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Copyright and "The Exclusive Right " of Authors

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ARTICLES

COPYRIGHT AND "THE EXCLUSIVE RIGHT" OF AUTHORS

*L. Ray Patterson**

> The Congress shall have Power . . . *To promote the Progress of Science* and useful Arts, *by securing for limited Times to Authors* and Inventors *the exclusive Right to their* respective *Writings* and Discoveries.

U.S. CONST. art. I, § 8, cl. 8 (emphasis added).

> The origin and progress of laws, securing to authors *the exclusive right of publishing and vending* their literary works, constitutes an article in the history of a country of no inconsiderable importance.

NOAH WEBSTER, POLITICAL, LITERARY, AND MORAL SUBJECTS 173 (1843) (emphasis added).

* Pope Brock Professor of Law, University of Georgia. Laura Gasaway, Craig Joyce, David Lange, Jessica Litman, and Jerome Reichman read earlier versions of the article and provided me with many helpful and insightful comments for which I am deeply grateful.

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Patterson: Copyright and "The Exclusive Right " of Authors

I. INTRODUCTION

The purpose of this essay is to define and explore the meaning of "the exclusive Right" in the Intellectual Property Clause of the United States Constitution as related to the promotion of learning, the public domain, and authors.[1] Without a clear understanding of this key term, one is likely to be unaware that lower federal courts are continually making rulings contrary to both the Copyright Clause and the Copyright Act. The classic example is the judicially created sweat-of-the-brow copyright, which in 1991—after seventy-five years of precedent—the Supreme Court decreed to be unconstitutional.[2] Other bad precedents, such as perpetual injunctions to prevent the infringement of future copyrights,[3] remain uncorrected.

Part of the reason for this state of affairs is that "the exclusive Right" has received little attention, perhaps because there is no question as to its 1787 meaning: the right of authors to publish and vend their writings.[4] The 1787 meaning of the phrase, however, is not the determinative point. As the right to vend indicates, the purpose of "the exclusive Right" was surely to

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[1] U.S. CONST. art. I, § 8, cl. 8. The Intellectual Property Clause contains the Patent as well as the Copyright Clause. The differences between the two Clauses become clear when the entire Clause is read distributively. I deal only with the Copyright Clause.

[2] *See* Feist Publications v. Rural Tel. Serv. Co., 499 U.S. 340 (1991) (holding white pages of phone directories uncopyrightable and invalidating the sweat-of-the-brow doctrine).

[3] Permanent injunctions to protect works not yet created are judicial copyrights in the tradition of the sweat-of-the-brow copyrights, granted without any regard for either constitutional restraints or statutory requirements. *See, e.g.*, Pacific & S. Co. v. Duncan, 572 F. Supp. 1186 (N.D. Ga. 1983) (holding videotaping of news broadcasts for sale to subjects of news reports does not constitute fair use), *aff'd in part and rev'd in part*, 744 F.2d 1490 (11th Cir. 1984), *on remand*, 618 F. Supp. 469 (N.D. Ga.), *aff'd*, 792 F.2d 113 (11th Cir. 1985).

[4] The conclusion is supported by abundant evidence from the time of the origin of copyright in Tudor England up until the 1976 Act, when Congress ostensibly ignored the constitutional limitations on its power by giving copyright owners five rights: the reproduction right, the adaptation right, and the public distribution, public performance, and public display rights. 17 U.S.C. § 106 (1988 & Supp. IV 1993).

While the phrase "publish and vend" has tautological possibilities in that to publish can be defined as the right to print for sale, to publish is more precisely defined as to distribute a work to the public, which the author may do without vending it. The right to publish and vend thus defines the author's right to distribute copies of the work to the public or not, and if he or she chooses to do so, to charge for the copies.

empower Congress to grant the author a right to gain a profit from his or her writings. Congress, then, can properly treat the Copyright Clause as giving it the power to grant copyright protection accordingly.

Such a purpose, however, does not conclude the matter because the Copyright Clause is specifically a limitation on, as well as a grant of, Congress's power. The limitations are manifest in three basic policies expressed in the Copyright Clause: the promotion of learning, because the language so states; the protection of the public domain, because Congress can grant copyright only for a limited time (and only for new writings); and the benefit for the author, who is the person entitled to copyright.[5] The policies are not wholly consistent—protection of the public domain necessarily limits the benefit to the author—and the careful phrasing of the Copyright Clause to include them all indicates a specific purpose: protection against the misuse of copyright. A misuse would occur, for example, if a copyright owner used copyright to inhibit rather than promote learning, which copyright history has revealed to be a real danger.[6]

The limiting policies, then, comprise the determinative point in defining Congress's power to grant copyright. However broadly Congress extends the copyright monopoly, that extension cannot lawfully negate the constitutional policies of copyright. As John Marshall wrote, "[t]he powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written."[7]

As I shall demonstrate below, Congress has for the most part adhered to the constitutional policies of copyright in enacting copyright statutes, but many lower federal courts have not felt themselves bound by those same policies in interpreting the statutes. The important question is why? The reason relates to misunderstandings as to the source of copyright. Is that source the

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[5] For a detailed discussion of the limitations manifest in the three policies, see generally L. RAY PATTERSON & STANLEY W. LINDBERG, THE NATURE OF COPYRIGHT: A LAW OF USER RIGHTS (1992).

[6] *See* Rural Tel. Serv. Co. v. Feist Publications, 737 F. Supp. 610 (D. Kan. 1990), *rev'd*, Feist Publications v. Rural Tel. Serv. Co., 499 U.S. 340 (1991) (holding telephone directory white pages uncopyrightable).

[7] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803).

common law as promulgated by judges, or is it the positive law enacted by a legislature? To state the issue another way: Is copyright an author's natural-law property right or merely the grant of a limited statutory monopoly?[8]

Disagreement as to the source of "the exclusive Right" generates confusion. With the expansion of copyright to protect means of communication other than the printed word, this confusion has become increasingly influential, for it is a fertile source of arguments for enhancing the copyright monopoly.[9] The subtlety of the dispute is that the issue appears to be only about the source of copyright, but in fact it is about the nature of copyright and therefore about the scope of its protection. If the source of copyright is a natural-law right of the author, the argument that the protection is plenary follows logically; if the source is statutory law, the protection is necessarily limited by the terms of the statute.

There is, however, no reason for confusion as to either the source or the nature of copyright. The authoritative pronouncements that copyright is the grant of a limited statutory monopoly are too many and too clear. Other reasons, then, must be sought. A major reason is that copyright owners resisted statutory limitations from the start and by their strong advocacy of the natural-law rationalization sought to (and did) change the issue from a legal question

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[8] This question—originally at least—was unrelated to the meaning of "the exclusive Right" as used in the Copyright Clause. Proponents of both the natural-law theory and the statutory-grant theory agreed that copyright was only the right to publish and vend, presumably because there was then no other way an author could profit from his or her writings. *See generally* Howard B. Abrams, *The Historic Foundations of American Copyright Law: Exploding the Myth of American Law Copyright*, 29 WAYNE L. REV. 1119 (1983) (arguing that historic foundation of copyright law rests on misreading of history and precedent); Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France*, 64 TUL. L. REV. 991 (1990) (distinguishing natural-law theory used in revolutionary France and statutory-grant theory used in the United States); L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1, 28-33 (1987) (discussing distinction between ownership of work and ownership of copyright).

[9] The stationers' copyright created no issue as to the nature of copyright, for it was created and controlled by members of the Stationers' Company. But its successor, the statutory copyright of the Statute of Anne, was a limited right. It was in opposition to the statutory-grant theory that the natural-law theory was promoted as a plenary property right. *See* EATON S. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS 22-23 (Boston, Little, Brown & Co. 1879) reprinted by The Legal Classics Library (1987) (examining copyright law during nineteenth century).

into a political question.

The difference between a legal and a political question is that the former can always be answered with integrity in terms of reason and logic; the latter can be resolved only by compromise dictated by self-interest.[10] The significance of the source of copyright as a political question, however, is not the answer it may provide but the ambiguity it generates. That ambiguity gives courts—who inevitably view the political question as a legal one—the leeway to ignore constitutional policies of copyright.

Much can be learned, for example, by looking at the free-speech values contained in the Copyright Clause,[11] which courts have consistently ignored. The reason, it seems, is that courts view copyright as property derived from the author's natural-law right *even if by way of statute.* Under this view, the Copyright Clause empowers Congress to grant a private lawmaking power to copyright owners to enable them to protect their private property. Consequently, the government bears no responsibility if owners use their "property" as a device of private censorship.

Copyright for new communications technology has enhanced copyright's intrusion into the free-speech arena because it has made the monopoly available for the performance—in addition to the publication—of information. The cross-pollination effect of the extension of copyright protection from a product, *e.g.*, a book, to a process, *e.g.*, live television broadcasts, means an expansion of the monopoly for the old as well as the new communications technology, which enhances the danger of private censorship severalfold.[12]

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[10] When presented with copyright issues, courts inevitably resolve them in terms of how they perceive the self-interest of the parties. Since courts perceive copyright as property—always a matter of self-interest to the property holder—the majority of copyright decisions probably favor copyright owners.

[11] The free-speech values are made manifest by the fact that copyright exists to promote learning (which requires accessibility to the material to be learned), exists only for limited times (thereby protecting the public domain), and is available only to authors and only for their writings (which provides additional protection for the public domain and access to learning materials).

[12] Courts tend to grant greater protection to the products of new technology rather than old because their rulings in regard to new technology are not bound by precedent. Thus, lower courts tend to limit severely the right to copy a computer program. *See* Whelan Assoc. v. Jaslow Dental Lab., 609 F. Supp. 1307 (E.D. Pa. 1985) (giving copyright protection to "look and feel" of such programs), *aff'd*, 797 F.2d 1222 (3d Cir. 1986), *cert. denied*, 497 U.S. 1031 (1987); *cf.* West Publishing Co. v. Mead Data Cent., 616 F. Supp. 1571 (D. Minn. 1985)

This threat to the constitutional policy that copyright promote learning means that a central problem in contemporary copyright law is how to continue the protection afforded to the public by constitutional policies while providing needed legal protection for providers of the services. The framers used the right to publish and vend as the measure of those policies, and this limited grant made by Congress led to the development of copyright principles to implement those policies. Among the most important of those principles are: (1) the limited-grant principle, (2) the separation principle, (3) the primary-market principle, and (4) the accessibility principle.

My thesis is that these principles continue to be the means for preserving and implementing the constitutional policies of copyright. So long as courts apply them, Congress's extension of copyright in response to the political exigencies of modern communication technology can be kept within the limits of its constitutional power.[13] As I shall demonstrate below, these principles are codified in the Copyright Act of 1976, but this fact does not become apparent until the rules of that statute are interpreted in light of the Copyright Clause.

Part II of this article deals with the source of "the exclusive Right" that the framers empowered Congress to secure, which

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(giving copyright protection to page numbers of non-copyrightable works (court opinions) in published form to prevent their use in computer databases), *aff'd*, 799 F.2d 1219 (8th Cir. 1986), *cert. denied*, 479 U.S. 1070 (1987). Once the copyright owner's right to copy computer programs, for example, is enhanced, it is relatively easy for copyright owners to get courts to extend this enhancement to printed material, the traditional form of copyrighted works. *See* Basic Books v. Kinko's Graphics Corp., 758 F. Supp. 1522 (S.D.N.Y. 1991) (giving copyright protection in spite of fair-use arguments to excerpts of text in college photocopied and bound course packets). This is the cross-pollination effect.

[13] The adherence of the United States to the Berne Convention makes an appreciation of this point more important than ever. The merger of the economic based statutory-grant-of-monopoly theory of American copyright with the author's natural-law-proprietary-right theory of the Berne Convention provides a basis for overriding the policies in order to enhance the monopoly of copyright and make it consistent with member countries of Berne, countries whose legislatures are not limited in power by the Copyright Clause of the United States Constitution and in which free speech is not as high in the pantheon of values as in the United States. The scope of copyright protection that the Berne theory of copyright apparently justifies thus demonstrates the wisdom of the framers in limiting the power of Congress to grant copyright and the folly of disregarding the constitutional policies to which American copyright is subject.

requires a brief consideration of the history of English copyright jurisprudence as well as the American understanding of that jurisprudence. Part III shows that copyright policies and principles are derived from the meaning of "the exclusive Right" as the right to publish and vend; and Part IV demonstrates that the 1976 Act codifies the principles discussed in light of "the exclusive Right." Part V is a brief commentary on understanding copyright, a goal that requires courts to cease reading the Copyright Act piecemeal and to read it whole in light of the Copyright Clause. Part VI is the conclusion.

II. THE SOURCE OF "THE EXCLUSIVE RIGHT"

The source of "the exclusive Right" is not subject to reasonable doubt. It is a legislative body. Anglo-American copyright has *always* been statutory, although in England the first copyright acts (other than the printing patents granted under the sovereign's prerogative) were ordinances of the London Company of the booktrade, the Stationers' Company, and were, in effect, private statutes.[14] In this country, the legislature has always been the source of copyright. Thus, twelve of the thirteen states enacted copyright statutes during the period of the Confederation;[15] and the ultimate legislative body was the Constitutional Convention of 1787, which delegated to Congress the power to secure to the author a copyright for his or her writings. Even though they used the word "secure," if the framers intended to empower Congress to grant authors a natural-law right, they acted inconsistently.[16] A

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[14] *See generally* L. RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE (1968) (detailing treatment of stationers' copyright).

[15] The state statutes are reprinted in U.S. COPYRIGHT OFFICE BULLETIN NO. 3, COPYRIGHT LAWS OF THE UNITED STATES OF AMERICA 1783-1962, at 1-19 (1962) [hereinafter COPYRIGHT OFFICE BULLETIN NO. 3]. Delaware was the state that did not enact a copyright statute. Note that the so-called common-law copyright, a judicial creation, was not a copyright, but the right of first publication.

[16] Counsel in the Supreme Court's first copyright decision argued that the author had at common law a perpetual property in the copy of his works. Using Millar v. Taylor, 98 Eng. Rep. 201 (K.B. 1769), to sustain his position, counsel asserted that Justice Willes, Justice Aston, and Lord Mansfield all "agreed, not only that an author had a property at common law, but that it was perpetual, notwithstanding the Statute of Anne." Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 596 (1834). He sought to buttress his position with the language in the Copyright Clause. The Court, of course, rejected the argument with its holding that

natural-law right would be secured in perpetuity, but Congress is empowered to secure "the exclusive Right" that is copyright only for a limited time, a limitation consistent with the historical sources of American copyright law, events in seventeenth and eighteenth century England.

A. THE ENGLISH HERITAGE

The event in the history of Anglo-American copyright that led to the shaping events of the seventeenth and eighteenth centuries was the Charter of the Stationers' Company granted in 1556 by Philip and Mary, the Roman Catholic successors to Henry VIII's Protestant son, Edward VI. The Charter gave the stationers the power to make "ordinances, provisions, and statutes" for the governance of "the art or mistery of [s]tationery," as well as the power to search out illegal presses and books and things with the power of "seizing, taking, or burning the foresaid books or things, or any of them printed or to be printed contrary to the form of any statute, act, or proclamation . . . ."[17]

The power to burn offending books was a benefit to the sovereign (a weapon against unlawful publications), and a boon to the stationers (a weapon against competition). The book-burning power thus shows the real motivation for the Charter, to secure the allegiance of the stationers as policemen of the press for the sovereign in an uncertain world. The stationers, however, insisted on a *quid pro quo*. They were interested in governmental censorship only because it gave them the power of private censorship to control competition, and their allegiance shifted as the world changed. Thus, William Crosskey points out that Philip and Mary incorporated the Stationers' Company "to set up a mode of regulating the English printing trade that would facilitate the efforts of

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copyright is the grant of a limited statutory monopoly. ("The delegation is to secure exclusive rights—not to grant property or confirm property, or grant rights or confirm or establish rights, but to secure rights." *Id.* at 600.)

[17] The Charter of the Company of Stationers of London, *reprinted in* 1 EDWARD ARBER, A TRANSCRIPT OF THE REGISTERS OF THE COMPANY OF STATIONERS OF LONDON, 1554-1640 A.D. xxviii-xxxii (Peter Smith ed., 1950) (1875). The Charter was renewed by Elizabeth I on November 10, 1559. 1 *id.* at xxxii.

the Romish clergy to stamp out the Protestant Reformation."[18] But the motives of the stationers "were of a less exalted kind."[19] Thus, Elizabeth, relying on the stationers' self-interest, confirmed the Charter to turn the stationers to support the English, rather than the Romish, church, and the Stationers' Company became,

> in turn, the instrument of the Stuarts against the Puritans, in the early seventeenth century; the instrument of the Puritans, against their royalist enemies, when the Puritans came to power; the instrument of the royalists against the Puritans, after the Restoration; and, for a brief time, the instrument of the triumphant Whigs, after "the glorious Revolution," of 1688. But through all these vicissitudes, the stationers themselves steadfastly remained, what they had always been, eminently practical men;[20]

and they consistently protected their monopoly.[21]

Probably the form that copyright took after the Charter was granted—registration of the title of a book in the Company registers in the name of a member—was the continuation of a practice begun before the Charter made the guild of stationers a London Company. In any event, it is proper to characterize the first English copyright, the stationers' copyright, as a private-law copyright. It was defined only in the ordinances of the Stationers' Company, self-governance being one of the prerogatives of a London Company.[22] This private-law copyright (for the benefit of publishers) antedated the public-law copyright (for the benefit of the public) by a century and a half and had all the features that made it effective as a basis for the Company's monopoly and as a tool for governmental censorship. The private-law copyright was available

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[18] 1 WILLIAM W. CROSSKEY & WILLIAM JEFFREY, JR., POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 478 (1953).

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *See generally* CYPRIAN BLAGDEN, THE STATIONERS' COMPANY, A HISTORY, 1403-1959 (1960) (detailing history of the Company).

only to members of the Stationers' Company, could be transferred and sold in perpetuity, and did not require any writing by the copyright claimant.

The stationers' copyright produced no controversy as to either its source or its nature. There was no reason it should have. The stationers created their copyright, shaped it to their ends, and kept control of it for themselves. All this they were able to do not only because their royal Charter gave them the power to control printing presses, but because their copyright paralleled the reign of press control in England.[23] Censorship needed a perpetual copyright for obvious reasons. Perpetual copyright precluded the public domain for literature, which could not be tolerated by a government dedicated to censorship and press control. Writings in the public domain are free for all to publish—without a licenser's imprimatur.

Thus, the end of legal support for the stationers' copyright also—without fanfare—meant the creation of a public domain for literature. While this watershed event apparently has received little attention, it happened with the final demise in 1694 of the Licensing Act of 1662[24]—the last of the licensing decrees—which ended the public-law support for the stationers' copyright as well as press control. The death of the private-law copyright in theory meant that no law—neither statutory nor judicial—protected anyone's exclusive right to publish a book, either in perpetuity or otherwise. But the stationers' monopoly of the booktrade was so strong that the stationers' copyright continued to be used as a private copyright for Company members in support of their monopoly.

The booksellers, however, wanted (and needed) statutory support for what they would later contend was the author's common-law right, and they petitioned Parliament to restore the condition they considered necessary for the continuation of their monopoly—governmental censorship. Thus, their initial pleas were for

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[23] During this time, the stationers continually petitioned the government for decrees and acts of censorship that protected their copyright, in part because the vagaries of politics led to the beheading of Charles I in 1649 and the Puritans' rule until Charles II returned from his travels in 1660. For a detailed discussion of the decrees and acts of censorship, see generally PATTERSON, *supra* note 14, at 114-42 (sixth chapter entitled "Copyright and Censorship").

[24] Licensing Act of 1662, 13 & 14 Car. II, ch. 33 (Eng.).

new censorship legislation to protect the government (and themselves). Only when these pleas failed did they make their plea for a copyright to protect the author.[25]

Parliament eventually responded to the plea for an author's copyright with the Statute of Anne in 1710.[26] The characterization of the statutory copyright as an author's copyright, however, is one of the great canards of history. While that Statute made copyright available to authors for the first time, there was only one benefit for the author that was not available for the bookseller—the renewal term—and the Statute was designed to destroy (and prevent the recurrence of) the booksellers' monopoly. Thus the Statute of Anne can best be characterized as an anti-censorship trade regulation statute. Analysis shows that Parliament avoided vesting statutory copyright with features that made its private-law predecessor so effective a tool of both censorship and monopoly.[27] It did so by making the new statutory copyright available only for new writings, by limiting the term of the new statutory copyright to two terms of fourteen years (the second term being available only to the author if living at the end of the first term), by making it available to anyone entitled thereto (not merely members of the Stationers' Company), and by including in the new copyright act a list of officials to whom a complaint could be made if the booksellers charged too high a price for books (the same officials listed as licensers in the Licensing Act).

The booksellers thus properly viewed the Statute of Anne as a great threat to their monopolistic control of literature and learning for private profit. The realization of the threat, however, was delayed for twenty-one years by the Statute's continuation of the stationers' copyrights for that period of time. In 1731, when the grace period ended, the booksellers began their campaign to regain the legal control of copyright they had lost by the demise of the Licensing Act of 1662 (and by the passage of the new copyright statute).

The details of the booksellers' efforts have been recounted

[25] *See generally* PATTERSON, *supra* note 14, at 127-34 (for account of the stationers' petitions).

[26] Statute of Anne, 8 Anne, ch. 19 (1710) (Eng.).

[27] *See generally* L. Ray Patterson, *The Statute of Anne: Copyright Misconstrued*, 3 HARV. J. ON LEGIS. 223 (1966) (analyzing Statute of Anne provisions).

elsewhere.[28] The point here is that to regain control of copyright, the booksellers had to devise a strategy to secure judicial recognition of the stationers' copyright in the guise of a common-law copyright that would override the statutory copyright. This was no easy task. The common-law courts had never exercised jurisdiction over copyright (presumably because of press control policies);[29] and prior to the Statute of Anne, the author had never been eligible for copyright (because of the stationers' monopoly in controlling the booktrade).[30]

This background explains why the booksellers concentrated on the source of copyright in order to turn a legal question into a political question. They did so by arguments intended to elicit sympathy for the author (conveniently ignoring their role in creating the poor plight of the author that they bemoaned) and avoided sound logic and reason. Although the claim for an author's natural-law right was to rebut the charge of monopoly, the booksellers also claimed the author's right to assign those rights to a bookseller.[31] The right of assignment was the political ploy, for it meant both that authors could be deprived of their "natural law" rights by contract, and that the booksellers' monopoly would be enhanced by that same contract. Even so, the Court of King's Bench in *Millar v. Taylor* gave the booksellers what they wanted and recognized the author's common-law copyright in perpetuity.[32] (It may not have hurt that Lord Mansfield, the chief justice of the King's Bench and the senior judge of the three supporting the

[28] *See generally* AUGUSTINE BIRRELL, SEVEN LECTURES OF THE LAW AND HISTORY OF COPYRIGHT (London, Cassell 1899); BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT (1967); PATTERSON, *supra* note 14; PATTERSON & LINDBERG, *supra* note 5.

[29] 1 CROSSKEY & JEFFREY, *supra* note 18, at 477, 481.

[30] *Id.* at 479. As Augustine Birrell said: "It is of great significance that at no time during the manuscript period [i.e., prior to the printing press] was any claim for author's copyright made or asserted." BIRRELL, *supra* note 28, at 49-50.

[31] "If the copy of the book belonged to the author, there is no doubt but that he might transfer it to the plaintiff. And if the plaintiff, by the transfer, is to become the proprietor of the copy, there is as little doubt that the defendant has done him an injury, and violated his right: for which, this action is the proper remedy." Millar v. Taylor, 98 Eng. Rep. 201, 206 (K.B. 1769) (Willes, J.).

[32] *Id.* at 201.

booksellers, had represented booksellers in prior litigation.)[33]

The *Millar* ruling, however, lasted only five years before the House of Lords overturned it in *Donaldson v. Beckett*[34] in 1774. The precise issue presented to the Lords (in the form of several questions) was whether, by reason of the natural law, the author had a common-law copyright in his or her works that existed in perpetuity despite the Statute of Anne's limited-term copyright. The Lords held that the author does have a common-law copyright, but that it exists only until the work is published. After publication, the work goes into the public domain except for such rights as the copyright statute provides.

The most significant point about *Donaldson* is that it was a compromise, *i.e.*, a political, decision. The Lords, by holding that the common law was the source of the author's copyright prior to publication, appeared to give the author a victory. But the common-law copyright, being *only the right of first publication*, was no copyright at all since it did not entail the exclusive right of continued publication. The common-law copyright concept, however, proved to be very useful to those claiming that the natural law was the source of the statutory copyright. Their argument was that the common-law copyright, clearly a product of natural law, was the source of the statutory copyright and therefore that the statutory copyright was merely the securing of a natural-law right. Thus, the harm of the *Donaldson* ruling was that it laid the groundwork for the future enhancement of the copyright monopoly on the basis of the natural-law-property theory. In a sense, the booksellers, while losing the battle, won the war for their successors.

B. THE AMERICAN UNDERSTANDING

The American understanding of copyright as of May 2, 1783, is indicated by a Continental Congress Resolution of that date recommending "the several States to secure to the Authors or

[33] "I was counsel in most of the cases which have been cited from Chancery: . . . The first case of Milton's Paradise Lost was upon my motion. I argued the case of *Millar* against *Kincaid*, in the House of Lords." *Id.* at 257.

[34] 1 Eng. Rep. 837 (H.L. 1774).

Publishers of New Books the Copyright of such Books,"[35] which twelve of the thirteen states had done by 1787.[36] The Resolution defined copyright as the "exclusive right of printing, publishing and vending" books,[37] and the inference is clear: As *Donaldson* had held, without a statute the author had no exclusive right of printing, publishing and vending his or her writings that continued after they were first published.[38] The common-law rule thus made it desirable that Congress have the power to secure to authors nationwide protection for the exclusive right to publish and vend their writings.

The Continental Congress Resolution is particularly strong evidence of the American understanding of the legislature as the proper source of copyright because the resolution was in response to the report of a committee whose membership of three included James Madison (who was to play a major role in drafting the Constitution a few years later). It was Madison who argued the desirability of the Copyright Clause in No. 43 of *The Federalist Papers*.[39] The states, he said, could not effectively provide such rights, the inference being that the rights could not be uniformly protected by state law—either statutory or common law—in a federal system and had to be secured by national legislation.

The state copyright statutes, most of which were enacted in response to the Continental Congress Resolution, were modeled on the Statute of Anne and thus presaged the inevitable. The federal copyright was to be a direct descendant of its English counterpart. The language in the United States Copyright Clause was almost surely taken from the title of the Statute of Anne of 1710;[40] the American Copyright Act of 1790[41] is a copy of the English Act; and the United States Supreme Court in its first copyright case,

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[35] COPYRIGHT OFFICE BULLETIN NO. 3, CONTINENTAL CONGRESS RESOLUTION OF MAY 2, 1783, *supra* note 15, at 1.

[36] Modeled on the Statute of Anne to varying degrees, the state copyright statutes had two characteristics of particular interest today: (1) Many of them justified copyright protection as a natural-law right of the author; and (2) almost all of them treat the right to vend as a part of, and thus a limitation on, the reproduction right. *See id.* at 1-21.

[37] *Id.* at 1.

[38] *Donaldson*, 1 Eng. Rep. at 840.

[39] THE FEDERALIST No. 43 (James Madison).

[40] 8 Anne, ch. 19 (1710) (Eng.).

[41] 1 Stat. 124 (1790) (passed during the second session of the first Congress).

Wheaton v. Peters,[42] used *Donaldson v. Beckett* as guiding precedent in confirming copyright as the grant of a limited statutory monopoly.[43]

The framers of the Constitution thus incorporated the English experience into the Copyright Clause and thereby ensured that both Congress and the Supreme Court would do likewise. While the framers may not have had complete knowledge of the historical details of the early English copyright, they surely understood the importance of the ideas they took from the Statute of Anne and wrote into the Constitution: the promotion of learning, the protection of the public domain, and the limited benefit to the author. Therefore, the English Statute is a useful annotation for understanding "the exclusive Right" in the context of the policies contained in the Copyright Clause.

1. The Promotion of Learning. Given the historical context from which the Statute of Anne emerged, it seems clear that the promotion of learning was an anti-censorship, or free-speech, policy. Thus, the statutory copyright was limited to new writings that had to be published (without any licenser's imprimatur) in order to secure the limited term of copyright.

At this late date, it is difficult to appreciate the Statute of Anne as a source of free-speech rights or to understand that freedom of learning in 1710 was relatively new, having existed only since 1694. Thus, it is useful to note the origins of the pre-statutory copyright as described by Augustine Birrell:

> In considering the origin of copyright, two things must never be forgotten. First, the Church and her priesthood, frightened—and who dare say unreasonably frightened?—at the New Learning, and at the independence and lawlessness of mind and enthusiasm that accompanied the New Learning; and, second, the guilds or trade unions, jealous of their privileges, ever at war one with another, and making their appeal to the Crown for protection against outside interference with their strictly defined

[42] 33 U.S. (8 Pet.) 591 (1834).
[43] *Id.* at 595.

domains of business.[44]

Just as copyright sprang from "the censorship of the Press and the monopoly of the booksellers,"[45] resulting from a frightened priesthood and a fearful monarch, so did the freedom of learning in the guise of the freedom of religion and the free press.[46]

The new statutory copyright took the same form as the stationers' copyright, registration in the register books of the Company. But we can assume—on the basis of provisions in the Statute—that Parliament was not willing to risk the loss of the new freedom of learning by allowing copyright again to be used as a device of censorship or an instrument of monopoly. The evidence is that Parliament used the Licensing Act of 1662 as a model of both what to do and what not to do. In addition to requiring a new writing *and publication* as conditions precedent for copyright and limiting the term of copyright as a condition subsequent, Parliament also made clear that the importation of books in foreign languages printed overseas was not to be forbidden,[47] as they could have been under the Licensing Act.[48]

The lesson from the stationers' copyright that remains relevant, however, is that copyright is a means of information control. This is so whether the control is exercised in the interest of the government's political power or in the interest of the copyright owner's private profit. As such, copyright can be used to inhibit rather than to promote learning. This explains why in the United States from 1790 (the date of the first Federal Copyright Act) to 1978 (the effective date of the 1976 Act), there were two conditions necessary

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[44] BIRRELL, *supra* note 28, at 19.

[45] *Id.* at 51.

[46] This unhappy history, then, explains why the Copyright Clause and the First Amendment of the United States Constitution have a common origin: they are both products of the Tudor and Stuart policies of press control, which lasted until 1694, shortly after the Glorious Revolution in 1688, when the Protestant Succession in England was assured. It also explains the political origin of copyright.

[47] Statute of Anne, 8 Anne, ch. 19, § 8 (1710) (Eng.). The prohibition did not extend to books in the English language printed overseas, which provided protection for a domestic industry.

[48] Licensing Act of 1662, 13 & 14 Car. II, ch. 33, § 5 (Eng.). Section 5 required that all books from overseas be brought to the port of London to be examined for "heretical, seditious and dangerous books."

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for copyright: (1) a new writing, and (2) publication of that writing.[49] The 1976 Copyright Act eliminated the condition of publication. Herein lies the importance of understanding "the exclusive Right" that Congress is empowered to secure as the right to publish and vend. The absence of the publication requirement means, in effect, the availability of an unconditional copyright as a means of information control to inhibit learning, the very misuse of copyright the framers sought to guard against. This is why under the Constitution the Congress can grant only a copyright that ensures public access to the copyrighted material. This is the real significance of the meaning of "the exclusive Right" as the right to publish and vend.

2. *The Public Domain.* A vitally important part of the statutory scheme of the 1710 Copyright Statute for the promotion of learning was the protection of the public domain, which can be said to have come into existence in 1694, the date of the final demise of the Licensing Act of 1662. Recall that the stationers' copyright was available for any book regardless of age (provided a fellow stationer did not hold the copyright) and that the stationers' copyright existed in perpetuity. Thus, the Statute of Anne's requirement of a new writing and its limited term of copyright were integral parts of the statutory scheme that protected the public domain, as the drafters of the Copyright Clause presumably realized.

According to William Crosskey, the framers placed limitations on Congress's power to secure copyright in order to eliminate the author's perpetual copyright, which would have effectively destroyed the public domain. Said Crosskey:

> [T]hose limitations were expressed, first, because the Convention did not desire that Congress should have any power to grant perpetual copyrights; and, second, because it *did* desire, by restricting Congress to the creation of limited rights, to extinguish, *by plain implication of "the supreme Law of the Land,"* the

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[49] The former requirement protected works in the public domain from recapture by copyright; the latter meant that the public would have uninhibited access to writings protected by copyright. Once a book is on the shelf of a free lending library, it is free for all to read.

> perpetual rights which authors had, or were supposed by some to have, under the Common Law.[50]

Crosskey's analysis may describe more accurately the desires of Parliament in using the statutory copyright to replace the stationers' copyright than the desires of the members of the Convention. But if we assume that the framers were familiar with the stationers' copyright, their words speak from knowledge; if they were not familiar with the early English copyright, their words speak from wisdom and foresight. In any event, Crosskey's analysis is supported by the words of the Constitution.

It is ironic, then, that the public-domain policy seems to be the least appreciated of all the policies in the Copyright Clause. Consider, for example, the extension of the term of copyright in the 1976 Copyright Act for four or more generations, a lengthy copyright available for ephemeral works as well as permanent works. The reason for this myopia probably is that the public domain is the one copyright concept that entrepreneurs cannot manipulate as they can, for example, the author's copyright. Once a work is in the public domain, it is not subject to recapture by copyright (although it is not clear that all American courts understand this point).[51] Copyright entrepreneurs thus see the public domain as the greatest threat to their opportunity for profit.

The importance of the public domain, however, is obscured not only by the copyright owners' opportunity for increased profit, but also by the persistence of the theory that the natural law is the source of copyright. The Lords' decision in *Donaldson* should have ended that theory in England, just as the Supreme Court's reliance on *Donaldson* in *Wheaton* should have disposed of the issue for the United States. Yet, nineteenth-century writers on copyright con-

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[50] 1 CROSSKEY & JEFFREY, *supra* note 18, at 486.

[51] *See, e.g.*, West Publishing Co. v. Mead Data Cent., 616 F. Supp. 1571 (D. Minn. 1985) (granting West Publishing copyright protection for pagination of its law reporters), *aff'd*, 799 F.2d 1219 (8th Cir. 1986), *cert. denied*, 479 U.S. 1070 (1987). *See also* Feist Publications v. Rural Tel. Serv. Co., 499 U.S. 340 (1991) (undermining *West Publishing* by denying copyrightability of telephone directory white pages); L. Ray Patterson & Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 U.C.L.A. L. REV. 719 (1989) (offering critical view of *West Publishing*).

tinually promoted the natural-law theory.[52] And despite the Supreme Court's continual rulings to the contrary, judicial decisions suggest that copyright as the natural-law "property" right of the author continues to find favor with some lower courts.[53]

Apart from the intuitive appeal of the notion that one "owns" what he or she creates, the persistence of the natural-law copyright theory is due in part to the House of Lords's compromise decision in *Donaldson*. Although the Lords decided that the right of copyright after publication is a statutory monopoly, the so-called common-law copyright they created had no basis other than the natural law. They thereby gave credibility to the *Millar* case even as they overruled it. Yet, the public domain—protected by both the writing requirement and the limited term—is as important today as it was when the framers made it an integral part of the Constitution. As President George Washington said in a message to Congress on January 8, 1790 that led to the enactment of the 1790 Copyright Act: "Knowledge is, in every country, the surest

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[52] Eaton S. Drone, author of the leading copyright treatise of the nineteenth century, argued strongly for the author's perpetual, *i.e.*, natural-law, copyright. "To say the authors have rights of property in their literary productions, and that they are lost by publication, which is their very source of value, is absurd." DRONE, *supra* note 9, at 13. "[T]he copyright statute which deprives authors of property in their intellectual productions after a term of years, cannot be defended on any principle which sanctions the taking of private property for public uses, or which justifies the regulation of private property for the common welfare." *Id.* at 19.

An article in *The American Jurist and Law Magazine* issue of July 1833 takes the same view, claiming that "an author, according to all rules of law, has perpetual copyright." Joseph K. Angel, *Literary Property*, 10 AM. JURIST & L. MAG. 62, 80 (Boston, Lilly, Wait & Co. 1833).

A review by Philip H. Nicklin of a book entitled REMARKS ON LITERARY PROPERTY quotes the author as having a similar view: "I incline to the belief that authors should have *full property in perpetuity*; that is to say, that they, their heirs and assigns, should possess the entire control over their works forever . . . ." Philip H. Nicklin, *Review of Remarks on Literary Property*, 19 AM. JURIST & L. MAG. 476, 477-78 (Boston, Charles C. Little & James Brown 1838). The reviewer expressed the opinion that this proposal was impractical. *Id.* at 479.

[53] *Cf.* American Geophysical Union v. Texaco, 802 F. Supp. 1 (S.D.N.Y. 1992) (holding copying for internal use by a commercial research library does not constitute fair use); Basic Books v. Kinko's Graphics Corp., 758 F. Supp. 1522 (S.D.N.Y. 1991) (holding that copying excerpts from books without copyright owner's permission to make college course packets constitutes copyright infringement).

basis of public happiness."[54] That source of happiness is unlawfully rationed to the extent that copyright usurps the public domain beyond its constitutional limits.

3. *The Author's Right.* One of the many ironies of copyright law is the use of the term "author's copyright" by reason of the Statute of Anne (and the language in the Copyright Clause taken from the English Act). The irony is that the Statute of Anne[55] did not provide for an author's copyright. The statutory copyright was the stationers' copyright with a limited term and thus a publisher's copyright made available to authors. Statutory copyright did not even come into existence until the book to be copyrighted was published, which required a publisher, who could—and normally did—exact the assignment of the copyright in partial payment for his services.

Indeed, James Madison in the Continental Congress Resolution recommended that states secure copyright to publishers or authors,[56] a recommendation that may give some significance to the exclusion of publishers from the Copyright Clause. Whether the omission was a matter of style or substance, we cannot know. But we do know that the monopoly problem of copyright was created by publishers, not authors. And we know of the efforts publishers made to secure perpetual copyright for authors that would benefit the entrepreneur more than the creator. The notion of the author's copyright is thus a result of botched copyright theory, primarily in the Lords' ruling in *Donaldson*.

Even at this late date it is well to understand why. There are at least two reasons. One is that the Lords gave credence to the natural-law theory by creating an ersatz copyright that existed only prior to publication. A more subtle reason is that the booksellers never presented the courts with a properly framed issue as to what the natural-law versus statutory-grant controversy entailed.

To argue—as the booksellers did—that copyright is a natural-law right of the author without more is to imply that the issue is the natural right of the author *vel non*, with no regard for the rights of

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[54] Address from George Washington to Congress (Jan. 8, 1790), *in* COPYRIGHT IN CONGRESS, 1789-1904, at 115 (Gov. Printing Office, 1905).

[55] 8 Anne, ch. 19 (1710) (Eng.).

[56] COPYRIGHT OFFICE BULLETIN NO. 3, *supra* note 15, at 1.

others, and so the courts treated it. But this malformation of the issue as between the author and nobody obscured the impact of a natural-law copyright on the natural-law rights of members of the public as users. Persons in a free society have as much of a natural-law right to learning as an author has to exclusive publication. Properly framed, then, the real issue was the right of the author to publish in perpetuity (and thus to subject the materials of learning to private control forever) versus the right of persons to use published writings freely after a limited period of monopoly (by reason of the public domain). Since the user's right was protected by the public domain, the properly formulated issue—the right of the author to control publication of his or her work in perpetuity versus the right of individual members of the public to use the work for learning—would have made clear what history tells us: Copyright is an intrusion upon the common-law public domain.[57]

The conclusion, however, was not accepted, apparently because it was not recognized that *Millar*'s[58] natural-law theory of copyright is based on two notions that turn out to be fallacies. The first notion is that an author is entitled to copyright protection because he or she creates a work; the second is that no one is entitled to reap where he or she has not sown. The two fallacies are: (1) that an author creates a work out of private materials that he or she owns as the carpenter owns the wood out of which he fashions a cabinet; and (2) that the author does not reap where he or she has not sown. These two fallacies combine to obscure the free-ride aspect of copyright.

The author does not own the materials out of which he or she creates a work and always reaps where he or she has not sown.

> Will it be denied, that the most original writer is the work of his own age and of former ages, as much at least as of his own proper genius; that the general domain has furnished him with the elements of the

[57] *See* David Lange, *Recognizing the Public Domain*, LAW & CONTEMP. PROBS., Autumn, 1981, at 147 (arguing that "recognition of new intellectual property rights should be offset today by equally deliberate recognition of individual rights in the public domain").

[58] Millar v. Taylor, 98 Eng. Rep. 201, 257-62 (K.B. 1769).

> ideas which he has elaborated; that in restoring them to the civilization to which he is indebted for them, he acquits himself of a duty toward humanity . . .?[59]

The point is best demonstrated, perhaps, by Shakespeare, whose plays, in terms of modern copyright law, are derivative works.[60] A modern example is Eugene O'Neill, who owes much to Aeschylus for his *Mourning Becomes Electra*.[61] And Justice Story wrote in 1845: "If no book could be the subject of copy-right which was not new and original in the elements of which it is composed, there could be no ground for any copy-right in modern times . . . ."[62] There is, then, no justification for the author's perpetual copyright to be substituted for the public domain.

The author who has an exclusive right to publish and vend his work for a limited period of time is amply rewarded for his or her efforts. The constitutional limitations on the benefit that Congress

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[59] Charles Renouard, *Theory of the Rights of Authors*, 22 AM. JURIST & L. MAG. 39, 43 (Boston, Charles C. Little & James Brown 1839).

[60] Editors often name Shakespeare's sources in the introduction to the plays. *See, e.g.*, WILLIAM SHAKESPEARE, THE LONDON SHAKESPEARE (John Munroe ed., 1957). In this work, the editor tells us that "*As You Like It* was directly and closely based on Lodge's novel *Rosalynde. Euphues Golden Legacie*. . . ." I *id.* at 593. "Shakespeare's main source for this play [*Julius Caesar*] was North's translation of Amyot's French translation of Plutarch's Lives of Caesar, Brutus and Antony, first published in 1579, and from 1595, printed by Shakespeare's Stratford friend, Richard Field . . . . Shakespeare selected such incidents and passages as suited his dramatic purpose, in places adopting North's own words . . . ." V *id.* at 259. "The actual source [of *Othello*] was Novel VII of the Third Decade in the *Hecatomithi* of Geraldi Cinthio, published in Monreale in 1565 and in Venice in 1567. It was not translated into English in Shakespeare's time; but a close translation into French by Gabriel Chapuys appeared in Paris in 1584 . . . . The transmutation in the play of Cinthio's novel, of which the main lines are preserved, has had much comment: *'Tout subsiste en effet,'* writes Guizot, *'et tout est changé.'* " V *id.* at 724-25. "Shakespeare's main source for the play [*Henry V*] was Holinshead, which he follows in places so closely that the book must have been open before him." IV *id.* at 1020.

Indeed, Shakespeare was so "derivative" that the sources of his plays are published in eight volumes in NARRATIVE AND DRAMATIC SOURCES OF SHAKESPEARE (Geoffrey Bullough ed., 1973).

[61] EUGENE O'NEILL, MOURNING BECOMES ELECTRA, (1931).

[62] Emerson v. Davies, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (No. 4436) (involving copyright infringement of elementary arithmetic text book).

can grant to authors are thus more than justified.

C. NATURAL AND POSITIVE-LAW RIGHTS

Of the three policies in the Copyright Clause—the promotion of learning, protection of the public domain, and benefit to authors—two are intended to benefit the public, one the author. Only the benefit to the author, however, has been claimed to be a natural-law right. And this is true despite the fact that the benefit to authors serves only as a means; the author's right, granted for only a limited time, is to promote learning as its end.

There are two explanations for the continued claims as to the author's natural-law right. One is that the theory is to the advantage of publishers, whose ulterior motives are disguised by a false implication that the theory is primarily to benefit the author. The other is that writers generally treat the issue of the natural-law basis for a right and the issue of the scope of that right as being the same. The assumption seems to be that if the author's copyright is a natural-law right, it provides the author with absolute dominion over the work and exists in perpetuity.

This is a one-dimensional treatment of a three-dimensional problem. The natural-law right of the author has two aspects: the basis of the right and the scope of the right in terms of time and control. The scope of the right is the aspect that has generally been ignored, presumably because the common-law copyright—based on the natural law—existed in perpetuity so long as the work was not published and thus gave the author absolute dominion as a matter of fact, which did not require theory.[63]

The common-law copyright, however, provides no rationale for features of the statutory copyright protecting published works, both because the common-law copyright was not a copyright and because the scope of the author's natural-law right in the work changes with publication.

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[63] "A work before it is published belongs only to the author; it is his spoken or written meditation, his thought, his intellectual being; it is himself; the author is not bound to account for it to any one, and is the absolute master to modify or destroy it. The fruit which he then draws from it is the well-being of study, the enjoyment of labor and of the exercise of his faculties; it is that pleasure of creation which is produced by the birth of ideas." Renouard, *supra* note 59, at 43.

> It may be demanded, whether an author, who has communicated his ideas by publication, and, in return, has received influence, honor, and perhaps profit from such communication, can, after having obtained these advantages, break the association into which he has caused the public to enter, and, at his pleasure, withdraw the share furnished by himself. Will it not be admitted, that if the public has gained knowledge of the work, the author, on his part, has gained a public?[64]

And having gained a public, does not the author owe an obligation to the members of his or her public not to deny them the use of the work, even while retaining the copyright?[65] Can the author use his or her work to assert influence over the thinking of others and then retain absolute dominion over the instrument of that influence?

The author's act of publication thus brings into play the rights of others. And to say that the author's natural-law right in the work continues after publication is tantamount to saying that the author has a natural-law right to influence others by information control, that is, by controlling access to his or her work. But this right comes into conflict with the right of others to learn without being subjected to the vagaries of censorship, whether in the form of a tax on learning or otherwise. The point can be made with a question: What justification is there for giving a mortal author perpetual control of his or her writings consisting of materials taken from the public domain?

A more important question is why have writers on copyright been able to keep the notion of the author's natural-law copyright in the forefront despite the Supreme Court's continual assertion that copyright is a positive-law concept, a limited statutory grant intended primarily to benefit the public interest? As good a guess as any is that few have bothered to analyze the meaning of "the exclusive Right" in the Copyright Clause as being only the right to

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[64] *Id.*

[65] There is a distinction between the use of the work and the use of the copyright. *See* PATTERSON & LINDBERG, *supra* note 5, at 14.

publish and vend one's own writings. For once this point is recognized, the natural-law pattern of the Clause emerges in a different form.

The freedom to learn is a natural-law right and the materials of learning are a necessary condition for the exercise of that right. Even if we say copyright has a natural-law basis, the benefit to the author is a reward to induce the author to make his or her writings public so that others may enjoy their natural-law right of learning. Copyright thus is, and can be, only a positive-law concept, for only a positive-law concept can serve to mediate two natural-law rights.

The Copyright Clause makes the point by recognizing the natural-law right of the people to learn as well as the natural-law right of the author to gain a profit. Thus, we come to the fundamental point. Copyright, whatever its basis, cannot co-exist as a natural-law right in a society where learning is a natural-law right and the public domain has a natural-law basis. Therefore, American copyright must be—as the framers intended—a positive-law concept, a legislative grant of limited rights conditioned on the author's making his or her writing available to the public. This principle was acknowledged in the Resolution of the Continental Congress, implied in the Copyright Clause, and adopted by the United States Supreme Court in *Wheaton*. This is why the copyright statutes do "not provide for the continuation of the common-law [i.e., natural-law] right, but under constitutional authority, created a new [statutory] right."[66] The most important natural-law right of the Copyright Clause is not the right of the author to gain a profit, but the right of the people to learn: The future of a society is determined by the learning of its citizens.

III. COPYRIGHT POLICIES AND PRINCIPLES

Of the three copyright policies in the Copyright Clause—the promotion of learning, the protection of the public domain, and the benefit to the author—two benefit both users and the public

[66] Globe Newspaper Co. v. Walker, 210 U.S. 356, 362 (1908) (involving mainly a jurisdictional issue of damages for infringement of a copyright); *see also* Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932) ("As this Court has repeatedly said, the Congress did not sanction an existing right, but created a new one.").

interest. Despite the clarity of their statement, however, the rules in the Copyright Act of 1976 are further removed from the public interest than the rules in any copyright statute have ever been. The policy of learning is attenuated because copyright no longer requires a public distribution of the work; the public domain is subordinated to the interest of the copyright owner because copyright can now last for a century and more; and the benefit to authors is lessened because (under the work-for-hire doctrine) copyright is no longer limited to authors.

The divergence between copyright policies and copyright rules is clearly due in part to the extension and modification of copyright to modern communications technology. What is not so clear, however, is that Congress in effect codified copyright principles in the Copyright Act of 1976. This result, however, may be more the product of the limiting policies of the Copyright Clause than conscious concern for the public welfare. As Jessica Litman has so clearly demonstrated, the industry plays a dominant role in shaping copyright legislation with small-minded concerns, weighted as they are by the desire for control and profit.[67] Thus, the Copyright Act contains any number of instances showing the industry's fingerprints with intent to influence judicial construction of the statute.

The industry's fingerprints mean that the codification of the policies becomes clear only if they are viewed in the context of the Copyright Clause and only if one assumes that the rules are to be interpreted as part of a coherent and consistent statute. The policies in the Copyright Clause are important because Congress had to relate them to the rules to be enacted. This meant that the legislature had to cross the intellectual gulf between policies and rules with a logical bridge of principles. These principles, deduced

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[67] "A review of the 1976 Copyright Act's legislative history demonstrates that Congress and the Registers of Copyrights actively sought compromises negotiated among those with economic interests in copyright and purposefully incorporated those compromises into the copyright revision bill, even when they disagreed with their substance. Moreover, both the Copyright Office and Congress intended from the beginning to take such an approach, and designed a legislative process to facilitate it." Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 879 (1987); *see also* Jessica D. Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275 (1989) (critically examining how copyright statutes are drafted through negotiations among industry representatives).

from the policies, are the source of the rules and serve as propositions of transition that enable one to move from policy to rule without having to make logical leaps that leave a void in one's reasoning. Therefore, Congress used principles to bridge the gap between the rules it considered and the policies it had to implement in much the same way one unconsciously uses the multiplication tables to determine that eight times eight is sixty-four.

A short essay does not provide the space for discussion of more than a few copyright principles. Those here discussed are: (1) copyright is the grant of a limited monopoly for a limited period (the limited-grant principle); (2) a copyright is separate from its work (the separation principle); (3) the copyright owner can control the copyright only for the primary market (the primary-market principle); and (4) learning requires access to the work to be learned (the accessibility principle).

A. THE LIMITED-GRANT PRINCIPLE

The limited-grant principle—*copyright is the statutory grant of a monopoly limited in scope as well as time*—is a necessary corollary of all three stated policies of the Copyright Clause because "the limited grant is a means by which an important public purpose may be achieved."[68] The Supreme Court promulgated this principle in *Wheaton v. Peters*.[69] Thus, compliance with the public-interest mandate explains why copyright "comprises a series of carefully defined and carefully delimited interests to which the law affords correspondingly exact protections,"[70] and also why copyright "has never accorded the copyright owner complete control over all possible uses of his work."[71] Consequently, copyright can consist only of a series of rights to which a work is subject for a period certain. The limitations flow directly from "the exclusive Right" that Congress can grant: the exclusive right to publish and vend the work for a limited time. The Copyright Clause thus gives Congress jurisdiction only over the copyright and denies it jurisdic-

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[68] Sony Corp. v. Universal City Studios, 464 U.S. 417, 429 (1984).
[69] 33 U.S. (8 Pet.) 591 (1834).
[70] Dowling v. United States, 473 U.S. 207, 216 (1985).
[71] *Sony*, 464 U.S. at 432.

tion over the work itself, as the separation principle demonstrates.

B. THE SEPARATION PRINCIPLE

The separation principle—*the copyright and a copy of the work are separate legal entities subject to separate ownership, and both are separate from the work, which can be owned by no one*—is a corollary of the limited-grant principle. The Supreme Court's most famous statement of this principle is found in *Baker v. Selden*,[72] which established the rule that copyright cannot protect ideas, and therefore the copyright is separate from the work. The Supreme Court's most definitive statement of the separation principle was, however, in *American Tobacco Co. v. Werckmeister*,[73] in which the Court said that it was not the "physical thing created (the copy), but the right of printing, publishing, copying, etc., which is within statutory protection."[74]

The crucial relevance of the separation principle is that no one can own the work. The copyright of a work and a copy of that work can be owned by different persons, and this difference in ownership is the essence of copyright. As the Supreme Court in *Werckmeister* stated, copyright "grows out of the recognition of the separate ownership of the right of copying from that which inheres in the mere physical control of the thing itself."[75] Thus, the copyright and the copy in which the work is embodied "are distinct subjects of property, each capable of existing and being owned and transferred independent of the other."[76]

The separation principle is thus fundamental to copyright law. The principle tells courts (and copyright owners) to distinguish: (1) the existence of the copy from the existence of the copyright; (2) the ownership of the copy from the ownership of the copyright; and (3) the use of the copy from the use of the copyright.[77] These

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[72] 101 U.S. 99, 101 (1879).

[73] 207 U.S. 284 (1907) (holding a painter does not transfer copyright of a painting when selling a painting).

[74] *Id.* at 298.

[75] *Id.* at 299.

[76] *Id.* at 298 (quoting Stephens v. Gladdis, 58 U.S. (17 How.) 447, 452 (1854)).

[77] This is the basis of the distinction between the use of the work and the use of the copyright. *See* PATTERSON & LINDBERG, *supra* note 5, at Ch. 14.

distinctions flow from the fact that copyright is an instrument to encourage copyright owners to distribute copies of the work in order to promote learning, not an instrument to control use of the copies after they have been distributed. The separation principle thus enables one to determine when a use of the copy is a use of the work and when it is a use of the copyright. This distinction follows from the function of copyright—to protect the exclusive right to publish and vend the work. The separation principle is thus a corollary of the primary-market principle.

C. THE PRIMARY-MARKET PRINCIPLE

The primary-market principle—*the copyright owner cannot qualify the title of a lawfully purchased copy of the work*—is a recognition that the right to publish is limited by the right to vend and grows out of the limited-grant principle. Therefore, it precludes the copyright owner from controlling the secondary market for copies after he or she has sold them.

The Supreme Court apparently first utilized the primary-market principle in an action in which the publisher (copyright owner) sought to compel a retailer to sell books at the price set by the publisher.[78] The Court determined that when the copyright owner sold a copy, it had exhausted the right to vend:

> What the complainant contends for embraces not only the right to sell the copies, but *to qualify the title of a future purchaser*. . . . To add to the right of exclusive sale the authority to control all future retail sales . . . would give a right not included in the terms of the statute . . . .[79]

The premise of the primary-market principle is that the author does not own the work.[80] This may explain why it is the most

[78] Bobbs-Merrill Co. v. Straus, 210 U.S. 339, 350-51 (1908).

[79] *Id.* at 351 (emphasis added).

[80] This point explains the Supreme Court's use of the primary-market principle in *International News Service v. Associated Press*, a copyright case without the copyright. International News Serv. v. Associated Press, 248 U.S. 215 (1918) (concerning INS's pirating of AP news stories during World War I). The Court treated the news reports as quasi-

misunderstood of the copyright principles, because copyright owners in fact—if not theory—claim that they do. Consider, for example, copyright notices that deny anyone the right to make any copy of any portion of a work by any means for any purpose without the written consent of the copyright owner. The Supreme Court in *Wheaton* made clear the unlawfulness of such claims with its rhetorical question: "Is there an implied contract by every purchaser of his book, that he may realize whatever instruction or entertainment which the reading of it shall give, but shall not write out or print its contents[?]"[81]

As the question implies, when the primary-market principle is violated, copyright effectively ceases to be a limited grant, the separation principle ceases to have any meaning, and the right of accessibility is diminished.

D. THE ACCESSIBILITY PRINCIPLE

The accessibility principle—*the copyrighted work shall be accessible to the public during the copyright term*—is also predicated on the fact that neither author nor copyright owner (nor anyone else) can own the work. The predicate is important because the accessibility principle is the most fundamental copyright principle: it is the means to the end. If the work can be owned, the owner can control accessibility to it, and copyright can be used to inhibit, rather than fulfill, its constitutional purpose of promoting learning. This is why the limited-grant principle, the separation principle, and the primary-market principle can be viewed as necessary

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property as between competitors (not a property right against the public) and limited the grant of relief to an injunction until the value of the news reports had passed. *Id.* at 245-46. Thus, the Court in effect applied the primary-market principle, but its less than careful use of language obscures its real import: no one (not even the proprietor) owns the work. *Bobbs-Merrill*, 210 U.S. at 234-36. It was not the news reports that were quasi-property as between competitors; it was the right to distribute first the news reports that one had prepared. *International News Serv.*, 248 U.S. at 239-40.

International News Service, by denying AP any property right against the public, demonstrates the essence of the primary-market principle: the author (or copyright owner) cannot qualify the title of the copy of a work that is published. Therefore, neither the author nor the copyright owner can burden a published copy with restrictive covenants to impede the public's right of learning.

[81] Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 657 (1834).

components of the accessibility principle. If copyright is not a limited grant that separates the work from the copyright and limits the copyright owner's control of copyright to the primary market, the copyright owner would be given the power of private censorship for personal gain or power.

The Supreme Court in *Sony*[82] used the accessibility principle. In *Sony*, the copyright owners of motion pictures licensed their performance for television and sought to have the Court hold that an individual who videotaped the motion pictures for his or her own personal use infringed the copyright. The copyright owner provided only ephemeral accessibility in a rigid time frame, thereby severely limiting the opportunity for learning. The Court held that the fair-use doctrine permitted the individual to videotape the copyrighted motion pictures for his or her own personal use.[83] The most important Supreme Court implementation of the accessibility principle, however, is *Feist* because it constitutionalizes the right to use uncopyrightable material in a copyrighted work.[84]

These four interrelated copyright principles derive from the proposition that no one can own a work. Therefore, all of them are necessary for integrity in the administration of copyright law. As used here, integrity means the interrelation of the parts to the whole and to each other in order to accomplish the basic purpose of a particular body of law. The purpose in this instance is the promotion of learning to benefit the public; if any of the principles is disregarded, that purpose suffers.

IV. COPYRIGHT PRINCIPLES AND RULES IN THE 1976 ACT[85]

Just as policies are the source of principles, principles are the source of rules. Therefore, Congress derived the rules in the 1976 Act from copyright principles, in effect codifying the principles it used. The 1976 Act does essentially three things: it defines copyrightable works, grants rights to the copyright owner, and limits those rights by defining them and limiting their scope.

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[82] Sony Corp. v. Universal City Studios, 464 U.S. 417, 429 (1984).

[83] *Id.* at 442.

[84] Feist Publications v. Rural Tel. Serv. Co., 499 U.S. 340 (1991).

[85] Copyright Act of 1976, 17 U.S.C. §§ 101-810 (1988 & Supp. II 1991 & Supp. III 1992 & Supp. IV 1993).

Although the Act contains some seventy-eight sections, the core provisions are contained in only five sections: section 102, the requirements of copyrightable subject matter; section 103, the scope of copyright protection for derivative works and compilations; section 106, the grant of rights section; section 107, the fair-use section; and section 201, defining the ownership of copyright. The remaining seventy-three sections serve to embroider the framework of the core sections with details and to complete the regulatory pattern of the Statute.

A. SECTIONS 102 & 201: LIMITED-GRANT PRINCIPLE

The limited-grant principle finds expression in section 102,[86] which does two things: section 102(a) limits copyright to original works of authorship fixed in a tangible medium of expression; and section 102(b) denies copyright protection to facts, whether merely in the form of an idea or embodied in procedures, processes, systems, methods of operation, concepts, principles, or discoveries. Section 102 thus limits copyright to original works of authorship and therefore states the condition precedent for copyright.

Section 201,[87] by vesting the ownership of copyright initially in the author, is another manifestation of the limited-grant principle. There was, of course, no need for Congress to grant ownership of the work to its author, who controls the initial disposition of the work by reason of physical control. Recognizing this—as well as the constitutional limitations on its power—Congress granted ownership only of the copyright, making copyright only a limited grant to which the work is subject. The point here is that the work and the copyright are separate, which the statute makes explicit in section 202.

B. SECTIONS 202 & 103: SEPARATION PRINCIPLE

The separation principle is the source of section 202,[88] which provides that ownership of a copyright is distinct from ownership

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[86] *Id.* § 102 (1988 & Supp. IV 1993).
[87] *Id.* § 201 (1988).
[88] *Id.* § 202.

of the material object in which a work may be embodied. Section 103[89] is derived from the same principle. It provides copyright protection for derivative works and compilations, with one major limitation. Because such works are only partly original, the section 103 copyright provides only partial copyright protection, limiting the copyright protection to the original contributions of the derivative or compilation author.

Section 103 is thus a corollary of the limited-grant principle—it limits the scope of copyright protection—and is derived from the separation principle—because the work and the copyright must be distinguished in order to determine the scope of copyright protection.

C. SECTIONS 109 & 106: PRIMARY-MARKET PRINCIPLE

The primary-market principle is utilized in section 109, which authorizes the owner of a particular copy to sell or otherwise dispose of that copy without the authority of the copyright owner.[90] Once the copy has been sold, the primary market for that copy is automatically exhausted. It becomes—in modern advertising parlance—a pre-owned copy.

A more subtle manifestation of the primary-market principle is section 106,[91] which grants five rights to the copyright owner: the right to reproduce the work in copies; the right to prepare derivative works; the right to distribute copies publicly; the right to perform the work publicly; and the right to display the work publicly. The public limitation on the right to distribute, perform, and display effectively limits these rights to the primary market, and section 106 is a codification of the primary-market principle in the form of a multi-faceted rule.

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[89] *Id.* § 103.

[90] 17 U.S.C. § 109 (1988) codifies the first sale doctrine and is unique in two respects: (1) it is the most direct codification of a principle; and (2) it manifests the other three of the four principles discussed above. The rule that the purchaser of a copy may dispose of that copy as he or she wishes has two effects. It limits the power of the copyright owner over the copyright and it increases the power of the user over the work. Thus the rule reflects the limited-grant principle, the separation principle, the primary-market principle, and the accessibility principle.

[91] *Id.* § 106 (1988 & Supp. IV 1993).

It is the multiple parts that obscure the rule as a codification of the primary-market principle.[92] The different parts enable copyright owners to treat the rights as separate and distinct from each other. This is error based on the false premise that ownership of the copyright entails ownership of the work, and that one who "owns" the work has the absolute right to prevent any copying of it—just as one has the absolute right not to lend another his or her item of personalty. The copyright owner, however, does not "own" the work, only the copyright.

D. SECTIONS 107 (& 108): ACCESSIBILITY PRINCIPLE

The elimination of the publication requirement as a condition for copyright and the extension of copyright to a term of seventy-five or one hundred years created a substantial risk to the public's accessibility to the copyrighted work. The rational justification for the codification of the fair-use doctrine is that it is a means of resolving this problem by making the copyrighted work accessible for learning.

Some courts, however, have taken a narrow view of fair use and given it the opposite effect. For it is only when the fair-use doctrine is interpreted in the light of the constitutional purpose of copyright—the promotion of learning—that it clearly becomes a codification of the accessibility principle. Supporting this view is the fact that the four fair-use factors in section 107[93] are directed to the primary market. Except for the nature of the use, the factors are derived from *Folsom v. Marsh*,[94] in which Justice Story promulgated the fair-use doctrine to prevent competing authors from making a wholesale use of the copyrighted work, for example,

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[92] Since the copyright is composed of several rights, and since the rights are granted in one section of the statute, they are properly interpreted only in relation to each other. Thus, it is necessary to copy the work to distribute it publicly, and it is appropriate to copy the work to perform or to display it publicly. Therefore, to say that the copyright owner has the absolute right to copy the work independently of the public distribution right is to negate the statute's limitation of the copyright owner's control to the primary market.

[93] 17 U.S.C. § 107 (1988 & Supp. IV 1993).

[94] 9 F. Cas. 342, 344-45 (1841) (No. 4901) (holding multi-volume biography about George Washington was infringed by an abridgement).

by abridgement.[95] The major purpose of the fair-use doctrine as first promulgated thus was to protect the primary market for the author as against other authors.

The point is made by use of the *potential* market as a factor in determining whether a use is fair. Since statutory copyright now exists from the moment of creation, the potential-market factor protects the work that has not been published against unfair economic exploitation the same as if the work had been published. That, of course, is the point of *Harper & Row, Publishers v. Nation Enterprises*.[96]

While section 107 (fair use) is an obvious codification of the accessibility principle in the form of a rule, section 108[97] (library use) is an unobvious weakening of the same principle. The right of fair use makes a copyrighted work accessible during the copyrighted term, but section 108 is directed to the use of a work in a public library and may well be one of two unconstitutional provisions of the 1976 Copyright Act.[98] This is because it defines (and thus limits) the right of library patrons to use a copyrighted work owned by the library. Since libraries exist to promote learning, an extension of the copyright monopoly to inhibit the traditional use of library materials flies directly in the face of the policy that copyright should promote (not inhibit) learning. Section 108 thus merits no discussion because the only appropriate comment to make about it is that it should be held unconstitutional even though it authorizes the use of section 107 to override it.

V. UNDERSTANDING COPYRIGHT

Understanding copyright begins with an understanding of "the exclusive Right." If the phrase means only the right to publish and

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[95] "The theory that an abridgment of a copyrighted work is not an invasion of literary property is traced to a *dictum* expressed by Lord Hardwicke in 1740, when Sir Matthew Hale's *Pleas of the Crown* was alleged to have been infringed." DRONE, *supra* note 9, at 435 (citing Gyles v. Wilcox, 26 Eng. Rep. 489, 490 (1740)).

[96] 471 U.S. 539 (1985) (holding fair use cannot be used to justify a scoop of an unpublished manuscript or to avoid copyright infringement liability).

[97] 17 U.S.C. § 108 (1988 & Supp. IV 1993).

[98] The other is 17 U.S.C. § 201 (1988), to the extent it authorizes the work-for-hire doctrine.

vend, copyright can be only a right—or series of rights—to which a work is subject. If the phrase is taken to mean exclusive rights arising from ownership of a work, copyright becomes a plenary property right. Copyright, however, is so abstract an expression that it is no more than "a prohibition of conduct remote from the persons or tangibles of the party having the right" defined by statute.[99] Thus it wears the property label uneasily.

Because proprietary concepts are largely concepts of control in the form of the property owner's right to exclude others from enjoyment of the property, they are detrimental to the purpose of copyright, the promotion of learning. This purpose explains why the copyright owner is by statute limited to defined uses, the copyrighted work is subject to use by others, and the copyright is terminated at a time certain. The copyright that Congress can grant is thus both more and less than a property right. The "more" is a defined statutory monopoly; the "less" is the limitations regulating that monopoly. The basis for understanding the nature of copyright, then, is to know that it is primarily a regulatory concept, for Congress can grant only the rights to publish and vend, rights that the Constitution requires be subject to regulation in the form of both conditions precedent and conditions subsequent.

That copyright is a conditional right means that it is not so much a reward as it is a *quid pro quo*. The author receives the reward for making his or her original work of authorship accessible to all. Contrary to the common notion, the reward is not for the act of creation, but for distribution to provide public access: public learning comes not from the creation of a work, but from reading and studying it, a truism that copyright owners have apparently managed to hide from courts for many years. Thus, to allow the author to retain the right—for life and beyond—to control access to a publicly disseminated work is to grant him or her the power to defeat the purpose of copyright even after having received its reward.

This danger calls for a better understanding of copyright than most courts have shown. Recall that without the statutory grant

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[99] White-Smith Music Publishing Co. v. Apollo Co., 209 U.S. 1, 19 (1908) (Holmes, J. concurring) (holding copyrighted score only protects author from unauthorized copies of sheet music, not perforated rolls of music for a player piano).

that is copyright, the author would not be entitled to an exclusive right of publication. Therefore, even as it intrudes upon the public domain, copyright must also protect it by ensuring accessibility both for the cause of learning and in aid of creation by authors. (Arguably, for example, without the public domain for literature, O'Neill's *Mourning Becomes Electra*[100] could be characterized as a plagiaristic infringement of Aeschylus, to say nothing of many of Shakespeare's plays in relation to Plutarch's *Lives*.)[101] Copyright's role of protecting, even as it intrudes upon, the public domain results in a statutory design that requires three elements: the work, the copyright, and copies of the work.

Few courts, however, appreciate the relationship between these elements, primarily because of the physical manifestation of copyright, the copy of the work. Indeed—to turn back briefly to copyright history—the stationers viewed copyright as the private ownership of the actual "copie" or manuscript, which they somehow obtained from the author.[102] And when interpreting the Statute of Anne, the House of Lords ruled that the initial copy (manuscript) of any work is owned by the author.[103] Since the manuscript was transformed into a printed copy protected by copyright (also owned by the author), it followed logically to most people that the author owned the work. Thus, according to William Blackstone, under Roman law, "in works of genius and invention," when one painted a picture on another man's canvas, the law gave the canvas to the painter.[104] And in the language of the Supreme Court: "At common law an author had a property in his manuscript, and might have an action against anyone who undertook to publish it

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[100] EUGENE O'NEILL, MOURNING BECOMES ELECTRA (1931).

[101] PLUTARCH, LIVES OF THIS NOBLE GRECIANS & ROMANS (Sir Thomas North trans., David Nutt 1895).

[102] *See, e.g.*, 2 EYRE & RIVINGTON, A TRANSCRIPT OF THE REGISTERS OF WORSHIPFUL COMPANY OF STATIONERS 1640-1708 A.D. 415 (Peter Smith ed., 1950) (1913) (concerning Master John Starkey's claim to *Paradise regayn'd* by John Milton); *id.* at 178 (concerning Master Henry Hirringman's claim to *Hamlet* by William Shakespeare).

[103] Millar v. Taylor, 98 Eng. Rep. 201 (K.B. 1769) (recognizing a common-law copyright in an author and referring to Donaldson v. Beckett, 1 Eng. Rep. 837 (A.L. 1774), which held that an assignee of an author did not receive a perpetual common-law copyright).

[104] 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 406 (Bell's American ed., 1771) (from twenty-sixth chapter, entitled "Title to Things Personal by Occupancy").

without authority."[105] One reason the idea of the author's *ownership* of his or her work continues to persist, then, is that people still tend to equate copyright with the physical manifestation of the work in the form of a copy.

It is, of course, to the copyright owner's advantage to keep copyright as concrete as possible, for the more concrete it appears to be, the more proprietary copyright can be made to seem. And it is as property that copyright justifies copyright owners in treating the Copyright Act as a *de facto* grant of private lawmaking power to enable them unilaterally to expand the copyright monopoly. For example, the basis of the often-made claim of the right to receive fifty cents per page for any copying must be the copyright owner's absolute and exclusive right to copy any portion of a work, which has no basis in the Copyright Act and indeed is refuted by section 107, the fair-use doctrine. (Significantly, it was not until the photocopying machine presented the possibility "of gathering great profits in small payments"[106] that the absolute right to copy was manufactured.) Given the sanctity accorded to the right to contract, lower courts find it difficult to condemn the copyright owners' usurpation of legislative power in the guise of private contracts.[107] This is especially true when the courts—as they generally do—view the copyright owners as protecting works they own by reason of copyright. Therefore, it will be useful to dispose of the myth that the author owns the work.

The work is an intangible creation of the mind and as such cannot be owned by anyone. "It is the intellectual production of the author which the copyright protects, and not the particular form which such production ultimately takes . . . ."[108] And as an intellectual creation, the work can exist only in the mind. As

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[105] Caliga v. Inter Ocean Newspaper Co., 215 U.S. 182, 188 (1909) (holding copyright based on recent application for registration of work cannot be sustained).

[106] Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502, 513 (1917).

[107] This is almost surely why the Supreme Court has taken the unusual step of constitutionalizing the right of others to use uncopyrightable material incorporated by someone else in a copyrighted work. Feist Publications v. Rural Tel. Serv. Co., 499 U.S. 340 (1991) (holding telephone directory white pages are uncopyrightable). The lower court's rejection of a right that the framers of the Constitution intended from the beginning justified Justice O'Connor's bold step and the unanimous concurrence of her fellow justices.

[108] Holmes v. Hurst, 174 U.S. 82, 89 (1899) (holding copyright statute must be strictly complied with to receive copyright protection).

Congress recognized in the House Report on the 1976 Act, "[i]t is possible to have an 'original work of authorship' without having a 'copy'. . . embodying it . . . ."[109]

The work thus necessarily stands apart from—and precedes—even its original copy. When reduced to a copy, the work consists of *words* (or if a work of art or music, *images* and *sounds*) borrowed from the public domain to give expression to public domain *ideas*. The copyright relates only to that copy and is no more than a statutorily created and limited right to regulate the sale of additional copies. There are, then, only two entities in copyright law that can be owned: the copy (a physical manifestation of the work) and the copyright (the right to reproduce the work in copies). The author owns both the first copy (or manuscript) and the copyright; the purchasers of copies own their individual copies. Under the Copyright Act no one can own the work any more than one can own ideas.

While in theory the law *could* recognize ownership of the work, to do so would be like giving legal title to daydreams. The ownership of an intellectual creation means nothing until it is reduced to a "copy," for without fixation, the creation fades as surely as the daydream is shattered by an intruding voice. And once the work is reduced to a copy, it is only the copy—as the fixation of an original work of authorship—that need be protected. There is no need to recognize "ownership" of the work. Indeed, there are dangers in doing so because ownership of the work would entail ownership of its contents, including ideas. Copyright would thus cease to be only a series of limited rights to which a given work is subject for a limited time and would become, instead, ownership of ideas, an ownership that the Copyright Act specifically and emphatically rejects in accordance with the limitations on Congress's power found in the Copyright Clause.[110]

Even so, the notion of ownership of the work persists. Copyright owners claim that as owners of the work they have a right to control another's use of the *work* as well as the use of the *copyright*.

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[109] H.R. REP. NO. 1476, 94th Cong., 2d Sess. 53 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5666. The Report goes on to point out that it is also possible to have a copy that does not manifest an original work of authorship.

[110] U.S. CONST. art. I, § 8, cl. 8.

The only explanation is the goal of obtaining control of the secondary market for their works (they already have control of the primary market) to enhance the profit potential for copyright. Their goal, in short, is a statutory guarantee of profit.

While profit is not a four-letter word in terms of the free-market system, it can be argued that a statutory guarantee of profit for an author's writings is to be had only at great risk to the public welfare. For once they have persuaded Congress to abuse the public interest by extending the copyright monopoly for more profit, copyright owners have no reason not to realize the fruits of their efforts by charging monopolistic prices. Thus the statutory guarantees of profit—for which copyright owners work so hard—skew the constitutional scheme of copyright. However subtle and however justified in terms of entitlement, guarantees of profit reduce all learning to marketable commodities. And learning as merely a marketable commodity will lead inevitably to coin-hungry turnstiles in the now free lending libraries, a threat to the natural-law right of learning that we can ill afford, as history tells us. For learning as a commodity for the marketplace is a fair description of the situation with the stationers' copyright, which was deemed to consist of the writing itself in the form of the manuscript.

Ultimately, the concept of the ownership of writings does not work because copyright can properly be viewed only as a three-part concept which must serve the interest of three groups: authors, entrepreneurs, and users. Each has a legitimate interest in copyrighted works—authors in reputation and monetary gain, entrepreneurs in profit, and users in learning. Each group thus has a legitimate claim to consideration by the others because the goals are interrelated, and the rights leading to those goals must be kept in proportion.

One's conclusion as to the nature of copyright is determined by one's view of its source. A coherent and consistent view of copyright requires that the source be Congress, which can grant the author only the right to publish and vend, with only such extensions as do not subordinate constitutional policies to the cause of private profit. The point is that copyright law is more regulatory than proprietary in nature, for only the regulatory concept makes any sense in view of the three policies that the Copyright Clause mandates: promotion of learning, protection of the public domain,

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and benefit to the author.

VI. CONCLUSION

The expansion of copyright law to accommodate new developments over the two centuries since the 1790 Act has caused an erosion of constitutional policies to the extent that the contemporary challenge in copyright law is how best to secure the protection these policies were intended to provide. Two steps may be useful. One is for courts to recognize that they revive the stationers' copyright when they create judicial copyrights. This is because the judicial copyright is subject to no limitations other than those that may be in the court order, seldom framed with either the Copyright Clause or the limitations of the Copyright Act in mind. The judicial copyright thus becomes a device of monopoly beyond its constitutional bounds and an instrument of censorship contrary to the free-speech values contained in the Copyright Clause.

The second step is to recognize that copyright entrepreneurs are asserting their limited rights "in absolute terms to the exclusion of all else"[111] as a part of their campaign to create what is tantamount to a black market consisting of unlawfully claimed copyright rights.[112] They are following in the tradition of the English booksellers in their claims for the authors' perpetual common-law copyright. History is thus repeating itself, and the early judicial success of copyrightists in this century parallels the early judicial success of the booksellers in the eighteenth century. The extension of copyright to the products of new technology has provided an occasion to revive the proprietary idea that justified its creation for new technology—the printing press—in the first place.

If history continues its repetitive cycle, courts will eventually recognize the consequences of the black-market rights of copyright—an unregulated monopoly and private censorship—and will act accordingly. The remedy, however, will come much sooner if judges recognize that the Copyright Clause gives Congress the

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[111] Sony Corp. v. Universal City Studios, 464 U.S. 417, 432 n. 13 (1984).

[112] For an example of the extreme claims of copyright owners, see Appendix A, the copy of a letter from the Association of American Publishers Copyright Compliance Office to a copyshop owner.

power only to grant the exclusive right to publish and vend for a limited period of time and interpret the Copyright Act in light of those limitations.

The key to understanding "the exclusive Right" is the right to vend, for the right to publish with no intent to sell copies raises the issue of access. Copyright, in short, was designed to protect against competitors. And its main function is to protect the entrepreneur against those who would pirate a work for competitive sale in the marketplace. The proprietary aspects of copyright thus should extend not to the individual user who makes only a personal use of the work. The opportunity for a few to gather "great profits in small payments"[113] is not a proper basis for denying the constitutional rights of the many to use copyrighted works to further their learning.

The framers limited copyright to the exclusive right to publish and vend having made copyright subject to both conditions precedent and subsequent as a means of further limiting the copyright monopoly. The Constitution thus imposes duties on the copyright owner that require him or her to validate the statutory permission given to intrude upon the public domain for private profit. We find those duties in copyright policies and principles. They are an integral part of copyright law necessary to ensure that copyright entrepreneurs do not change their temporary easement into a fee-simple ownership of the public domain.

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[113] Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502, 513 (1917).

VII. APPENDIX

March 1, 1993

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Bel-Jean Copy/Print Center
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Carol Risher has approached you before regarding your copyright policies. (I refer specifically to her March 9, 1992 letter to you.) At the time of that correspondence, you represented to us that you had an understanding of copyright and that you received permission prior to making copies. While we appreciate that you seek permission in some instances, as evidenced above, it is imperative that permission be both sought and obtained prior to each instance of copying multipage excerpts of copyrighted material.

The copying of multipage excerpts from copyrighted works for sale or distribution to students without the permission of the copyright owner is an infringement of copyright under 17 U.S.C. § 501. Such copying without permission subjects the infringer to damages, injunctive relief, and the obligation to pay the copyright owner's costs of suit (including legal fees).

I am writing on behalf of the AAP and of Penguin USA, whose copyrights were infringed, to put you on notice of the legal standards with which you must comply; to obtain your written agreement that you will comply with them, that is, that you will refrain in the future conduct of your business from making such multiple copies of excerpts of copyrighted materials as course materials without prior permission; and to demand payment of $2,500, in exchange for a promise not to engage in litigation in connection with this incident. The goal of the AAP and its publisher members is not to discourage anthologizing -- to the contrary, publishers grant permission for modest fees many thousands of times yearly. But we do seek to discourage anthologizing without consent.

As you know, a recent AAP-sponsored lawsuit against the Kinko's copyshop chain confirmed that, absent permission from the copyright holders, the copying of excerpts from copyrighted works for compilation into course anthologies which are then distributed to students infringes the copyright in the works excerpted. Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522 (S.D.N.Y. 1991). In that suit, which focussed [sic] on twelve instances of copying spread through five separate course anthologies prepared at two Kinko's copyshops, the Court

- required Kinko's to pay damages of $510,000 -- $50,000 for each of nine works copied, and $20,000 each for three additional works (those from which Kinko's copied the fewest pages for the smallest classes);

- entered an injunction prohibiting Kinko's from making, without permission, any anthology or coursepack that contains more than one page from a copyrighted work;

- compelled Kinko's to pay plaintiffs' legal fees, which were ultimately set at $1,365,000.

The Court rejected Kinko's defense that the educational motive for which the copying was undertaken, and the fact that professors asked for the copying in connection with their classes, sufficed to render the anthologizing "fair use" under the copyright laws. It concluded that each of the twelve instances of anthologizing challenged by the publishers -- ranging from as small as 14 pages of a 175-page work to 110 pages of a 400-page work -- constituted copyright infringement.

Basic Books v. Kinko's did not change the law; to the contrary, it comported with basic copyright principles. (Kinko's is not appealing.)

Those basic copyright principles have recently been confirmed in another litigation brought against a copyshop engaged in unauthorized anthologizing. On February 27, 1992, three publishers instituted an infringement action against a Michigan copyshop, alleging that the copyshop was engaged in the unauthorized anthologizing of copyrighted works for sale to students. The case is Princeton University Press et al. v. Michigan Document Services, Inc. and James M. Smith, Civil Action No. 92-CV-71029-DT (BKH) (E.D. Mich.), in which the plaintiffs seek statutory damages, injunctive relief, and attorneys' fees, as did the successful plaintiffs in the Kinko's litigation.

We understand you are aware that on April 1, 1992, United States District Court Judge Barbara Hackett issued a preliminary injunction from the bench against the defendant copyshop and its owner-operator, stating that their unauthorized anthologizing was a "clear misappropriation," and holding that defendants were likely to be adjudged infringers at trial. Because of the preliminary injunction, the copyshop may not copy or anthologize any of plaintiffs' works without permission, under pain of contempt. This result reflects existing principles of the copyright law, as did the Kinko's case.

Even before the decision, many copy centers had adopted policies requiring that permission be obtained before copying multipage excerpts of copyrighted works for distribution to students in course anthologies. These policies were adopted by both on-campus, university-run shops and commercial copyshops. (A pamphlet

detailing the basic requirements, published jointly by the National Association of College Stores and the AAP, is enclosed.)

We call on you to agree, by your signature on both copies of the attached agreement, to cease and desist from copying, without permission, multipage excerpts of copyrighted works for sale to students. In addition, the scope of the infringement identified above, committed in the face of the widely publicized decision in Basic Books v. Kinko's, warrants a payment of $2,500 to help defray the costs of the AAP's copyright enforcement program in this matter and to impress on your business the need to operate in compliance with controlling law. Once the signed agreements are returned with your check, we will deliver, by returning a copy fully executed by the AAP, a promise by the AAP on behalf of itself and the publishers identified above not to undertake litigation by reason of the excerpts referred to in this letter.

Should we not hear from you, we will take further action as appropriate, including enhanced monitoring of anthologies at your facility for copyright infringement, and the referral of this and/or other anthologies to counsel without further notice to you. Absent your signed agreement and payment, the AAP and the publishers will consider that you are subject to being sued for the copyright infringements specified in this letter as well as other infringements in a suit seeking a substantial recovery like that in the Kinko's case, without further warning. (If you believe that there are circumstances establishing that there has been no infringement, or that militate against the relief we are here seeking, let me know promptly.)

The AAP and its publisher-members are committed to actively ensuring compliance with copyright law.

Very truly yours,

Virginia Antos
Director of Copyright Compliance

Enclosures

AGREEMENT

1. The Association of American Publishers ("AAP") warrants that it is authorized by Penguin USA ("the publishers") to promise Bel-Jean Copy/Print Center ("the copyshop") that the publishers will not undertake litigation by reason of the copying specified in the letter from Virginia Antos dated March 1, 1993. The AAP and the publishers agree not to undertake such litigation, provided that the copyshop returns a duly signed copy of this agreement and the payment specified in paragraph 2 below immediately upon receipt of this letter.

2. The copyshop hereby agrees to cease and desist from creating, copying, distributing, or selling, any anthology, compilation, collective work, course packet, or similar collection containing multipage excerpts of copyrighted works for sale to students as course materials without prior written permission of the copyright holders or the duly authorized agent of the copyright holders of such excerpts, and to pay to the AAP the sum of $2,500 to cover the costs of the AAP's copyright enforcement program in this matter.

3. The copyshop also agrees to permit persons authorized by the AAP, as evidenced by a letter from the AAP giving such authorization, to review and to purchase at regular prices copies of any anthologies or coursepacks being held for sale or distribution (or for copying for sale or distribution).

4. In addition to the AAP and the copyshop, this Agreement runs to the benefit of, and may be enforced by, the publishers and all AAP members.

BEL-JEAN COPY/PRINT CENTER

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By: Name:
Company:
Title:

ASSOCIATION OF AMERICAN PUBLISHERS

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By: Virginia Antos
Director of Copyright Compliance

Date: March 1, 1993