

be held to be an assignment of the work itself. Thus, ownership of the work remains in the author, subject to the various rights comprising copyright that the author assigns.

The utility of the statutory-grant theory, which requires a distinction between the work and the copyright, becomes apparent when it is applied to practical problems. One of those problems is the relationship of copyright and free speech; another is how to understand (and limit) the fictions and fallacies that pervade the copyright statute; a third is the scope of the right to copy. The satisfactory analysis of all these issues, which are developed further in the next three chapters, depends upon the distinction between the ownership of the work and the ownership of the copyright.

As we have demonstrated here, the unified theory of copyright informing the current statute is based on two elements: (1) copyright is a statutory grant of rights to which a given work is subject, and (2) the copyright of a work is distinct and separate from the work itself. The rights to which authors are entitled by reason of their creation of new work are independent of the copyright and therefore should not be treated as a part of the copyright but in a companion body of law.

The justification for the statutory-grant theory of copyright, finally, is simple. Copyright must accommodate the interests of authors, entrepreneurs, and users. The accommodation can be satisfactorily achieved only by legislation, and only if the courts interpret that legislation in a manner consistent with the theory upon which it is based.

The law hath not been dead, though it hath slept.
—William Shakespeare

Give me the liberty to know, to utter, and to argue freely
according to conscience, above all liberties.
—John Milton

9

Copyright and Free-Speech Rights

Copyright and free-speech rights (a phrase we use to encompass both the free-speech and free-press clauses of the First Amendment) can be viewed as opposite sides of the same coin. The former is a matter of proprietary rights, the latter of society's political rights. They are bonded because both deal with the flow of information, one in the interest of profit, the other in the interest of freedom. The profit motive, however, is not a wholly reliable monitor. Like the locks in a canal, it

may facilitate the flow of information, or it may in fact serve to dam that flow. This explains why the regulatory aspects of copyright must govern the proprietary aspects, for the early history of copyright—which we ignore at our peril—demonstrates how closely copyright and free-speech values were (and are) connected.

The relationship between copyright and free-speech rights is a topic that has received relatively little close attention, perhaps because courts have not yet appeared to take it seriously. When the issue has been used as a defense in copyright infringement actions, for instance, the presumption consistently appears to be in favor of copyright. One explanation for this may be that copyright jurisprudence in the United States has had a much longer history than free-speech jurisprudence. Only in recent years, for example, has the Supreme Court begun developing the notion that free-speech rights encompass the right to *hear* as well as the right to *speak*, the right to *read* as well as the right to *print*—that is, a *right of access*.

Another explanation may be that as long as copyright required publication, the free-speech danger that it posed was minimal. This is because the point at which copyright and free-speech rights intersect is the right of public access, and the publication of the work ensured that access. But with the application of copyright to the unpublished materials of modern communication technology, the danger to the free-speech right of public access becomes more apparent.

The thesis of this chapter is threefold: first, because copyright had a major, if indirect, role in the development of the free-speech rights, the copyright clause encompasses free-speech values that merit recognition; second, because lawmakers (especially courts) have ignored those values, copyright today poses a significant danger to free-speech rights; and third, because both copyright and free-speech rights must be accommodated in a complimentary fashion, the propri-

etary aspects of copyright law must be recognized as being subordinate to the regulatory aspects of the statute.

The Role of Copyright in the Development of Free Speech

The historical origins of the relationship of copyright to free-speech rights have almost completely escaped scholarly attention—probably because the Statute of Anne, enacted some sixteen years after the end of the Licensing Act of 1662, is deemed to be the beginning of Anglo-American copyright.¹ Thus, the even earlier stationers' copyright and its role in governmental censorship have unfortunately become a mere footnote in copyright history. Ignorance as to what preceded a legal concept is ignorance of why it was created, and the cost of such lost perspective is confusion as to the significance of subsequent developments. This has been true, at least, in the case of copyright and free-speech rights.

We need to return to an obvious but fundamental point: both copyright and free-speech rights owe their origins to the advent of the printing press. Without the press there would have been neither a reason for copyright nor an occasion for press control. The presence of the press, however, coincided with religious fanaticism and political tyranny in England that caused the government to control and censor its output. It was the history of these events that caused the leaders of the former British colonies to establish free-speech rights as legal doctrine to forestall such happenings in their new nation. The freedoms protected by the First Amendment—freedom to establish and exercise religion, freedom of speech and of the press, and freedom to assemble and to petition the government for redress of grievances—are not a matter of coincidence, but history.

Prominent throughout the religious and political controversies in sixteenth- and seventeenth-century England was the

stationers' copyright, which served as a tool of the censors. The role of copyright in censorship thus was instrumental, not substantive, in nature, for copyright was a private-property concept, created independently of political policies and only later pressed into governmental service. Its use as a device of governmental censorship has been forgotten since it lost its utility as such with the demise of the Licensing Act of 1662.

The end of the stationers' copyright inevitably meant there would be a new statute for the book trade. But since the new statutory copyright was to function in much the same way as the old copyright, one can also assume that Parliament, in creating it, was concerned with rendering copyright ineffective not only as an instrument of monopoly but also as a device of censorship. The Statute of Anne was thus directed to the monopoly of books *per se* as well as to the booksellers' control of the book trade.

Apart from the limited term for copyright that creates the public domain, three sections of that first English act suggest both a repudiation of censorship and an affirmative concern for the right of access to books: section 4 provided for price control of books, section 5 provided that copyrighted books were to be supplied to nine different libraries, and section 7 provided that the act was not to prevent the importation of, or apply to, books in foreign languages printed beyond the seas, which had previously required the licensor's imprimatur as part of the scheme of censorship. In short, the statute was intended not only to destroy the booksellers' monopoly but also to ensure what today we would call free-speech rights for the benefit of the public.

The drafters of the English copyright act took seriously its stated purpose—the encouragement of learning—a goal that required making books available to the public. The Statute of Anne thus created the rationale for the incorporation of free-speech values into the concept of copyright—values such

as the right of access, which received expression also in the statute's creation of the public domain. The regulatory function of copyright to control publishers was thereby also utilized so as to benefit the public.

Whether or not the drafters of the U.S. Constitution fully comprehended the free-speech values in the provisions of the Statute of Anne we cannot know, but we do know that they made direct use of the wording of the statute's title, and it is clear that these words incorporate free-speech values. The three policies that the copyright clause mandates—the promotion of learning, the preservation of the public domain, and the protection of the author—are consistent with and essential to free-speech rights. Consider, for example, a society in which learning is suppressed, published material is subject to the control only of publishers, and authors have no rights. These were the conditions that had prevailed during the reign of the stationers' copyright, conditions that the Statute of Anne repudiated; because it did, the copyright clause of the U.S. Constitution contains free-speech values.

While these free-speech values of the copyright clause have received little, if any, recognition in copyright jurisprudence, their presence can be of considerable value in the administration of U.S. copyright law. Since the free-speech clauses of the First Amendment and the copyright clause deal in part with the same subject matter—writings—the fact that the copyright clause does contain free-speech values avoids a potential conflict between two provisions of the U.S. Constitution, with one denying a power that the other arguably grants.

In crucial ways, the free-speech values in the copyright clause can be said to complement the free-speech rights in the First Amendment. While Congress can make no law abridging the freedom of speech or the press, Congress can—to promote the progress of learning—make a law encouraging authors to disseminate their writings by giving them the exclusive right to

publish for a limited period of time. The major rights of free speech in the First Amendment are the rights to speak and publish; the major free-speech value in the copyright clause is the public's right to hear and read.

Although the copyright clause incorporates free-speech values, it does not create free-speech rights. The major difference between the First Amendment and the copyright clause in terms of congressional power is that the first is a denial of power and the latter a grant of discretionary power with implied limitations—a situation that facilitates the use of fictions to expand the limited power. Since Congress has used fictions to expand its power, the problem now is essentially one of the administration and interpretation of the copyright act. For example, the copyright clause empowers Congress to grant copyright only to authors and only for their writings. Congress's creation of the corporate copyright is thus of questionable constitutionality, and if that copyright were to be used to inhibit public access, its use would surely be unconstitutional. Similarly, if the Copyright Office were to deny copyright registration for a writing based on its *content*, that action would surely violate the First Amendment. The First Amendment, in short, is a useful aid to the implementation of the free-speech values of the copyright clause without denying Congress the power to accommodate copyright to changing technology.

The Copyright Threat to Free-Speech Rights

The essential free-speech value in the copyright clause is the right of public access to copyrighted materials, and the remarkable aspect of copyright during the nineteenth century is the extent to which both Congress and the courts implemented this right. Congress did so by requiring publication of the work as a condition for copyright; the courts did so by

developing the fundamental principles of copyright, the most important of which was the limited-protection principle.

The 1909 Copyright Act, however, provided a basis for the erosion of this principle with two innovations: the addition to the copyright owner's existing arsenal of the right to copy the work (which then provided a basis for the claim that the right to copy is an independent and absolute right) and the creation of the work-for-hire doctrine (which led to the corporate copyright, the basis of the electronic copyright).

The actual event that marks the beginning of the erosion of the limited-protection principle can be said to be the formation of the American Society of Composers, Authors, and Publishers (ASCAP) in 1914 by Victor Herbert and other outstanding figures. ASCAP is a musical performing-rights society, which licenses the *public* performance of musical compositions, the earliest example of a copyright user's tax. In this instance, however, the tax can be justified, as it was imposed on users-for-profit, the commercial exploiters of the music. Even so, the charge of a fee every time a work is performed or heard publicly is analogous to charging a fee every time a written work is read or copied for personal use—a point which is now being rapidly approached.

The 1909 innovations did not reach full fruition until the 1976 act, the drafting of which was influenced by the development of the new technology of communication—the photocopying machine, television, and the computer. Two of these machines—television and the computer—have made the *transmission* of information a separate industry. Consider, for example, the Westlaw and Lexis computer legal research services, which do not require the creation of writings but merely transmit public-domain materials via the computer and yet receive plenary copyright protection.² Consider also copyright protection for live television broadcasts, which has resulted in

the electronic copyright, by reason of which the transmission itself is "copyrighted."

The third machine—the photocopier—has given rise to a copyright industry that engages in the licensing of the right to photocopy copyrighted materials for private use, thereby making the erosion of the limited-protection principle almost complete. The copyright user's fee has thus been extended from being a tax on commercial exploiters of musical compositions with statutory sanction, to being a tax on the individual user of copyrighted printed material without statutory sanction (and, at least in some cases, contrary to the user's right of fair use). An additional irony (and corruption of the intent of copyright) is that the Copyright Clearance Center—as its own literature indicates—imposes its user's tax to benefit not authors but publishers.

A copyright user's tax, of course, inhibits the right of public access to copyrighted materials. This problem is more important and the solution is less complex than most perceive it to be. It is important for two basic reasons. First, copyright law has been expanded to protect more than the creations of authors and artists. Probably the largest component of copyrighted works today is public-domain material—collective works that contain materials on which either the copyright has long expired or never existed. Newly "copyrighted" volumes regularly appear on the market containing judicial opinions, statutory codes, and classical literature (even the Bible, the Torah, and the Koran), as well as compilations of factual data (directories, catalogues, market reports, and so forth).

Second, copyrighted works no longer need be disseminated in copies as a condition for copyright protection, but may be only performed over the public airwaves. Television is the primary source for the political, economic, social, and scientific information most Americans receive, and such reports obviously shape opinions, attitudes, and decisions. To say that

copyright gives the purveyors of this information a plenary right to control public access to it is not only nonsense, it is dangerous nonsense.

The central problem in copyright law today is that a constitutionally based statute is being given an unconstitutional interpretation by copyright owners—and worse, by courts. The copyright act should be interpreted in light of the policies of the copyright clause (which reflect its free-speech values) and the basic judicial principles of copyright that the current statute has codified. Herein lies the importance of a unified theory of copyright.

Free Speech and Proprietary Rights

The major flaw in the dual theoretical basis of copyright was that it encompassed both proprietary and political rights without any basis for subordinating one to the other. Proprietary rights, as the term is here used, are the individual's rights to control the products of his or her efforts for profit. Political rights, in contrast, belong to the members of the body politic and are related to self-governance—the right to vote, the right of due process, the right of free speech, and so forth.

Logically, political rights must be regarded as more important than proprietary rights, since the latter ultimately have to be both recognized and enforced by the government that is sustained by political rights. Proprietary rights tend to be concrete, however, whereas political rights are typically abstract, and in a one-to-one combat of ideas the concrete usually has the advantage over the abstract. In copyright litigation, for example, an accusation that a defendant has stolen the plaintiff's property is much more powerful than the claim that a defendant is exercising a free-speech right. The larger truth as to the importance of political rights is often lost in the legal melee.

If copyright were actually based on the creative-work theory, it would follow that copyright was primarily proprietary in nature, designed to protect one's property. And since free-speech rights deal with one's own speech, they would not—under that theory—extend to the transmitting or conveying of another's property. But once copyright is recognized as being based on the statutory-grant theory, it follows that copyright is primarily regulatory in nature. And since it is only a series of rights to which a given work is subject, copyright can now be construed in a manner consistent with free-speech rights.

The problem comes into focus when one recognizes that the subject matter of copyright and the essence of community rights are the same: information. The information may be cultural in nature (creative works) or political in nature (public-interest works). In either case, however, it is received information that not only shapes opinions and attitudes but also serves as the basis of action. Any legal instrument that enables one to control the flow of information poses censorship dangers.

The copyright statute curbs proprietary censorship in two ways. First, it limits the rights of copyright by defining those rights precisely. Second, it limits the scope of copyright protection for derivative works and compilations (which are most often public-interest works) as compared with the copyright protection offered for original creative works. Both of these features reflect the statutory-grant theory: the first by using the rules that grant the rights to limit them as well, the second by reducing the scope of copyright protection according to the nature of the author's efforts. The implicit lesson here is that the regulatory aspects of copyright, which serve the public purpose, must govern the proprietary aspects, which serve primarily a private purpose.

As the history of copyright demonstrates, this regulatory-proprietary pattern is neither accidental nor obscure, but it is

often ignored. The reason can be traced ultimately to the failure to distinguish between the work and the copyright, for unless this distinction is made, there is no basis for distinguishing between the use of the work and the use of the copyright. The copyright statute governs only the use of the copyright, not the use of the work, but while Congress has legislated within the scope of its power (employing the aid of a few fictions), the statute is subject to interpretation by copyright owners as well as by courts. There is no constitutional restraint on the copyright owners as to either their proprietary interpretation or their power to sue alleged infringers who disagree with their interpretation. The binding interpretation of copyright is thus up to the courts. That interpretation should be made not only in terms of the wording of the statute, but also in light of the free-speech values of the copyright clause.

Copyright can be used either to control the flow of ideas, as in a totalitarian society, or to facilitate the flow of ideas within a free society. The use of copyright as an instrument of censorship during its early—and most proprietary—stage of development should not be forgotten. To facilitate the flow of ideas within society, copyright must be treated primarily as a regulatory concept. This is the command of both the copyright clause and the free-speech clause of the First Amendment. If one accepts the proposition that copyright must accommodate the interest of three groups—authors, entrepreneurs, and users—no other conclusion is available.

Recognizing the subordination of the proprietary aspects of copyright does not, of course, eliminate them. But it is important to keep in mind that even if copyright is a property, as the owners claim, that property is clearly limited to the copyright on the work and does not encompass the work itself. American copyright is only a series of rights to which a given work is subject: "Not primarily for the benefit of the author, but primarily for the benefit of the public such rights are given."³