

Should the very concept of copyright be rethought — at least in the realm of academic scholarship?

This article recommends that the UK Higher Education Funding Councils adopt a policy requiring that they will in future only consider outputs that are available under a Creative Commons licence when assessing the quality of UK academic research. Such a policy would offer many benefits for universities, for researchers, and for society at large. Although incidentally such a policy would reduce costs for libraries, the primary reason for the recommendation is to benefit society at large. However, a key question remains: will the Funding Councils adopt a policy for the greater good of all society, but which will prove to be very controversial?

On 20 February 2012, Adrian Hon, the owner of the games company Six To Start, wrote an amusing spoof article¹ in the *Daily Telegraph*. Part of it went as follows (reproduced with his permission):

“Yet now, as we’ve instituted decade-long jail terms and unlimited fines for copyright infringers, it’s time to take the next step in extending copyright terms even further.

Imagine you’re a new parent at 30 years old and you’ve just published a bestselling new novel. Under the current system, if you lived to 70 years old and your descendants all had children at the age of 30, the copyright in your book – and thus the proceeds – would provide for your children, grandchildren, great-grandchildren, and great-great-grandchildren. But what, I ask, about your great-great-great-grandchildren? What do they get? How can our laws be so heartless as to deny them the benefit of your hard work in the name of some do-gooding concept as the ‘public good’, simply because they were born a mere century and a half after the book was written? After all, when you wrote your book, it sprung from your mind fully-formed, without requiring any inspiration from other creative works – you owe nothing at all to the public. And what would the public do with your book, even if they had it? Most likely, they’d just make it worse. No, it’s clear that our current copyright law is inadequate and unfair. We must move to Eternal Copyright – a system where copyright never expires, and a world in which we no longer snatch food out of the mouths of our creators’ descendants. With Eternal Copyright, the knowledge that our great-great-great-grandchildren and beyond will benefit financially from our efforts will no doubt spur us on to achieve greater creative heights than ever seen before. However, to make it entirely fair, Eternal Copyright should be retroactively applied so that current generations may benefit from their ancestors’ works rather than allowing strangers to rip your inheritance off. Indeed, by what right do Disney and the BBC get to adapt *Alice in Wonderland*, *Sleeping Beauty*, and *Sherlock* without paying the descendants of Lewis Carroll, the Brothers Grimm, and Arthur Conan Doyle?

Of course, there will be some odd effects. For example, the entire Jewish race will do rather well from their Eternal Copyright in much of the *Bible*, and Shakespeare’s next of kin will receive quite the windfall from the royalties in the thousands of performances and adaptations of his plays – money well earned, I think we can all agree.

I do want to point out a genuine problem with Eternal Copyright, in that it will be difficult to enforce due to the inherently criminal nature of digital technology, which allows



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184 information to be copied perfectly and instantly. Absent a complete ban of the technology, which admittedly would be a little draconian, one obvious solution would be to hard-wire digital devices to automatically detect, report, and prevent duplication of copyrighted material. Yes, this might get the libertarians and free-speech crazies out protesting, but a bit of fresh air wouldn't do them any harm."

Somewhat to my surprise, a lot of people thought the author of the article was being serious. In fact, he was persuasively arguing the case that the term of copyright is already far too long; the logic of those wanting even longer terms for copyright is precisely what he outlined.

The first copyright state, the Statute of Anne in 1710, gave copyright in printed books a lifetime of 14 years, renewable for another 14 years under certain circumstances. Nowadays, we are used to much longer copyright lifetimes, and its extension to cover all media types. But still the rightsholders are not happy, and they constantly press for longer lifetimes, or more draconian measures to deal with copyright infringement. Their argument is that piracy is damaging their business model. This is an intuitively plausible argument, but it must be said that hard evidence (as opposed to anecdotal evidence or extrapolation from small interview samples) for damage to sales caused by copyright infringements is sparse, and indeed, by its very nature is almost impossible to acquire. And there is some evidence to support an alternative hypothesis, i.e., that those who download a lot of material illegally are more likely to make purchases than those who don't download.

"... in some areas of creative endeavour there is no need for copyright protection at all."

In this essay I want to consider an alternative proposition, namely that in some areas of creative endeavour there is no need for copyright protection at all. I refer to the field of scholarly publishing. Let me be clear; I am not suggesting a change in copyright law, for reasons explained below. Rather I am suggesting a change to the use made of copyright by scholars.

Because there is no definition of scholarly publishing, it would not be possible to introduce legislation abolishing copyright for a particular type of publication. Indeed, our international commitments as signatories of the major international treaty on copyright, the Berne Convention (which, interestingly, itself has been under attack recently) oblige us to automatically grant copyright to the creator (or employer of that creator) of a new piece of work. So a law stating, "copyright applies to everything apart from scholarly works" is a non-starter for as long as we are signatories to the Berne Convention as well as because of the horrendous definitional problems that would arise.

So what am I suggesting? I am suggesting that as a condition of employment as an academic in a UK-based educational establishment, a UK scholar should be required to offer all outputs of their research from now on with a Creative Commons licence. In other words, the copyright remains with the author (or their employer), but the copyright owner has chosen to grant anyone the right to copy their work, without having to ask for permission or pay any fees.

This is not the same thing as the idea of mandates requiring a member of academic staff to submit their outputs to an institutional or subject repository, which, in turn, is available typically with a Creative Commons licence. The progress of approving, and then implementing mandates has been extremely slow, and as a result many institutional repositories only carry a small proportion of staff outputs.

Now why would a university wish to impose such an extreme constraint on the freedom of its staff to publish what they want where they like? It would do so only if it was in the university's own self-interest. I can only foresee one circumstance where this would be adopted as employer policy because of such self-interest. That would be if the Research Excellence Framework (REF) – or whatever succeeds it as a mechanism for allocating income based upon research by the UK Higher Education Funding Councils – adopts the following policy: *we will not consider any output in our evaluation unless it is available under*

185 *a Creative Commons licence*. I am not suggesting that this policy be adopted by the Funding Councils for the current REF round, as too many outputs are already out there ready to be evaluated which are not, and cannot in time be made Creative Commons licensed. But what if the Funding Councils were to adopt this policy for the *next* REF onwards? Now would be the time to adopt such a policy, well before any outputs are going to be written for the next REF period. It would also give the employing institutions time to make the necessary changes to their employment policies.

Why would the Funding Councils want to adopt such a policy? They would do so if they accepted my basic premise, outlined below, that scholarly outputs should be considered to be part of the world's cultural and educational heritage and should be available to all as a common good. There would, incidentally, be some useful benefits to the REF process in that all outputs would be downloadable, printable and/or readable by REF assessors without having to go through the palaver of obtaining licences, as is currently done on REF assessors' behalf by the Funding Councils. But these would be minor benefits, hardly worth on their own the inevitable hassle of the Funding Councils adopting such a policy. All this, in turn, implies that the Funding Councils would be adopting a policy (for the first time?) based not on the convenience of the Funding Councils themselves, or particularly to benefit UK-based higher education institutions, but rather for some higher ethical principle.

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What would be the implications for the researchers? They would have to negotiate with their publishers along the lines of "I am really sorry, but I cannot assign copyright to you, or license you to publish this, unless you guarantee to make the work available under a Creative Commons licence. You can't do that/are not willing to do that? Well then I very much regret I have no choice but to offer it elsewhere". If enough authors did this – and they would HAVE to, because their contracts of employment would obligate them to – publishers would have two choices: either to give way, or forego the output in question.

There is no doubt that such a policy would be popular with libraries that subscribe to scholarly publications since their subscription costs in the medium term would inevitably reduce as a much greater proportion of scholarly outputs became available for free.

But why is such a drastic step, which restricts the freedom of academics to publish where they want, necessary? The stories of increasing prices and the serials crisis are familiar to all. Moves by academics and by librarians to resist price rises are familiar to the readers of this journal. The recent humiliation of Elsevier, having to withdraw its support for the draft US Research Works Act (which would take us in the opposite direction, by requiring federally-funded research outputs to appear in subscription journals) because of academics' outrage over its stance, shows what can happen if enough academics get together to challenge the status quo. My objection to the high prices charged by commercial journal publishers is not because I am anti-capitalist or anti-profits. As someone who worked in the electronic publishing industry for 12 years, I am well aware of the valuable contributions commercial publishers have made in the past to the scholarly publishing sector. But that was in the past, before the internet changed everything. My support for the use of Creative Commons by UK scholars is based on something more fundamental. Scholarly research outputs are something everyone needs – every individual, every organization, every country – to make informed decisions about their lives and their future. Unlike some other life necessities, such as food, heat and housing, scholarly information is non-rivalrous – i.e., if I get some I do not deprive others of it – and so is not subject to normal market forces. One can have an efficient flow of scholarly outputs without having to use the market.

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Indeed there remain many individuals and organizations throughout the world that do not have the hardware, software or network capacity to log into Creative Commons-licensed works, so what I am suggesting is not a panacea. But it would be an important first step towards the democratization of information.

186 The fundamental question posed by this essay is whether the UK Higher Education Funding Councils have the wish or the will to engage in this sort of high-level policy decision, bearing in mind the intense criticism by the scholarly publishing industry and by many academics that would surely follow the introduction of such a policy. Whilst I do not rate the chances of the Funding Councils adopting my proposed approach as very high, they are certainly higher than any effort to stop the copyright owners' juggernaut drive towards longer copyright terms and greater penalties for infringement, as the recent debates on the extremely modest suggestions for changes to UK copyright law resulting from the *Hargreaves Review* have shown.

I rest my case, m'lud. And by the way, of course, this article is available directly from me under a Creative Commons BY-NC licence.

Reference

1. Hon, A, 20 Feb 2012 [blog comment], *The Telegraph* blog: <http://blogs.telegraph.co.uk/technology/adrianhon/100007156/infinite-copyright-a-modest-proposal/> (accessed 27 February 2012).

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