

Making Copyright Work for Authors Who Write To Be Read

Molly Shaffer Van Houweling*

As I prepared to speak on the topic of “academic perspectives” at the 2014 Kernochan Center Symposium *Creation Is Not Its Own Reward: Making Copyright Work for Authors and Performers*, I realized that the panel’s billing had multiple meanings for me. As a legal academic, I study the impact of copyright law on individual authors and the way that individual authors deploy copyright to manage their works. So that is one aspect of my academic perspective—that of an outsider observing authors’ relationships with copyright. But I also consider myself an author, as do other academics for whom writing scholarly books and articles is a job requirement. Most of us do not make money from selling copies of our works of authorship. But control over our works is nonetheless key to our professional endeavors, and copyright can be an important source of that control. Thus my second “academic perspective” is that of an academic author who wants copyright to work for her.

In my capacity as an academic author, I have joined with several of my Berkeley colleagues to establish an organization called Authors Alliance.¹ We aim to represent fellow academics and other authors concerned with managing their rights in ways that ensure that their works are accessible to today’s readers and preserved for generations to come. Hence our motto: *promoting authorship for the public good by supporting authors who write to be read*. This is not a mission that is at odds with authors making money from their works. But it recognizes that whether a book or article makes money or not, we want it to be accessible now and in the future and thereby to contribute to our intellectual legacies.

So what could stand in the way of achieving that authorial aspiration? Surely those authors who want to ensure that people can read their works can just voluntarily make those works accessible—posting them on the Internet, distributing them using print-on-demand platforms and perhaps inviting further distribution by applying open access Creative Commons licenses to them.

In theory this is possible. In practice it is often not, and copyright (and the contractual practices with which it intersects) is part of the problem. Academic authors—eager to secure publication in prestigious venues—often sign away their copyrights without thinking (or without even carefully reading their publication agreements). They later find themselves wanting to reuse those works, to bring them back into print, to anthologize them or simply to post them on the Internet.

* Professor of Law, University of California, Berkeley; Co-Director, Berkeley Center for Law & Technology; Co-Founder, Authors Alliance.

1. See *About Us*, AUTHORS ALLIANCE, <http://perma.cc/633L-PZZQ> (last visited Feb. 12, 2015).

But after signing away their exclusive rights, they need permission from their publishers to make their own works accessible in these ways (if the use goes beyond what counts as fair use under the law). In the meantime, contracts get lost, publishers go out of business, and authors may find they do not know where to begin the process of negotiating for the permissions they need. This is an ironic twist on the orphan works problem: in some cases in which a copyright owner cannot be found for purposes of seeking permission, the person who wants permission is the author herself!

These problems do not plague only absent-minded professors. The difficulty of wanting to reuse one's own work but not having the rights to do so is something we heard about during the Symposium, when playwright Doug Wright reported that he did not have the right to reuse dialogue he had written for a screenplay adaptation of his own stage play.² He reported trying whenever possible to avoid this situation, to retain his copyrights and thereby to be, as he put it, "the CEO of [his] own imagination."³

What could help other authors retain their status as CEOs of their own imaginations? As managers of their own intellectual legacies? In terms of copyright reform, it would help to make recordkeeping work better for authors. In particular, requiring that transfers from authors to publishers be recorded, and that subsequent transfers be recorded as well, would help us keep track of our rights in case we want to get permission to reuse our own works in the future.⁴ Requiring recording is included in the Authors Alliance *Principles and Proposals for Copyright Reform*.⁵ So is simplifying the termination of transfer process, through which authors currently have a statutory right to reclaim assigned copyrights but only after navigating a maze of confusing requirements (and waiting over three decades).⁶ An additional reform that is not specifically mentioned in the Authors Alliance proposals but that I personally favor would be putting a thumb on the scale in favor of fair use when the user of the work is also its author.

Apart from these legal reforms, we can also improve the situation for would-be imagination CEOs and intellectual legacy managers by educating authors about their rights. Ongoing efforts to do that include Columbia Law School's "Keep Your Copyrights"⁷ project and a series of projects underway at Authors Alliance.

2. See Kernochan Ctr. for Law, Media & Arts, *Keynote Addresses*, COLUM. L. SCH. (Oct. 10, 2014), <http://perma.cc/74FF-PRTJ>.

3. See Doug Wright, *Playwrights and Copyright*, 38 COLUM. J.L. & ARTS 301, 304 (2015).

4. For reform proposals along these lines, see, for example, Daniel Gervais & Dashiell Renaud, *The Future of United States Copyright Formalities: Why We Should Prioritize Recordation, and How to Do It*, 28 BERKELEY TECH. L.J. 1459 (2013); Jane C. Ginsburg, "With Untired Spirits and Formal Constancy": *Berne-Compatibility of Formal Declaratory Measures to Enhance Copyright Title-Searching*, 28 BERKELEY TECH. L.J. 1583 (2013); see also Molly Shaffer Van Houweling, *Land Recording and Copyright Reform*, 28 BERKELEY TECH. L.J. 1497 (2013).

5. *Principle 2: Improve Information Flows About Copyright Ownership*, AUTHORS ALLIANCE, <http://perma.cc/NS5J-ZASH> (last visited Feb. 12, 2015).

6. *Principle 1: Empower Authors to Disseminate Their Works*, AUTHORS ALLIANCE, <http://perma.cc/2BK4-KB3S> (last visited Feb. 12, 2015).

7. *Keep Your Copyrights*, COLUM. L. SCH., <http://perma.cc/K59Z-C7T3> (last visited Feb. 12,

One involves Berkeley Law students working to produce a roadmap for authors who want to understand their contracts and perhaps to renegotiate them in order to regain control of their works.

The Authors Alliance work is inspired by the successes of some of our members. For example, author Katie Hafner (a member of the Authors Alliance Advisory Board) successfully negotiated with Bloomsbury USA to bring her acclaimed 2008 book *A Romance on Three Legs*⁸ back into (non-electronic) print to meet the needs of readers who wanted to access it in hard copy instead of e-book form.

There are other Authors Alliance members whose have the opposite problem. Their books are available in print but they want to distribute them digitally in order to maximize their readership. These works may have outlived their short commercial lives, but their authors want them to have long intellectual lives. When Nobel Laureate Harold Varmus (another member of the Authors Alliance Advisory Board) found himself in this situation, he successfully negotiated with W.W. Norton to make his memoir *The Art and Politics of Science* freely available in electronic form.

Other publishers may be similarly willing—in theory—to work with authors who want to increase their works' accessibility and preserve their intellectual legacies. But reality includes competing priorities and obligations that may preclude time-consuming renegotiations over backlist books. We hope that Authors Alliance's educational materials and tools will lower these transaction costs and thus help authors and publishers work together to overcome unnecessary obstacles to access and preservation.

In sum, my dual “academic perspective” leads me to conclude that a combination of law reform, education and changes in the practices of authors and publishers can help authors operate as imagination CEOs who wisely manage their own intellectual legacies. For some authors, wise management includes deploying their rights to ensure they can be paid. For all authors, wise management includes deploying their rights to ensure they can *be read*.

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8. See *A Romance On Three Legs: Glenn Gould's Obsessive Quest for the Perfect Piano*, KIRKUS REV. (Mar. 15, 2008), <https://perma.cc/6LNE-QD2R>.