

Part III, Chapter 7: Uncopyright and Open Copyright¹

For better or (more likely) worse, copyright now automatically encumbers every new fixed work of authorship.² Copyright kicks in as soon as anyone writes an essay, doodles a sketch, or bangs out an email. A copyright's holder need not register the work³ or put notices on copies of it⁴ to qualify for copyright protection.⁵

If you want to play it safe, you should thus probably assume that some sort of copyright claim binds every fixed work.⁶ Even very old works often come with modern copyright strings attached. Consider, for instance, John Stuart Mill's classic work, *On Liberty*. Though the book originally issued in 1859, and has long since fallen into the public domain, my library's copy includes a notice reading, "Copyright 1978 by Hackett Publishing Company, Inc." Presumably, that copyright covers only the editor's introduction and selected bibliography. Yet Hackett's overbroad notice doubtless discourages some people—especially those who know little about copyright law—from reproducing even the free parts of *On Liberty*.⁷

In that and other ways, copyright policy currently fails to admit to its limitations. Cautiously presuming that copyright covers every fixed work, and duped by inflated copyright notices, we fail to fully enjoy our rights to the public domain. We should aspire to a more open copyright system, one that encourages both the creation of new works and the liberation of extant ones. For that, we need a way to signal, clearly and reliably, when a work has escaped the bounds of copyright. We need, in other words, an *uncopyright* notice.

¹ Much of the material in this chapter comes from a reworked passage of Tom W. Bell, *Escape from Copyright: Market Success vs. Statutory Failure in the Protection of Expressive Works*, 69 U. CIN. L. REV. 741, 801-03 (2001). I first wrote about "We Celebrate Your Birthday," at, *A Free Birthday Song*, Agoraphilia, November 11, 2006, at <http://agoraphilia.blogspot.com/2006/11/free-birthday-song.html>.

² The copyright notice requirement was largely struck from the Copyright Act by the Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (Oct. 31, 1988), effective March 1, 1989.

³ 17 U.S.C. § 408(a) ("[R]egistration is not a condition of copyright protection."). *But see id.* § 411(a) (providing that copyright owner cannot in general bring suit for infringement before having at least applied for registration), § 412 (limiting some remedies in some cases to registered works).

⁴ *Id.* § 401(a) (providing merely that such notice "may be placed on publicly distributed copies" of a work).

⁵ *But see id.* § 401(d), 402(d) (providing that attaching notice of copyright on published works will generally bar a defense of innocent infringement in mitigation of actual or statutory damages); § 405(b) (describing limits to liability of innocent infringer of a copyrighted work published before March 1, 1989 without an attached copyright notice).

⁶ For a call to reverse that presumption by re-imposing copyright registration requirements, see [[cite to Sprigman's article]].

⁷ For a fuller description of the problem, and some proposed cures, see [[cite to ___ Mazzone, *Copyfraud*, ___ N.Y.U. L. REV. ___ (200_)]].

A. The Uncopyright Notice

The Copyright Act provides that copyright holders can brand their works with "Copyright," or "Copr.," in lieu of the copyright symbol, "©."⁸ An *uncopyright* notice would naturally read "Uncopyright" or "Uncopr." The uncopyright symbol? A "©" overlaid with a backslash, per the international iconography of things forbidden. In cases where such graphics prove too troublesome, the cents character in parentheses — "(¢)" — would do nicely.⁹ Table __ illustrates the parallels.

Copyright	Uncopyright
Copr.	Uncopr.
©	©
(c)	(¢)

Table __: Copyright and Uncopyright Notices

Where will uncopyrighted works come from? Some will come from clearly unprotected parts of the public domain. The worthy Project Gutenberg, for instance, offers favorite old texts on the web, unencumbered with copyright protection, in an easily-accessed format.¹⁰ New works, too, might carry "(¢)" marks, put there by authors eager to help build the public domain.¹¹

B. Blockheaded Authors

Granted, not every author will want to forego copyright protection. Perhaps only very few will. Every little bit helps, though, and over time even a trickle of uncopyrighted works might fill an ocean of information. But why would anybody author a work for the public domain?

Samuel Johnson claimed, "No man but a blockhead ever wrote, except for money."¹² He would doubtless have said the same about the other media—music,

⁸ 17 U.S.C. § 402(b)(1).

⁹ That some uncopyrighted works might come with common law or technological protections that require payment prior to accessing the works makes use of a monetary symbol all the more (critics would no doubt say "all too") appropriate.

¹⁰ See <http://www.gutenberg.org/wiki/Main_Page>.

¹¹ Among the many licenses it offers, Creative Commons includes a "Public Domain Dedication." See <<http://creativecommons.org/licenses/publicdomain/>>. I salute that effort, but here offer a more direct approach to the problem.

¹² JAMES BOSWELL, *THE LIFE OF SAMUEL JOHNSON* 641 (Everyman's Library 1993) (1791).

painting, motion pictures, computer software, and so forth—that copyright now covers. Regardless of how they express themselves, savvy authors demand remuneration for their creative labors. Copyright helps to ensure that they get it.

And, yet, "blockheaded" authors exist. Some percentage of authors will at least sometimes share their expressive works for very little or no pay. We can even imagine an author, eager for attention or burning with artistic passion, willing to pay others to experience her masterpieces. We might not always understand what motivates such authors (though it is surely not fair to call them all "blockheads"). It matters only that, as Johnson himself impliedly recognized, non-monetary incentives sometimes suffice to stimulate authorship.

C. A Free Birthday Song

Call me a blockhead if you must, but love inspired me to donate a song to the public domain. I wrote it "We Celebrate Your Birthday" for my wife and sang it for her with our kids. I then cast it into the public domain, hoping that others might sing for their beloveds, thus honoring my own.

Although "Happy Birthday to You" would have proven more traditional,¹³ it comes carrying copyright's chains.¹⁴ Those would not have barred us from singing my wife, "Happy Birthday to You," in the privacy of our home, of course.¹⁵ But it just didn't seem right to celebrate a unique and freedom-loving a woman with a tired and limited song.

Coming up with a fair substitute for "Happy Birthday to You" proved tricky. That old standard has succeeded not merely by dint of good luck, after all. Consider it carefully, and you will see that it boasts many features of a successful birthday tune: a catchy, easy melody; simple and appropriate lyrics; and room for any name. I tried to satisfy those same criteria in this, my alternative song:

"We Celebrate Your Birthday"¹⁶

We celebrate your birthday! [clap]
 We wish you life, love, and play! [clap]
 We celebrate your birthday! [clap]
 For you, dear ____, we say, "Hooray!"

The tune, for each line, runs in 4/4 time thusly: D for 1/16th; G for 3/16ths; A for 1/16th; G for 3/16ths; F for 1/4; A for 1/16th; and B flat for 3/16ths. Those notes put it in the key

¹³ It allegedly ranks as the most popular song of all time. See <http://en.wikipedia.org/wiki/Happy_Birthday_to_You>.

¹⁴ See <<http://www.unhappybirthday.com/>>.

¹⁵ Such a performance would not have qualified as a public one, and thus would not fall within the copyright holder's rights. See 17 U.S.C. § 106(4).

¹⁶ Uncopyright 2006-07, Tom W. Bell.

of B flat major, but you can transpose it however you see fit. If you want to hear a performance, you can download an MP3¹⁷ or AIF (iTunes)¹⁸ file of me and the kids singing the song.

As I said, I intend to cast "We Celebrate Your Birthday" into the public domain. Please feel free to sing it to your own friends and family. I think my own birthday girl would *love* that.

D. Towards an Open Copyright System

U.S. Copyright law too much resembles a roach motel: Expressive works check in, but they don't check out. But even that gives present policies too much credit. Expressive works don't come looking for the Copyright Act's shelter; they get it by default. Most authors freely choose copyright protection, granted. Many probably wish it offered even better security against unauthorized copying. But even a haven can become a trap if it offers no freedom of exit. Recognizing uncopyright as an alternative to copyright, (©) as a counterpart to ©, would help make copyright policy more balanced, fair, and open.

Uncopyrighted does not necessarily mean unprotected. Common law or technological protections might limit the use of certain uncopyrighted works, as when trade secrets safeguard a customer list or when watermarks hinder re-use of an image. Even in those sorts of cases, however, users would benefit from knowing that copyright does not lurk in the background.¹⁹ More importantly, someone who comes across a work unprotected by copyright, common law, or technological tools—a work found in the commons—would want very much to know that fact. The rest of us would want her to know it, too, so that she might fearlessly pick up the work and put it to good use. Attaching an uncopyright notice to such works would encourage the recycling of them. We can best promote "the progress of science and useful arts" by developing new and better alternatives to copyright. By opening a clearly marked exit to the public domain, an open copyright system would stimulate the development of common law and

¹⁷ See <http://www.tomwbell.com/music/Celebrate_Your_Birthday.mp3>.

¹⁸ See <http://www.tomwbell.com/music/Celebrate_Your_Birthday.aif>.

¹⁹ Granted, an uncopyright notice might lead to confusion if attached to a work that reenters copyright due to the vesting of a contingent reversionary interest, or due to the curing of copyright misuse. That argues against using uncopyright notices little more than the marginal problem of expired copyrights argues against using copyright notices, however, and good faith reliance on an erroneous uncopyright notice might go towards mitigating the penalties for infringement. See 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.08 at 13-279 through 82 (1999) (describing scope and effect of innocent infringement defense) [[need to update cite]]. See also 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12.06, at 124.15 through 124.16 (1999) (describing how innocent infringer might have laches defense) [[need to update cite]].

technological tools for protecting expressive works. Those devices, insofar as they reward the creation, reproduction, and distribution of fixed expressive works, will help to ease the statutory failure that now afflicts copyright policy. Ultimately, we may even find that non-statutory protections for expressive works suffice to render copyright protection superfluous. Thus might *uncopyright* open the way to *no* copyright.