply selling unauthorized copies would not be infringing unless it could be shown that the seller made the copies.
A student selling used textbooks on eBay does not infringe the distribution right. The first sale doctrine limits the distribution and display rights to the owner of an authorized copy, so someone who owns a lawfully made copy may distribute it. A buyer of *Harry Potter* may sell his or her particular copy. By selling a copy, the copyright owner has lost control over the fate of that particular copy. First sale allows used bookstores to sell copyrighted books, libraries to lend copyrighted books, and museums to display or sell copyrighted paintings. But first sale applies only to the distribution and display rights. In other words, first sale allows a fan to sell her authorized copy of *Harry Potter* but not to make a copy, which would infringe the right to make copies, or to write a sequel—and that, in turn, could possibly infringe the adaptation right (we say “could,” because, as we will see, it may be fair use if noncommercial).

The digital world raises two big questions about the scope of the first sale doctrine. First sale allows the owner of a copy to sell that copy. So one could deliver a DVD or USB storage device with the copy, but how could it be sold online? If I e-mail a copy to the buyer and destroy my copy, is that equivalent to selling my copy, which I may do? Or have I made another copy and distributed it, both actions potentially infringing?

Also, first sale rights apply only to the owner of a lawfully made copy. Software is often sold under a license agreement, which says the buyer gets a license to use the software but does not become the owner of a copy. So the buyer cannot legally sell her copy.

**Questions**

1. Which could infringe?
   a. Flash buys a copy of *Harry Potter*, scans it, and sells 50 copies around town.
   b. Madoff advertises cheap first editions of *Harry Potter* on eBay. He takes buyers’ money and delivers nothing.
   c. Gordon buys 50 genuine copies of *Harry Potter* at an auction and sells them all.
   d. A library lends the same copy of *Harry Potter* 50 times in one year.
2. At an auction, Turing sells her computer, which is loaded with authorized copies of software. Has she infringed the distribution rights in the various copyrights, or does first sale apply?
3. Startup ReDigi allows people to resell songs from iTunes. ReDigi ensures that only one copy is delivered and that the seller’s copy is destroyed. Would first sale permit this as the sale of a copy?

**Answers**

1. Answers here are mixed:
   a. Flash could sell his authorized copy, but first sale does not allow him to make more copies or sell them.
   b. Madoff has not distributed anything, so he is not infringing copyright, but he may have to pay for fraud, wire fraud, false advertising, and plenty of other things.
   c. Gordon is not infringing the distribution right, because first sale allows him to sell the books.
d. First sale authorizes the owner of an authorized copy to sell, lend, or lease it. Without first sale, used bookstores and libraries would need permission from publishers.

2. Under first sale, Turing may sell authorized copies that she owns. But the software was probably provided under licenses that state that the copy does not belong to her and may not be resold. If the licenses are effective, Turing could be infringing. Do you think that’s fair?

3. This looks like infringement: the making and distribution of more copies. First sale would permit only the sale of a particular copy. Could fair use apply? Stay tuned.10

Performing the work in public

Bar bands could infringe copyright by performing Beatles songs without permission, such as by paying for a license. The bar could likewise infringe if it played recorded Beatles music over the sound system.

The copyright holder has the right to publicly perform the work, broadly defined as “to recite, render, play, dance, or act it, either directly or by means of any device.”11 Singing “25 Minutes to Go” privately at home will not infringe Shel Silverstein’s copyright, but singing the song at a concert could.
A public performance of a work may use a device. A coffee shop could infringe by playing a recording of “25 Minutes to Go” over the sound system. What about first sale, which limits the copyright owner’s rights once a lawful copy is sold? First sale allows the buyer to distribute or display the copy but not to make copies, adapt the work, or perform it publicly.

How would Shel Silverstein enforce such a right? Shel’s ghost could parade up and down every street in the country listening for unauthorized performances of his songs. Or someone could do it on his behalf. Collective rights organizations such as the American Society of Composers, Authors, and Publishers (ASCAP) or Broadcast Music, Inc. (BMI) represent considerable numbers of musicians. In fact, ASCAP and BMI do send agents to visit bars, coffee shops, restaurants, concert halls, and other venues. Crafty agents may phone businesses to hear if music is playing in the background or played to callers on hold. If music from their long list of copyrighted works is performed, the establishment will soon hear from the rights organization. That can be a surprise to a little coffee shop owner who thought she was entitled to play the music she purchased. Various licenses are available, however.

Questions

1. Which of the following could potentially infringe?
   a. Mick sings a Beatles song in the shower.
   b. Mick sings a Beatles song at a bar mitzvah.
   c. Mick sings Beatles songs onstage at the company picnic.
   d. A company pipes Beatles songs into the employees’ cubicles.

2. From The Boston Globe: A resident of New Hampshire (state motto: Live Free or Die) was arrested 4 times in 26 hours for blasting the neighborhood with AC/DC’s song “Highway to Hell” along with throwing a frying pan. She was charged with disturbing the peace and with assault. Was this copyright infringement as well?

3. Why don’t waiters sing “Happy Birthday to You”?

Answers

1. Answers here are mixed:
   a. A song in the shower is the classic example of a nonpublic performance.
   b. As long as just family and friends are present, a song at a bar mitzvah is not a public performance.
   c. Even if Mick is not a professional, a company picnic would be a public performance (this looks like fair use, as do some other examples—stay tuned).
   d. Performing the music using a device is potentially infringing—and ASCAP and BMI are in the business of identifying such infringement and selling licenses. Businesses may either pay up or turn to less costly alternatives such as classical music, which is too old to be copyrighted, or MUZAK and so-called “easy listening” music.

2. A public performance of AC/DC’s copyrighted music could possibly be copyright infringement. One need not sing the song to infringe. Playing a recording to the public is a public performance.
This was definitely public, hence disturbing the peace. But it may be protected by fair use (discussed later in the book) because she charged no fee and no lost licensing revenue is apparent. Anyway, AC/DC will be OK with it.

3. Restaurants prefer not to pay the licensing fee.

Displaying the work to the public

An artist built an installation in the Massachusetts Museum of Contemporary Art called *Training Ground for Democracy* in which visitors take on the roles of immigrants, activists, looters, and judges working their way through sets ranging from a movie theater to an aircraft fuselage. The artist and museum fell out, a common theme in copyright disputes. After the artist left for Europe, the museum proposed showing the artwork to the public but could not do it without infringing the artist’s copyright, which includes the right to display the work to the public.12

The public display right matters little for many categories of works. No one cares too much about displaying the lyrics or musical arrangement of “25 Minutes to Go.” Sound recordings cannot be displayed. Even the right to display such visual works as paintings and sculpture mattered little until recently. First sale applies to the display right, so only the owner of a painting, a poster, or a sculpture can legally display it. Displays of unauthorized copies of paintings, posters, and sculptures would infringe, but these displays have sparked few disputes. However, the Internet now permits displays of images everywhere, so public display right has become more important.

**Question**

An artist buys a book of photographs, cuts them out, hangs them in a gallery, and sells them. Infringement? Does it matter if the artist gives credit to the photographer? What if the artist draws on the photos?

**Answer**

The artist owns authorized copies of the photographs, so he may display them and sell them under the first sale doctrine. Failure to attribute makes no difference to copyright infringement.

Drawing on the pictures may infringe the adaptation right. But fair use may protect the artist.

**Why does this book keep saying “could infringe”?**

Someone who copies from *Harry Potter* or distributes copies, adapts the work, performs it, or displays it publicly could possibly be infringing copyright, but there is no infringement if she simply writes a different book about wizardly students—because copying ideas is not infringement. Nor is there infringement if a person makes fair use of the work, such as by writing a parody that comments on *Harry Potter*, or Xeroxing a passage to hand out to a copyright class, or writing a sequel for fun, without publishing it. For brevity’s sake, this
book says “could infringe” instead of repeatedly saying “infringes, unless fair use, the nonprotection of ideas, or some other limit on copyright applies.”

Why copyright?

Laws forbid antisocial acts like murder, kidnapping, and double-parking. Copyright law forbids sociable acts like distributing books, singing songs, and translating *Harry Potter* into Icelandic. The purpose is to encourage people to distribute books, sing songs, and translate *Harry Potter* into Icelandic. How so?

Two reasons are most often given for copyright. The first is that copyright gives people an incentive to create works. The second is that copyright lets artists control use of their works and prevents others from distorting or knocking off those works.

The first reason for copyright is economic. Absent copyright, a potential author might think, “Why take a year to write a book/make a movie/record an album if anyone else could then sell or give away copies of my work?” To give authors an incentive to create works, copyright law protects them against free-riders in that only the author has the right to exploit the work. The U.S. Constitution states such a reason for copyright and patent:

> The Congress shall have Power . . . to Promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

Even in industries like music, publishing, and software, many works would be created even in a world without copyright. But copyright increases the supply of works. Samuel Johnson observed, “No man but a blockhead ever wrote, except for money.”

Copyright also balances the right of authors to control their works against the interests of others in using the work. If copyright were merely an incentive, it would apply only to certain categories of works and would have real limits on duration. But copyright automatically attaches to any work, even those that would be created without copyright, such as diaries, academic works, free software, hobbyist works, student papers, and artworks—and lasts 70 years past the author’s death.

*The Virgin and Child with St. Anthony Abbot and a Donor (1472) by Hans Memling*
Financial spurs to creativity go well beyond copyright. Academics must, as the saying goes, “publish or perish.” Students pay to be required to produce work. Advertisers produce quite creative works. Long before copyright law, the painting by Memling shown here was funded by the kneeling merchant so that he could be pictured in sacred company. A movie or opera may cast someone beloved of an investor. Patrons (like the donor in Memling’s painting) have supported artists, as have governments and universities. Some musicians and comedians look more to sell tickets than recordings. Crowdfunding, such as Kickstarter, now allows authors to get broad-based financial support for proposed projects. The Nigerian movie industry relied little on copyright in becoming the second most productive in the world, between Bollywood and Hollywood. Prizes, such as Nobel, Pulitzer, and Booker, plus publication, peer esteem, and self-fulfillment all fuel creativity—and apparently always have: scientists have found creative artifacts dating from pre-human hominids.

**Question**

If copyright were just an incentive to produce works, how long would the term of a copyright be?

**Answer**

Consider this: a patent’s term of about 17 years motivates plenty of inventors. An author’s decision to create would rarely be affected by whether her copyright would expire in 20 or 30 or 100 years. How long do you think copyright should last?

**When does copyright expire?**

Boy Texting in 1911?

Retronaut.com
Chapter 1
Copyright: What, Why, When, Whence?

I wandered lonely as a cloud
That floats on high o’er vales and hills,
When all at once I saw a crowd,
A host, of golden daffodils.

William Wordsworth (1804)

Works published before 1923, such as the photograph, book, and poem shown here, are no longer under copyright. Yet, Shel Silverstein died in 1999, perhaps swallowed by a boa constrictor, and his copyrights live on. Others would need permission from Silverstein’s heirs to make copies of Where the Sidewalk Ends, publicly perform The Cover of the Rolling Stone, or publicly display the drawings from The Giving Tree. Life is short, copyright is long. Copyright now lasts 95 years, plus or minus a few years.

Pre-1978 works: 95-year term

Mark Twain argued for perpetual copyright. As he put it, ownership of a house does not expire, so ownership of a copyright should not. Copyright does last a long time. Just how long depends on when the work was created. In 1809, the first copyright law in the United States gave a total copyright term of 28 years. Obviously, those works are long out of copyright. Fast-forward through several iterations: the Copyright Act of 1909 gave a copyright term of 56 years if the copyright holder filed a renewal at 28 years. Many works went out of copyright after 28 years because no renewal was filed. Other works under the 1909 act started to go out of copyright around 1966, when works published in 1910 reached the 56-year limit.

Warm up your adding machine. In 1977, Congress added 19 years, giving an effective term of 75 years (28 + 28 + 19 years) for pre-1978 works. Works whose copyright had expired did not get additional time, so works published before 1923 (1978 – 56 = 1922) are out of copyright. The Waste Land is in the public domain, as it was published in 1922.
The new term of 75 years meant that nothing from after 1922 need run out of copyright until 1998 (1923 + 75). As 1998 approached, works from the 1920s were headed for the public domain. Such works included early Mickey Mouse cartoons, *The Great Gatsby*, many Tin Pan Alley songs, and the ever-green “Happy Birthday to You.” In 1998, Congress again added 20 years to the term of all copyrights. The term of pre-1977 copyrights is now 95 years. That means that nothing from 1923 or after will run out of copyright until after 2018 (1923 + 28 + 28 + 19 + 20). By comparison, if a patent had a 95-year term, then patents would still be in effect on inventions like insulin (1923), nylon (1935), and radar (1935)—not to mention the machine to slice bread (1932).
Questions

1. Here are some for Watson, the Jeopardy-winning artificial intelligence program. Which of these works were published before 1923 and so are not under copyright? Feel free to consult Google or Siri.¹⁹
   - Sigmund Freud, The Interpretation of Dreams
   - W. E. B. Du Bois, The Souls of Black Folk
   - Franz Kafka, The Metamorphosis
   - James Joyce, Ulysses
   - A. A. Milne, Winnie-the-Pooh
   - Virginia Woolf, A Room of One’s Own
   - Aldous Huxley, Brave New World
   - Dr. Seuss, The Cat in the Hat

2. When would these copyrights expire?
   a. “When I’m 64” (Lennon & McCartney, 1967)
   b. “Seventy-Six Trombones” (Meredith Willson, 1957)
   c. ‘Bob Dylan’s 115th Dream’ (Bob Dylan, 1965)

3. Sometimes copyright owners use Roman numerals for the years in their copyright notices, such as “Ben Hur, © MCMLIX MGM.” When will MGM’s copyright in Ben Hur expire?

Answers

1. These works are no longer under copyright:
   - Sigmund Freud, The Interpretation of Dreams (1900)
   - W. E. B. Du Bois, The Souls of Black Folk (1903)
   - Franz Kafka, The Metamorphosis (1915)
   - James Joyce, Ulysses (1922)

   These works are still under copyright:
   - A. A. Milne, Winnie-the-Pooh (1926)
   - Virginia Woolf, A Room of One’s Own (1929)
   - Aldous Huxley, Brave New World (1932)
   - Dr. Seuss, The Cat in the Hat (1957)

2. For pre-1978 works, the term is 95 years.
   a. 1967 + 95 = 2062 (easy way to add 95: add 100 and then subtract 5)
   b. 1957 + 95 = 2052
   c. 1965 + 95 = 2060

3. The film was published in MCMLIX, so, assuming the copyright was properly renewed XXVIII years later in MCMLXXXVII, the copyright would last for a total of XCV years (XXVIII + XXVIII + XIX + XX)—that is, until MMLIV.

   Using Roman numerals is impractical. Perhaps that is the reason some still use them. It is time for a copyright notice with the year in binary: Software Law, © 11111011110 Ian.
Post-1977 works: Life + 70, or 95 years, depending on certain factors

_Monty Python and the Holy Grail_, from 1975, will be copyrighted until 2070 (1975 + 95). For works created after 1977, the term is the life of the author plus 70 years. Sherman Alexie has not shuffled off this mortal coil as of 2015, so _The Absolutely True Diary of a Part-Time Indian_ from 2007 will be under copyright until at least 2085 (2015 + 70). For post-1977 works by employees, the term is still 95 years, because corporations have no life to measure.

Copyright lasts a lot longer than incentives would require. No one deciding whether to write a book or even make a zillion-dollar movie considers whether it will still be under copyright 70 years after his death. As an economist would put it, the present value of possible payments seven or more decades in the future is negligible. In plain English, possible royalties 70-plus years from now will not affect the decision to write a song today. Rather, the long term of copyright better fits the idea of author’s rights. To a strong believer in author’s rights, if _Runny Babbit_ is still selling copies in 2050, Shel Silverstein’s heirs should get paid.

Questions

1. For joint authors, the term is measured by the longer life. Should authors pick young co-authors so as to get a longer term?
2. When would the following copyrights expire?
   b. “99 Red Balloons” (Nena, 1982)
   c. “99 Revolutions” (Green Day, 2012)
3. *Til death do us part, and then some.* Drudge churns out a potboiler as an employee of Roman Romances. In Drudge’s spare time, he writes a poem. Which work has a longer copyright?

Answers

1. There would not be much point in such a trick. If a 70-year-old author got a 20-year-old co-author, they would get some 50 more years of copyright—but not until both were long dead. Meanwhile, the 70-year-old would have to share rights now, a big price to pay for a possible benefit to her or his heirs.
2. The answer for all four examples is, “Not anytime soon.” For post-1977 works, the copyright term is life plus 70 years for individual and joint authors and 95 years for works made for hire. For joint authors the longer life is the measuring life. The authors in our examples are still going strong. The copyrights will last 70 years longer than they will. The earliest one is 1968, so that copyright has “only” the pre-1978 term of 95 years—and that is until 2053.
3. The answer for this example is, “It depends.” The copyright term for works by employees is 95 years. For works by individual authors, the copyright term is life plus 70 years. If Drudge lives another 25 years, then the copyright term for the poem will exceed 95 years. A kindergartner has the copyright in her finger painting. If she lives another 90 years, the copyright will last 160 years (90 + 70).

**Orphan works**

*General.* Stop! I think I see where we are getting confused. When you said “orphan,” did you mean “orphan”—a person who has lost his parents, or “often,” frequently?

*Pirate King.* Ah! I beg pardon—I see what you mean—frequently.

*General.* Ah! You said “often,” frequently.

*Pirate King.* No, only once.

The *Pirates of Penzance*, published 1879, so long out of copyright

A side effect of the long copyright term is the “orphan works” problem. Suppose that a researcher uncovers a photo, or short story, or song in an old book. The book bears a copyright notice, “© 1940 Peirce Press.” It is unclear as to who holds the copyright or whether it was renewed. Probably no one would object if the researcher published the photo/story/song/book. But a copyright holder could pop up and be entitled to considerable money for copyright infringement. A careful party would not take the risk of copyright infringement, whether on economic or ethical grounds.
Works written but unpublished as of 1978

Mark Twain’s *Adventures of Huckleberry Finn* (1885) has been out of copyright for over 100 years. But Twain’s autobiography, written from 1870–1899 and published in 2000, is under copyright. Twain kept most of his autobiography private, to avoid lawsuits and duels. To encourage publication of works unpublished as of 1978, Congress gave them copyright until 2047. This was not perpetual copyright, but it would extend more than a century beyond Twain’s life.

Whither copyright: Constitutional limits on copyright?

In 1998, Congress retroactively added 20 years to the copyright term, disappointing those who expected works from the 1920s to start going out of copyright. Some argued a retroactive copyright extension was beyond the constitutional power of Congress. If the idea was to give copyrights to encourage the creation of works, it was not a valid idea. Obviously, copyright extension in 1998 did not make authors back in the 1920s work harder. They also argued that Congress went beyond its power to grant copyrights for “limited Times” by repeatedly extending copyright terms, called by some “perpetual copyright on the installment plan.” But the Supreme Court upheld the law, ruling that Congress has great scope in fashioning copyright law. Copyright law itself was deemed to protect freedom of expression, because it permits fair use and allows copying of ideas.

The issue may arise again in 2018.