Literary Landlords in Plaguetime

Brian L. Frye[1]

Landlord, landlord, these steps is broken down.
When you come up yourself, it's a wonder you don't fall down.[2]

The coronavirus pandemic has affected our lives in countless ways. One of those unfortunate effects was the unavoidable closure of public libraries. Many people rely on public libraries for many different things, including free access to books. When public libraries closed, many people lost access to books, especially new books.

In response, the Internet Archive created the National Emergency Library, a collection of PDF scans of books that people could access on the internet. Of course, the NEL isn't a perfect solution. In order to avoid copyright concerns, it only includes books published more than 5 years ago, because they are unlikely to have significant commercial value. Moreover, PDFs are both less convenient and less accessible than ebooks and physical books.

Still, something is better than nothing. You would think everyone would applaud this heroic effort by a charitable organization to provide access to information during a national emergency to underserved populations. You would be so wrong.

When the Internet Archive announced the NEL, authors and publishers went apoplectic. Publishers immediately denounced it as willful copyright infringement. And many authors followed suit, whining that the Internet Archive was a "piracy organization" intent on depriving them of their rights. Oh, and their profits, of course.

Notably, there is no evidence that the NEL has impacted on anyone's profits. On the contrary, it seems that most patrons view the PDFs only briefly, much like patrons at any other public library.

Publishers and authors really object to the mere possibility that the NEL might decrease their profits on the margins, if someone decides to consult a book in the library for free, rather than buying it. Of course that is true of every library. But the NEL makes it more convenient, because you can do it from home, or anywhere.

In any case, on June 1, a group of publishers sued the Internet Archive for copyright infringement. What does it mean?

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[2] Langston Hughes, Ballad of the Landlord (1940).

Since time immemorial, authors and publishers have insisted that copyright is a kind of property, entitled to protection and respect, just like any other kind of property. In the 19th century, authors like Balzac and Mark Twain argued that copyright is a natural right that should exist in perpetuity. And who could forget the Motion Picture Association of America's infamous 2004 anti-piracy PSA?

There are many good reasons to object to this property metaphor, not least that intangible works of authorship are non-rival, so the scarcity problem of physical property doesn't exist. But nevermind, for the sake of argument, what does the property metaphor imply? Copyright owners are just landlords, like any other property owner who collects rent on their capital investment.

There's nothing wrong with being a landlord. We need people to invest in the creation and maintenance of property. But there's nothing morally special about it, either. So when copyright owners claim copyright infringement violates their moral rights, maybe we should say, "Ok, landlord," and take their claims with a grain of salt?

Copyright Theory

There are as many theories of copyright as there are copyright scholars, and then some. If you ask two copyright scholars to explain copyright, you'll get at least three opinions. Every copyright scholar has a theory of copyright they accept, and another they can't abide.

Among many other things, copyright scholars disagree about whether copyright is a property right or a regulatory right. Typically, scholars who like copyright think it is a property right, and scholars who dislike copyright think it is a regulatory right. But their disagreement is metaphorical. Or rather, it is a disagreement about which metaphor should govern copyright doctrine: property or regulation.

Scholars who like copyright tend to like the property metaphor, because the law loves property. Property law is formalistic, esoteric, and strong. The common law abides in property. By contrast, scholars who dislike copyright tend to prefer the regulation metaphor.

Disagreements between copyright theories. But they both agree that it is a form of property, or treated as a form of property. In particular, the people advancing deontological theories of copyright insist that it is a form of property, and that protection is justified because it is property.

The Economic Theory of Copyright

The prevailing theory of copyright is the economic theory, which holds that copyright is justified because it solves market failures in works of authorship caused by free riding. In the absence of copyright, works of authorship are pure public goods, because they are perfectly non-rival and non-excludable. Works of authorship are perfectly non-rival because consuming a work doesn't reduce the supply of the work. Of course, particular tangible copies of a work are rivalrous, but

the intangible work of authorship itself is not. And in the absence of copyright, works of authorship are non-excludable, because no one can stop anyone else from using the work, once it is published.

Neoclassical economics predicts market failures in public goods caused by free riding. Essentially, no one will produce public goods, because no one will pay for them. Producers typically only make things they can sell, but consumers won't buy public goods, because they can consume them for free. Accordingly, we should expect a shortage of public goods, because consumers won't pay the marginal cost of production.

In theory, copyright can solve that market failure by making works of authorship excludable. Copyright gives authors certain exclusive rights in the works of authorship they create, and enables them to transfer those rights to others. Or rather, copyright means that consumers have to pay. So, by hook or by crook, authors get paid, and produce more works of authorship.

The economic theory of copyright is plausible, and surely has at least some explanatory value. After all, no one would invest millions of dollars in producing a motion picture, unless they expected to profit by selling it.[3] But it also has many weaknesses.

For one thing, copyright ownership simply isn't a salient incentive for many of the authors who receive it. After all, copyright automatically protects every "original work of authorship" the moment it is "fixed in a tangible medium," with a comically low bar for originality. As many commentators have ruefully observed, according to the Supreme Court, copyright appears to protect everything but telephone books and snow shovels.[4] But stay posted for additional exceptions.

In other words, copyright automatically protects every letter you write, every to-do list you make, every doodle you draw, every snapshot you take, every email you draft, every status update you post, every tweet you send, and every instagram you share. But no one does any of those things because they want to own a copyright. They do them for the sake of themselves. The copyright is merely incidental. Indeed, most people don't even realize they are creating a torrent of copyrighted works every day. I call this the "dark matter" of copyright, the 99.99+% of copyrighted works of authorship that no one cares about, not even their own author. If the purpose of copyright is to encourage the production of works of authorship by providing an economic incentive, surely it shouldn't protect works that don't require an incentive in the first place.

For another thing, even when copyright is a salient incentive, the scope and duration of copyright protection is unrelated to the incentive required. Copyright gives all copyright owners essentially the same exclusive rights and the same term, irrespective of the incentive they

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[3] Well, maybe not no one. See, e.g., The Room?

[4] See Feist and Star Athletica.

needed to create the work. Of course, copyright does protect different categories of works in slightly different ways. But if the purpose of copyright is to give authors salient incentives to create works of authorship, one would expect at least some tailoring of the exclusive rights and term, depending on the nature of the work, in the interest of efficiency. Ideally, individual authors would only receive the rights and term they actually needed in order to produce each work. While such fine-grained tailoring of copyright protection is obviously impractical, in practice we see no tailoring at all, which is peculiar, because at least some tailoring is possible. For example, there is no reason to believe that all works need the same copyright term. The current term of the life of the author plus 70 years is excessive for all works. But it is comically excessive for works that will be obsolete within a matter of years, like computer programs.

Finally, it is increasingly clear that copyright isn't a salient incentive to many authors, even though other things are.[5] Artists typically tell unique objects and rely on scarcity, rather than copyright. They respond to economic incentives, but not the ones provided by copyright. As in many discursive communities, the salient incentive is attribution, not exclusive rights. For example, in the "academic gift economy," scholars are delighted when someone reproduces their work or uses their idea, but only if they receive credit. In academia, citations are the coin of the realm, and academics expect to get paid.

On reflection, one begins to suspect that the economic theory of copyright shares a feature common to many theories propounded by neoclassical economics: It works perfectly in theory, but utterly fails in practice. Or rather, the economic theory of copyright beautifully explains how to create an efficient copyright policy, assuming economically rational authors and no transaction costs. But the economically rational author is a rare bird indeed, and transaction costs are omnipresent, especially because no one can confidently predict what consumers will like, let alone what they will love. Moreover, nothing suggests that the economic theory had any impact whatsoever on our actual copyright policy. On the contrary, Congress just pretended to deliberate, and then copied the Berne Convention.

Of course, the dirty secret is that copyright reflects economic policy, even if it doesn't reflect the economic theory. It's just that the policy in question is driven by rent seeking, not efficiency. Copyright exists for the benefit of copyright owners - nominally authors, but actually publishers - who use it to extract rents from consumers. They always want more copyright, because you never know where a rent will materialize. And they are horrified by the very premise of the economic theory. After all, they don't want copyright to be efficient, that means no rents. They want copyright to be as inefficient as possible, because a consumer's inefficiency is a publisher's profit.

Moral Theories of Copyright

[5] Jessica Silbey, Amy Adler

But there's more to the story. While the economic theory is the prevailing theory among academics, judges don't take it seriously, lawyers ignore it, and the public has never heard of it. Mind you, judges are always careful to pretend that copyright reflects the economic theory. You know the drill: "Congress in its infinite wisdom carefully evaluated its policy choices and made these decisions, which we are duty-bound to accept as legislative facts."[6] Similarly, lawyers deploy the economic theory, if they think it will help their case, but it's always a supplemental argument, unless they don't have anything better.

The real problem is the public. Everyone knows the public is ignorant of and indifferent to the economic theory. Hell, the public is ignorant of and indifferent to copyright. Most people think authors are and should be entitled to control the use of the works they create, because they created them. That's it. They don't care about whether copyright provides a salient incentive. They don't care about whether copyright is efficient. They only care about what is right and what is wrong. Or rather, they only care about what they understand to be right and wrong, based on the social norms defining authorial ownership they learned and accepted.

Realistically, copyright policy is justified primarily by moral intuitions about authorial ownership, based on social norms that developed in relation to economic interests. The concept of authorship has existed since time immemorial. But it has meant many very different things at different points in time. Before the invention of the printing press, authorship only mattered if it generated patronage or prestige, because reproducing works was almost as costly as creating them. Accordingly, authorial ownership was limited to attribution. The printing press increased the value of authorship by decreasing the cost of reproduction. Suddenly, authorial ownership expanded to include reproduction. And as the economic significance of works of authorship has increased, the scope of copyright protection has increased as well.

Anyway, the public doesn't know or care what copyright says or does. It only cares about what is right. Or rather, people care about what they think is right, based on the social norms about authorial ownership and control they have internalized. Those norms have nothing to do with what the law actually says, and everything to do with social expectations. To put it another way, most people have no idea what copyright protects or prohibits. But they know a norm violation when they see it, and are always eager to punish them.

Copyright owners are plenty smart enough to recognize a good thing and take full advantage of it. And social norms about authorial ownership are about as good as it could get for them. As a general rule, the public loves authors of every stripe, and sympathizes with their interests. Whether it's novelists, musicians, or painters, fans almost reflexively condemn any perceived norm violation and are prepared to punish it. What's more, fans effectively let professionals define the ownership norms governing themselves. In other words, discursive communities are typically self-regulating, and enlist fans to enforce their rules. Of course, fans often create their own norms governing fan culture, which may themselves permit certain kinds of copyright

[6] Eldred.

infringement. But this is generally seen as acceptable, so long us the uses in question are non-commercial, irrespective of whether they are technically infringing.

Copyright owners rely on these social norms to enforce the shadow law of copyright, which is rooted in moral intuitions, not consequentialist predictions. Despite the nominal dominance of the economic theory, copyright as actually practiced is controlled by social norms based on beliefs about the moral justification of authorial ownership and control. Members of a discursive community avoid violating those norms, for fear of censure. Violators typically repent when confronted. Infringement actions typically settle, irrespective of their merits, in part because norm violators know that juries are likely to find liability, even in the absence of actual infringement. And even judges are inclined to weigh the "good faith" of an alleged infringer when evaluating an action. Infringement actions are a sucker's game, because the dice are loaded.

Copyright as Property

The common law loves metaphors, and copyright is no exception. For better or worse, copyright rhetoric is steeped in metaphor.[7] And the most important metaphor for copyright owners is "property." Copyright owners want copyright to be property, or at least to be conceptualized by the public as a form of property, because people not only understand how property works, but also have strong intuitions about why infringing property rights is bad.

If copyright is property, then copyright owners are entitled to determine how their works are used. As Blackstone famously observed, property is "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."[8] Of course, what is given can always be taken away. Just as Blackstone went on to describe the countless limits on property rights, so too does the Copyright Act grant exclusive rights, only to list a congeries of exceptions.

Many scholars have resisted the property metaphor, as applied to works of authorship. They argue that exclusive rights in intangible goods have no relevant similarities to physical ownership of tangible goods. After all, people typically conceptualize property as land and things: rivalrous, tangible, and excludable. By contrast, a work of authorship has none of the qualities. It is perfectly non-rival, intangible, and partially excludable only because the law makes it so. Why should we use the property metaphor for works of authorship, if it isn't a helpful analogy for the actual, relevant qualities we want to describe? Perhaps a better analogy is to regulatory rights, which manage competition by determining who can participate in a market and how they can compete.

Of course, the concept of property is readily abstracted to include the exclusive rights in works of authorship provided by copyright. If property is just a nexus of contract and tort, then it readily

[7] See, e.g., Brian L. Frye, IP as Metaphor; David A. Simon, Analogies in IP: Moral Rights, 21 Yale Journal of Law & Technology 337 (2019)
[8] Blackstone, Commentaries.

accommodates copyright. The “new property” is large, it contains multitudes of rights. But is such abstraction conceptually helpful, especially if the property metaphor encourages the public to accept other metaphors that are actively misleading?

For example, copyright owners often characterize copyright infringement - or really, any unauthorized use, whether or not actually infringing - as “theft.” As a rhetorical move, it makes perfect sense. People understand the concept of theft and believe it is wrong. If copyright infringement is theft, then by extension, it must be wrong as well.

But the theft metaphor neither describes what happens when the copyright in a work of authorship is infringed, nor accurately characterizes the nature of the alleged harm. When physical property is stolen, the original owner is harmed by losing possession of it. If someone steals your wallet, they have your wallet, and you don’t. But when someone infringes the copyright in a work of authorship, they don’t deprive the copyright owner of the work or the ability to use the work. On the contrary, they are depriving the copyright owner of a potential sale of a copy of the work, or at worst, unfairly competing with the copyright owner, by selling or otherwise distributing copies of the work without permission.

Now, copyright infringement may very well be wrongful and socially harmful. But it isn’t theft in any meaningful sense. And calling it theft is unhelpful and confusing. Consumers are inclined to think theft is bad, so if copyright infringement is theft, it must also be bad. Yet, when you tell then what copyright infringement actually entails, they find it puzzling, because it includes activities they engage in all the time, without realizing they are unwitting infringers. Making a mixtape for your friend? Copyright infringement. Playing a radio in a coffee shop? Copyright infringement. Making photocopies of an article? Copyright infringement. Posting a photograph from the internet to social media? Copyright infringement. Suddenly, people are confused. How is this theft?

Copyright Owners as Landlords

Nevertheless, for the sake of this essay, I will accept the property metaphor. If copyright owners want to use it so badly, then let them own it. Let us assume that copyright owners are indeed property owners. What kind of property do they own? If we are going to use property metaphors for copyright owners, what kind of property owners are their analogues?

The obvious answer is: landlords. Landlords own real estate in order to generate a profit by renting it to others who need a place to live. Landlords don’t want to use their property themselves. On the contrary, unless someone else is using their property, landlords aren’t generating any revenue. Landlords do not benefit from the property they own, they benefit from the revenue that property generates in the form of rents.

Likewise, copyright owners own copyrights in order to generate a profit by renting works of authorship to consumers. No one needs to own a copyright in a work of authorship in order to

consume it. The only reason to own the copyright in a work of authorship is to generate revenue by renting the work of authorship to people who want to consume it. If no one is renting a work of authorship, then it isn't generating any revenue. Copyright owners are analogous to landlords because they own a (potentially) valuable capital asset and generate revenue by collecting rents on its consumption. Indeed, the analogy is delightfully apt because the congruence is so obvious, once observed.

Of course, there are certain differences, but they are insubstantial. Quibblers will surely object that landlords rent housing to tenants, but copyright owners sell copies of works of authorship to consumers. But as an economic matter, these are identical. When copyright owners sell a copy of a work of authorship, they are really just renting the work for the life of the copy. That may well be a long time, but if copyright has taught us anything, it's the malleability of the concept of "limited times."

Moreover, in our digital era, it is increasingly the case that copyright owners do not sell copies of works at all, but rather license the right to use them. By their own insistence, when copyright owners license a digital work to consumers, it is emphatically not a sale, and we know it isn't a sale because the first sale doctrine doesn't apply. Copyright owners often generate much of their revenue from licenses, which are just rents collected from people who want to use a particular work.

Indeed, conceptualizing copyright owners as landlords collecting rent on a capital asset is entirely consistent with the economic theory of copyright. Recall, under the economic theory, copyright is justified because it encourages authors to invest in the production of works of authorship by giving them certain exclusive rights to use those works of authorship. In other words, copyright provides an incentive to create works by giving authors the right to collect rents on the works they create, or transfer them to others who will. This is directly analogous to the housing market.

After all, how does the housing market work? In a nutshell, some people can build housing, some people have capital to invest, and some people need someplace to live. The people with capital pay the people who can build housing, and either rent the housing or sell it to those who will. Likewise, authors can make works of authorship, publishers have capital, and consumers want to consume works of authorship. The publishers pay authors to create works of authorship, and rent them to consumers. It is exactly the same model, just adapted for a different product.

Of course, landlords and copyright owners confront different risks. But not as different as you might think. Everyone needs housing. But no one necessarily wants to rent the housing you have on offer, or wants to pay a price that will be profitable. Likewise, everyone wants to consume works of authorship. But no one necessarily wants to consume the work of authorship you happen to own, or wants to pay the price you are asking for it.

The one great advantage of copyright owners is that intangible works of authorship don't require maintenance, in the traditional sense. Landlords must continually invest in the upkeep of their property, or it will deteriorate and lose value. A work of authorship is like a diamond, impervious to the passage of time. A copyright owner who owns a valuable work of authorship need do nothing but sit idly by and watch the rents roll in. Of course, just as jewelry may become unfashionable and lose value, so too may a work of authorship fall out of favor and stop generating rents. But a copyright owner can always just wait for the last trickle of rents to peter out, and then ignore a work, letting it sit idle on the off-chance it someday comes back into style. Sure, copyright owners may voluntarily invest in the promotion of a work, in the hope that their investment will pay off in additional revenue. But there is no obligation to do so, and copyright owners can cut bait at any time. Indeed, publishers are notoriously indifferent to sunk costs. If a work isn't producing, forget it, they are a dime a dozen.

Yes, copyright owners face considerable risk in predicting whether a particular work will be popular and profitable. But if that is a concern, they can always invest in works that have already proven themselves. Sure, they will be more expensive, but any sure thing always is. And yet, publishers continue to invest in speculative works. Why? Presumably, because they can purchase them on favorable terms. Authors are plentiful, but capital is not. Buy low, sell high has always been a winning strategy, in publishing as elsewhere.

The Landlord Metaphor

So, what's the problem? The landlord metaphor for copyright owners seems like a strong analogy with considerable explanatory punch. It is perfectly consistent with the economic theory of copyright, and seems to explain quite nicely how copyright owners actually use their property. Who would object to it, and why?

Well, as you'll recall, the shadow theory of copyright is a moral theory. We say the economic theory is the prevailing theory, but we don't really mean it. The real reason people believe in the legitimacy of copyright is because of their moral intuitions. Or rather, different people have different moral intuitions, depending on their role in the copyright market, but all of those intuitions converge to legitimate copyright ownership as a moral value.

Authors believe that copyright ownership is justified, because they ought to be able to control and profit from the use of the works they created. As I have observed, everyone believes in the legitimacy of the kind of property they hope to own, even if they don't believe in any other kind. After all, even Karl Marx believed in literary ownership, and self-professed Marxists are happy to righteously assert copyright ownership, even as they decry every other kind of property.

Why? Most authors seem to have internalized a version of the Kantian idea that a work of authorship is an expression of the author's identity and autonomy, so authors are entitled to control the use of the works they create, in order to preserve the integrity of their personhood. Of course, in practice, authorial intuitions about the legitimacy of ownership claims and

expectations about the scope of control authors are entitled to exercise over the use of the works they create tends to track the social norms of the discursive community in which an author typically participates. What a coincidence.

Some more cynical authors also seem to have internalized a more Lockean theory of copyright ownership, under which their right to control the use of the works of authorship they created is based on the fact they created the work in the first place. “If I made it, it’s mine,” as it were. The circularity of this proposition is largely ignored. After all, once a work of authorship exists, it could just as well belong to everyone. The only thing authors are really claiming is a share of the positive externalities associated with the work, not the work itself.

Copyright owners, typically publishers, have an even more cynical take on copyright ownership. From their perspective, a work of authorship is simply a capital asset, which produces revenue. They invested in the work for the purpose of claiming the revenue it generates, and that’s justification enough. Copyright secures their investment, by ensuring they can compel consumers to pay and can prevent unfair competition. One need not have any particularly exalted perspective on the moral legitimacy of copyright to hold this view. Dollars and cents are enough.

The weak link is consumers, who ultimately bear all of the costs, hopefully in exchange for some of the reward. The economic theory says consumers benefit from copyright protection, because copyright encourages marginal authors to produce the works of authorship that consumers want to consume, and in the absence of copyright, cultural production would be impoverished. But the economic theory bears little relation to reality. While it tells a neat and tidy economic story, imagines the facts necessary to make that story work. In practice, the scope and duration of copyright protection, and the actual function of the markets for copyrighted works of authorship, has no relationship to marginal incentives. Nor has there ever been any effort, or even intention, of structuring copyright to reflect marginal incentives. In practice, the economic theory is pure make-believe, with no meaningful relationship to how any of this actually works.[9]

The reality is that consumers accept the legitimacy of copyright ownership because they too believe the moral stories that authors tell about the justification of copyright. Authors insist that they should be able to control how the works they create are used, and object to uses they dislike. Consumers admire authors, and despise anyone who displeases the authors they idolize. So consumers are inclined to accept the legitimacy of the justifications authors offer for copyright ownership, just as they are inclined to accept the legitimacy of anything else their idols say. When Taylor Swift complains about people doing her wrong by using her songs in ways she disapproves, the Swifties have her back. And the same is true of any other author. After all, plagiarism norms are just the most vigorous expression of the norm that authors have a moral right to control how people use the works they create.

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[9] Jessica Silbey, The Eureka Myth.

But no one likes landlords. At best they are tolerated, and at worst, they are despised. For better or worse, among working people, landlord has always been a term of opprobrium, used to identify those who profit from capital, rather than from labor. Workers get wages for their labor, which landlords extract as rent.

No one wants to be called a landlord, in part because it is perceived as a sotto voce insult, and in part because it makes it harder to argue for the legitimacy of your claims to compensation. Or at least harder to make claims that people are inclined to take seriously and give moral force. As a consequence, people consciously avoid the term “landlord” and seek more anodyne alternatives. For example, the Small Property Owners Association created its delightfully cynical name explicitly in order to avoid the term “landlord.”[10]

Why does this matter? Well, if consumers come to see copyright owners as landlords, they might well be inclined to take their moral claims less seriously. After all, everyone knows they have to pay rent to the landlord. But few consider it a moral obligation. You pay the rent because you need a place to live, not because you are grateful to the landlord for providing it to you. On the contrary, you expect to get what you pay for, and if the landlord starts getting grabby or fails to hold up their end of the bargain, no one is reluctant to complain or cuss them out.

Of course, I am not casting aspersions on landlords, although others might.[11] For better or worse, landlords play an important role in our economic order. We need them in order to maintain the liquidity of the housing market, and they use capital to take risks and generate profits just like any other investor.

But landlords aren’t special. And if consumers come to see copyright owners as landlords, they might come to see copyright as not being special either. Or rather, works of authorship are special and valuable, in the same way that having a place to live is special and valuable. But rent is not special and valuable, and neither is the kind of control that accompanies landlordism.

If authors and copyright owners want to continue to rely on the shadow theory of copyright based on moral rights, they have to make sure that consumers continue to take those moral rights seriously. The more we call them landlords, the more they look like landlords, the harder it will be.

Literary Landlords in Plaguetime

[10] https://spoa.com/

[11] See, e.g., Overby, Mike, Copyright Holders Are Landlords and it's Not OK (June 26, 2020). Available at SSRN: https://ssrn.com/abstract=3637125 or http://dx.doi.org/10.2139/ssrn.3637125

I will close with an example. Shortly after the COVID-19 pandemic hit, the Internet Archive created the National Emergency Library, which was intended to provide digital access to books, in the absence of access to physical copies. Essentially, the Internet Archive has scanned many books for preservation purposes, and expanded access to those scans, in order to enable users to access books they wouldn't otherwise be able to use in the library.

Of course, the Internet Archive put limits on what it provided. Everything in the National Emergency Library was a PDF copy of a book that had been in print for at least 5 years. It continued to monitor access to and use of the books it provided. And it encouraged copyright owners to object, if they didn't want their works included in the Library.

Despite the exigent circumstances, and the limits on the works provided, authors and publishers went apoplectic. On their telling, the Internet Archive was a "piracy organization" and the National Emergency Library was an illegal enterprise. Its charitable mission and the limits it placed on the works it provided were irrelevant. They wanted it shut down, stat.

Shortly, a group of publishers filed a copyright infringement action against the Internet Archive, based on the National Emergency Library. Essentially, it alleged that the Internet Archive had infringed the copyright in a number of books, by distributing electronically without a license. And it requested a vast amount of statutory damages for those infringements. The Internet Archive has responded, but it seems likely the action will eventually settle.

Do the publishers have viable copyright claims. As much as it pains me to say it, probably yes. The Internet Archive has a variety of defenses, including fair use, which seems like it ought to enable libraries to continue lending books digitally, when they can't do it physically. But the National Emergency Library is at least arguably infringing based on the letter of the law.

But what about the optics? Do the publishers really want to pursue an action against a library for doing what a library does? Do they really want to insist on asserting vast statutory damages when they know perfectly well that they didn't actually suffer any real economic damages? Do they really want to make a stand on the principle that libraries are bad, because they prevent copyright owners from extracting every last cent from consumers? Apparently, some of them don't see the problem, including those who criticize libraries for "pimping out" books to consumers who, I guess might have bought a copy of a book instead?

Conclusion

Ultimately, this is a story about politics and ideology. Authors and copyright owners have convinced themselves that they are in the right and morally pure. But maybe they are victims of their own myopia? After all, landlords also see themselves as in the right and morally pure. The problem is that most of the public disagrees.

If you live by the metaphor, you die by the metaphor. I'd like to suggest that the landlord metaphor is a dangerous one for copyright owners, because it is so cutting. When you respond to a copyright owner's complaint with "ok, landlord," they are offended and appalled. Why? Maybe because it's true.

They defied the landlords. They defied the laws. They were the dispossessed, reclaiming what was theirs.[12]

[12] Leon Rosselson, Digger's Song (1975).