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## Copyright Inside the Law Library

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# COPYRIGHT INSIDE THE LAW LIBRARY

By David Vaver\*

*What follows is based on a talk given at a luncheon meeting of the Toronto Association of Law Librarians at the Park Plaza hotel in Toronto on November 23, 1994. An earlier version appeared in 14:3 TALL Newsletter 1 (February 1995). Professor Vaver claims no copyright in either version.*

I propose to talk about copyright law as it affects law practice. Two recent cases are of interest. The first, *R. v. Laurier Office Mart Inc.* (now reported in (1994) 58 C.P.R.(3d) 403), was decided in Ottawa on November 15, 1994, by Judge Ratushny of Ontario's provincial court. A copyshop was acquitted of seven charges of criminal copyright infringement for issuing course kits for courses at Ottawa University. The kits had been assembled by university professors using articles and chapters from books not written by them, and handed by them to the copyshop for copying as ordered by students in their courses. This was an easy case for the RCMP to investigate because one of its officers was taking a course at the university for which he had already gone and purchased materials.

The prosecution was instigated by CANCOPY, no doubt as a cheap way of getting the attention of copyshop owners. It had that effect for the copyshop charged: since nobody likes being prosecuted, the shop took a licence from CANCOPY and has since been paying royalties on copies it makes. The larger threat to other copyshops didn't quite materialize. After all, it is one thing to threaten and quite another thing to carry out your threats successfully. The case is presently on appeal, but I will discuss the first instance decision in more detail later.

The Ottawa decision does not, of course, mean that a *civil* action for infringement brought by the copyright owners would not have succeeded. If competently presented, it would have had a fighting chance of success, as the U.S. decision in *American Geophysical Union v. Texaco* (now reported 37 F.3d 881 (2nd Cir., 1994), decided in New York by a federal appeal court on October 28, 1994, suggests). The court decided that scientific researchers in Texaco labs could not routinely photocopy for their files entire articles from scientific journals routed to them by Texaco's library. Texaco had either to buy more subscriptions or to pay a royalty to the Copyright Clearance Center for each copy made.

In *Texaco*, the authors had transferred their copyrights free to the publisher, so the publisher was the copyright owner. In law publishing, at least in Canada and Commonwealth countries, copyright in articles appearing in periodicals usually remains with the author. Few authors are heard to complain about their articles being copied: they seem happy anyone would bother. As university budgets tighten, university administrators are getting twitchy about the situation. They see their faculty writing articles free for publishers who end up charging them for journals and for using articles written by their own faculty. In future, academics may be pressured not to assign their copyrights to publishers; some universities are talking about insisting on having the copyright themselves and sharing proceeds with their professors.

Meanwhile, the implications of *Texaco* for U.S. law libraries are these:

- What the authors of journal articles want or expect others to do with the articles is irrelevant once they have assigned their copyrights to a publisher: it is the publisher's interests that have to be considered.

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- If a business or other organization subscribes to a journal and routes the journal regularly to its employees, they may or may not be entitled to take copies for themselves:
- they cannot copy if their aim is "archival" (i.e., to have the article on the shelf for later reference) and if there is also a reasonably quick and effective means of buying the right to reproduce the article, like the Copyright Clearance Center or an effective permissions department run by the journal's publisher. If these means do not exist, the employee may be entitled to copy the article for later reference.
- the employees may copy articles if they are researching that particular topic and need the article for that research. Even then, they should scan the article and see what they really need. They should not copy bits they don't reasonably think they'll need.

Whether *Texaco* applies in Canada is far from clear. The U.S. law on "fair use" differs from ours; the social and cultural contexts of the two countries differ; moreover, it is uncertain how strong a precedent *Texaco* is even in the U.S. One of the three judges in the case issued a strong dissent, saying the majority's opinion did the cause of research no good at all. Research proceeds incrementally, one researcher building her work on another's; getting copyright clearances every time one comes across something that may be a lead impedes the cause of acquiring more knowledge and generating new ideas, the purpose of having copyright laws in the first place.

Cases like these make it an interesting time to be a law librarian. Faced with pressure from publishers and their collecting societies, firms, law societies and universities have set or are in the process of setting policies on copying practices. The air bristles with threats of litigation and demands for licence fees by publishers keenly honing their sense of grievance. It's a good time to think about the present and future state of copyright.

A law library typically contains law texts, law reports and periodicals, digests, legislation, reports from governmental and international organizations. There are also links to electronic databases, frequently replicated in the separate offices of users, be they lawyers or law professors. Much of this material is subject to copyright, but much is not.

Consider first *government material*. Governments have copyright in material published by their civil servants and government boards. In the early 1980s, James Lorimer's firm published a one-volume paperback abridgment of a multi-volume report on petroleum pricing issued by the federal Director of Competition. The federal government got an injunction against him, and he had to hand over all his stock and profits made from sales. Lorimer had offered the government the going royalty rate of 8% royalty on retail sales (which the court eventually awarded as damages on past sales), but the government stalled on giving permission. This was precisely why Lorimer had gone ahead before asking permission: he hadn't wanted to wait until the bureaucrats finished pushing their paper round, because by the time someone okayed his project, Lorimer's only hope may have been that his book would be assigned reading in a course on Canadian history.

In the U.S., federal and state legislation and law reports and other publications of the U.S. government have no copyright there and are assumed to have no copyright in Canada either. This is justified on the basis that the laws belong to the people, not their governments.

This democratic ideal does not seem to be widely shared by this country's rulers where — taking a leaf from Britain — the federal and provincial governments claim copyright in the legislation and judgments, although they seem little concerned about what copying goes on in law offices and law libraries. No judge in Canada has

ever decided these claims are supportable in law, although there is a decision in Australia in 1938 where the New South Wales government won an injunction preventing Butterworths from copying the N.S.W. statutes. The Crown had this right either through its prerogative power (the same power it uses to make war) or because it owned copyright in the legislation.

The reason for the Crown's having the right is said to be to ensure accuracy — the same reason that justified the British Crown's claim to control publication of the authorized version of the English and Scottish Bibles. The fear was someone might publish the Ten Commandments with a few choice revisions: miss out a "not" here and there, and where would society be? (Perhaps a great deal more interesting, but certainly not the exemplar of "peace, order and good government" the British upper classes expected of others, if not of themselves.) This reason assumes the infallibility of government printers and the relative sloppiness of private sector publishers; neither charge is entirely true today.

More recently, governments have tried to justify their claims on straight fiscal grounds: to make money off the commercial publication of statutes. At least within the federal bureaucracy, there is a lively debate about the propriety of this between the supporters of the treasury board and those officials who believe in open government. So far, abstract democratic ideals have found it hard to grapple with a mentality favouring deficit reduction and "user pays" principles. (There may be a better reason for the government to have copyright, which I shall come to in a moment.)

The federal and some provincial governments also claim copyright in the *judgments* judges and administrative tribunals deliver. Other claimants have joined the queue: some judges have, in the past, said they own copyright in their judgments; private reporters who take down oral reasons delivered from the bench also have claimed copyright in their reports, just as journalists do for their transcription of interviews. Claims like this bothered one British Columbian appeal judge enough for him to comment, in a case having nothing to do with Crown copyright, that it may be "contrary to public policy" for anyone to claim copyright in a judge's reasons. Presumably, the judge thought this material — which is not likely spontaneously to become as popular as the latest Danielle Steele or Stephen King ripper — should have the widest possible distribution. (*B.C. Jockey Club v. Standen* (1985) 8 C.P.R.(3d) 283, by Hutcheon J.A., concurring). Needless to say, that comment has not itself been widely disseminated by copyright claimants.

Ironically, nothing in the *Copyright Act* says the federal or provincial governments are themselves bound to observe copyright. So, on the one hand, while claiming the copyright law allows them to stop others from publishing their works, they see nothing incongruous in ignoring the copyright law to copy whatever they like, whenever they like. True, the federal government recently agreed to pay CANCOPY royalties for photocopying, but more out of moral compunction than legal obligation.

All this may be cleared up in the pending copyright reforms, although this may be too much to hope for. In principle, we may not mind governments having copyright in judgments and legislation if they simultaneously provide the fullest and freest access to this material. The copyright law might include a provision giving publishers a non-exclusive licence on condition that they would not claim copyright for their compilation, headnotes, summaries, etc., except against competing publishers who copy slavishly. Everyone else would have fullest access. Legal publishers might then realize something they have not always fully appreciated: that they are in a business that is impressed with a public interest. They are entitled to protection from unfair competition, but nothing more.

In the *private sector*, any work the author of which died before 1944 is now out of copyright, since the right lasts only for the life of the author plus 50 years. The whole work may be copied for any purpose including commercial publication.

Although more modern texts have copyright, this is tempered for works like books of forms that invite lawyers freely to copy the forms found there for use in their practice. That's the purpose of the book and, in law, the copyright owner extends an implied licence to users to use the forms in that way (unless they expressly qualify that licence by some prominent notice in the book). The implied licence does not, of course, allow anyone to publish the forms commercially.

For *law journals*, in Canada most authors retain the copyright in their articles. Publishers get only a licence to print. The order in which articles are placed in a journal is too trivial to produce a separate copyright.

As for *law reports*, I have already mentioned the actual *judgments*: I query whether there is or should be any copyright in these, and even if there is, public policy reasons favour the fullest use of and access to the judgments. At common law, public policy considerations like this may override copyright. As for *catchlines*, *headnotes*, and *indexes*, the publisher who prepares has copyright in them. Some years ago, West Publishing was able successfully to claim a copyright in its *page numbers* and case citations, but this is doubtful law both in the U.S. and elsewhere. There may be something in common between the work of a Kipling or Swift and the work of the inserter of page numbers in a book, but the page numberer would not be admitted to a writers' union on the basis of this qualification.

Whether copyright exists in the *selection of cases* made for an issue or volume of the law reports is doubtful: give any 20 lawyers the guidelines for inclusion and most would come up with pretty much the same selection. This suggests there is little originality involved, and anyway having a copyright would be relevant only if somebody wanted to copy all or most of the selection. Typically, this would be a competing publisher, and it seems reasonable to protect Canada Law Book from having someone else, wanting to start a rival publication to the Dominion Law Reports, save money on editorial staff and allow them simply to copy its selection of cases. It seems equally reasonable for anyone wanting to make a photocopy replacement of a tattered volume of the D.L.R. to get the publisher's consent or buy a replacement copy.

In the result, publishers can object to people who copy their headnotes, digests, and cumulative indexes like those at the back of the Dominion Law Reports, but not the alphabetical index at the front, which is mechanical and probably produced by pushing a sort button on a computer. Publishers can object to libraries copying these as a routine service for their lawyers and sending the copies round when the report comes in. The only safe course is to send the physical copy of the publication round. Whether law publishers who insist on this are acting in their long-term interests is for them to consider. In the short term, it seems poor customer relations for very little payback. In times when budgetary concerns affect law firms, they may very well make decisions on which publisher they want to deal with, depending on who gives them the best service and the least hassle. They may ditch those dominated by bean-counter mentality.

Legally, publishers may not be able to object to the copying of the above items *in all circumstances*.

Canada has no specific exemption in the *Copyright Act* allowing lawyers to copy material for use in court or before tribunals. Other countries do have exemptions like this, and the Phase 2 of Canada's copyright reform may well have some such exemption. Exemptions like this have been broadly interpreted. In a New Zealand case last year, a court said that lawyers could have a transcript made of a television programme when one of their clients wanted legal advice about whether the programme had defamed him. The judge said a copyright exemption allowing copying "for the purposes of judicial proceedings" went beyond cases where litigation had actually

commenced; it included cases where the material was "required to be reproduced" for legal advisers properly to advise a client to start litigation or to defend threatened litigation (*Television New Zealand v. Newsmonitor Services Ltd*, (1993) 27 I.P.R. 441, [1994] 2 N.Z.L.R. 91, 109-110.)

Lawyers probably already have some exemption like this in Canada, even if the *Copyright Act* does not expressly say so. Before appointment to the bench, all judges photocopied legal material in the course of their law practices. It is hard to imagine any now deciding that a long-standing open custom accepted within the profession and the judiciary is somehow legally suspect. Copyright is subservient to general public policy, and one important policy is the due administration of justice. In practice, this means at least that law reports, extracts from legal texts, journals or other books can be copied for inclusion in briefs and binders for use in court.

Lawyers should also be able to copy material fairly when researching legal points for their clients, although the lawyer shouldn't copy more than is reasonably necessary for the purpose; in practice, she should be given fair leeway. When going to court, the lawyer has, as an officer of the court, the obligation to produce not only the authorities that support her but also those that do not; if she is entitled to include those materials in her brief and binder of authorities, then she should have similar leeway in giving the legal advice on which a client may or may not end up going to court.

This may, quite apart from any public policy defence, be part of the *fair dealing* exemption in section 27(2) of the *Copyright Act*:

"The following acts do not constitute an infringement of copyright:

- (a) any fair dealing with any work for the purposes of private study or research;
- (a.1) any fair dealing with any work for the purposes of criticism, review or newspaper summary, if (i) the source, and (ii) the author's name, if given in the source, are mentioned."

Most law librarians sometime have had (or will have) the experience of trying to figure out for themselves what "fair dealing" means in a particular instance. They soon hit a mental brick wall, and go to some lawyer or self-proclaimed copyright expert to find what light they can shed on the subject.

The exercise is a bit like the apocryphal occasion earlier this century where the smart-mouth English lawyer F.E. Smith (later Lord Chancellor Birkenhead) was arguing an appeal before a judge of moderate ability. The judge was having difficulty understanding the subtleties of Smith's argument. Finally, when Smith had finished and sat down, the judge said to him: "Well, Mr. Smith, having heard your argument, I am not one bit the wiser now than I was when you started." Smith stood up and, fixing the judge with his iciest smile, replied: "No doubt, my Lord, but at least a great deal better informed." That's pretty close to the state of mind of anyone who has tried to give or receive advice on what amounts to fair dealing, except they end up being *neither* much wiser *nor* much better informed than when they started. For they will find that what amounts to fair dealing is said to be a question of fact depending on the circumstances of the individual case, and what may be thought to be fair in one case may, if the circumstances are just a little different, be thought unfair in another.

The trouble is that lawmakers since the beginning of the century got tired of trying to work out, except at the broadest level, what conduct should be treated as acceptable, so they threw the matter over to copyright owners and users to agree on; if they didn't agree, they could go to court and get a ruling from a judge on whether what they were doing was fair or not. In effect, the legislature delegated its respon-

sibility to make laws to judges. In Canada, few people have wanted to go to court to test the law. The action has been mainly in England and more so in the U.S. Lawyers and judges in Canada like their precedents as much as anyone else, so the danger is that Canada's fair dealing laws will be decided for us by British or U.S. judges, even though our social circumstances and aspirations may be different.

This danger does not exist in the decision of the Ontario provincial court's decision in *R. v. Laurier Office Mart Inc.*, the case of the Ottawa copyshop case charged with criminal copyright infringement, which I mentioned earlier. Professors from the University of Ottawa would tell their class that course materials could be obtained from the copyshop and the students would buy copies directly from the copyshop. In one case, the professor had 80 or 90 copies made and sold them directly at cost to the students. According to the judge, "None of the materials comprising the works were authored by any of the professors who testified and none of the professors had been aware then of any copyright issues or had obtained any permissions to copy." (These professors must have forsaken the ivory tower for hermetically sealed caves.)

Now even a *civil* copyright case is rarely straightforward. In cases that matter — and most that get as far as court do — high-priced lawyers are usually hired to nit-pick their way over the *minutiae* of the *Copyright Act* and its case law, and try to blind one another, and any judge with the ill fortune to have to hear the case, with quasi-science. It is true that, in most areas of the law, one can think of almost any idiotic proposition, and some judge sometime somewhere has said it. Canada can fairly claim to be up there with the world leaders on this score, but it's a close call. One of my favourites is the recent case in the federal Court of Appeal where a judge said that the reason sports games had no copyright protection was because one could bet on their outcome; unlike, he said, *Swan Lake* where nobody lays bets on what will happen to the swan. (The judge had obviously not been recently to any *avant garde* or amateur performance of *Swan Lake*, where it is sometimes touch and go whether the swan will finish up by slugging it out with the audience.) So the new test of copyrightability is: if you can bet on the outcome, it's not copyrightable; if you can't, it is. (*FWS Joint Sports Claimants v. Copyright Board* (1991) 36 C.P.R.(3d) 483, 489-90.) Improvisers, beware!

The game in copyright then is to find the propositions that favour one's case, and try to persuade a bemused judge that this or another piece of foolishness actually is the law, and that he or she must apply it.

If this is true of the civil law, it is even more true of the criminal law. Not many criminal copyright charges are laid in Canada, except in pretty obvious cases. People running basement operations copying video or audio recordings or computer software with 20 high-speed dubbing machines don't have many legal defences going for them these days. "I didn't know I needed permission from anyone" doesn't sound too convincing when you are operating in the dead of night behind closed doors in the basement and selling through bars, under the counter or out the trunk of a car. For those who want to trot out a few defences, prosecutors have been provided by the sound recording industry — and probably other industries — with briefing books that show them step-by-step what evidence they need to collect before they get to court and how to present it. I don't know whether there is a prosecutor's briefing book for prosecuting infringement of published books or periodicals, but if there was, either it wasn't precisely followed or the book itself didn't anticipate all the problems that might arise in this type of case.

In an ordinary *civil* infringement case, the plaintiff has to show (a) it is the owner of copyright; (b) the work's author qualified for copyright in Canada (i.e., the work was first made or published in Canada or a Berne or Universal Copyright Convention

country or the author is a national of one of those countries); (c) the defendant infringed by doing something only the copyright owner is authorized to do — copying, publicly performing, broadcasting, etc.; and (d) the copyright owner had not authorized the defendant to do that.

The defendant can contest any of those elements:

- If you say you're the owner, show me your title documents.
- How do I know the author comes from a Berne or UCC country or the work was first published there?
- I didn't infringe: what I took was not the owner's, and anyway, I took only a little bit.
- Someone else, not me, did the infringing.
- Even admitting the plaintiff's initial claims, I am entitled to do what I did because I was dealing fairly with the work, or I have some other privilege given me under the *Copyright Act* or at common law.
- The plaintiff is barred from suing me because it knew what I was doing for a long time and acquiesced in it, or didn't give me notice that I couldn't do any longer what I have been known to have been doing for a long time without let or hindrance.
- The plaintiff hasn't lost anything anyway and I haven't gained anything by the infringement, so I don't have to pay any money for the infringement.
- Any combination of the above.

In a criminal case, the prosecution must prove all a plaintiff has to in a civil case (except the quantum of monetary relief), and more:

First, it has to show the defendant had a guilty mind. For criminal offences, the *Copyright Act* says nobody is guilty unless he or she "knowingly" sells or distributes infringing copies. It is not a criminal offence to make an infringing copy: only to sell or distribute it to make money off it. And then the seller must know he was infringing; he knew he was doing something wrong and went ahead anyway. The drunk-out-of-his-mind copier apparently is innocent here, as the Supreme Court has said he is in other areas of the law.

Secondly, in civil cases, a plaintiff has to prove everything on a balance of probabilities. If something is more likely than not, then it is proved. In criminal law, everyone knows that proof of every element of an offence must be beyond a reasonable doubt. In criminal law, you must be very sure, because a person's liberty and reputation are at stake; in the civil law, it's enough to be *fairly* sure because it's only all about money. A statistical analogy: in the criminal law, you have to be 99% sure; in the civil law, 51% will do.

Thirdly, in civil cases, defences like fair dealing are the defendant's responsibility. The plaintiff does not have to show the defendant hasn't dealt fairly; the defence is a defendant's privilege. She or he has to show why what would otherwise be an infringement isn't one. The same might not apply to criminal law. What the defence has to prove in a civil case, in a criminal prosecution the prosecutor may have to disprove.

How did all this work out in *R. v. Laurier Office Mart Inc.*? The judge tossed out some of the arguments for acquittal the copyshop made. So, the prosecution had to show the copyshop "exposed or offered for sale" infringing works. The copyshop said they weren't exposed or offered for sale because they weren't lying around available for all to see in the copyshop. This sounds right, although the judge didn't agree: he said the copies were "exposed" because the professors had told the students they were there.

The judge was on stronger ground when she said that, in any event, the defendant was "offering the copies for sale". The defence argued that shops hardly ever make

offers for sale: they only invite buyers to make offers to buy. Sellers then accept those offers by taking the order or ringing up the price of the item and taking the buyer's money. This argument might work in Britain even today: there is a famous English case in which a court said that a flick-knife displayed in a shop window was not "offered for sale"; the store was only inviting buyers to make offers to buy. In Britain, therefore, no shop could ever be convicted of offering flick-knives for sale, because no offer to sell ever occurred. Happily, the Canadian judge was not overwhelmed by this nonsense. Whatever the position might be in the civil law of contract, she said the criminal law context was different: sellers who held themselves out as willing to take orders were offering to sell the goods.

The judge nevertheless ended up acquitting the copyshop for a number of reasons.

First, the defendant was not shown to have infringed "knowingly". The professors said they didn't think they were doing anything wrong. The copyshop didn't believe it either, at least until the police seized their works. It had since taken out a licence with CANCOPY. The shop may have been wrong but it did not act recklessly or with wilful blindness. The CANCOPY representative admitted in evidence that the copyshop "still does not seem to grasp a lot of issues and has a lot of questions". With that, everyone (including, no doubt, the judge) can certainly empathize.

Secondly, the prosecution had not proved some of the works had copyright. What happened was this. There is a copyright register in Hull where one can register ownership of copyright. Suppose one owns copyright in a book one has written called *Great Copyright Bores I Have Known*. One can register oneself as owner of that copyright upon paying the Registrar of Copyright some money. If you ever need to sue anybody for infringement, all you have to do is produce that certificate in court and it is evidence that copyright exists in the work and you are its owner. The defendant then has to disprove these facts. If it doesn't lead any convincing evidence to challenge them, then copyright and ownership will be found proved.

The prosecution produced certificates for all the works for which charges had been laid. However, some certificates were obtained after the offences occurred. This doesn't matter in a civil case, but here the judge said it did. She thought just because copyright existed on the day the certificate was issued didn't mean it existed on the offence date: at least this wasn't proved beyond a reasonable doubt. She also said she wasn't satisfied that copyright was held by the owner named in the certificate. The first reason makes no sense: if a work had copyright in November 1994, it must have also had copyright in July 1993, although its ownership may have changed. But the judge was right on the second point. For certificates issued before the offence date, she therefore found copyright proved; but for certificates issued later, she found copyright not proved and dismissed those charges.

Thirdly, the prosecution had to prove the copyright owners had not consented to the photocopying of their works. The professors had not got any permission from anybody. The only evidence that the copyright owners had not consented came from a CANCOPY employee, who gave evidence that CANCOPY represented the copyright owners and that it had not given permission. But CANCOPY presented no documents showing what rights the copyright owners had given it and therefore how it could validly give consent for them. So, again, the judge said this element had not been proved beyond a reasonable doubt. This seems right. We know the professors did not seek permission to copy but we do not know whether or not the copyright owners cared if copying occurred. A copyright owner who is indifferent about whether his work is copied can be taken to have consented to the copying.

Fourthly, infringement was not proved beyond a reasonable doubt. The professors had said only that chapters or portions of books or articles had been copied. Nobody had produced the works from which the material had been extracted, so the

judge didn't know whether the whole work that had copyright had been taken, or whether the parts taken were substantial, when compared with the whole work.

Fifthly, "fair dealing" had not been disproved. In a civil case, the defendant has to show fair dealing; but in a prosecution, the prosecutor has to prove the defendant had not dealt fairly with the works.

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Some final comments: it is easy to think about copyright merely as it affects us in our daily working lives, but it is just as, probably more, important to think about what copyright should be doing more generally in our culture. The institution of copyright has grown haphazardly; it seems to apply to far too much trivia, it impedes activities many people find inoffensive, and it enables the making of extravagant claims that ultimately line the pockets of distributors much more than they help the initial producers of work. In Canada, copyright has become degraded to the point where almost everything written down, drawn or recorded in some form can be protected. This is overprotection *par excellence*: people would still produce much of the same work even if there was no or less protection than the law currently allows them to claim. Some stimulus and protection no doubt need to be offered in some sectors to encourage the production of goods that can easily be appropriated and where the producer has not had an opportunity of earning a fair return for his or her labours. When copyright starts applying beyond this justification, it loses its moral authority and legitimacy. If copyright law is to deserve respect, it must appeal to the sense of fairness of its public, the people daily affected by it as both users and owners. I doubt this moral centre exists today. The challenge is to re-create copyright so it regains its moral authority, without which it cannot thrive and without which, frankly, it does not deserve to exist.

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