


The Protection of Literary Property

Revised
1978
Edition

PHILIP WITTENBERG



What you should know about copyrights and the new copyright law, authors' rights, contracts, libel, plagiarism, the right of privacy, censorship, fair use, quotations, and other important aspects of literary law.

The Protection of Literary Property

Revised Edition

 By PHILIP WITTENBERG

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PREFACE

Literary property essentially embodies a number of topics. There is the basic concept of property in the original creation of the author, the writer, and the editor. That property is protected through our copyright laws, both domestic and international. It is, of course, like all property, the subject of contract in various forms, including outright sale, lease, license, assignment, in part or in whole. It can be inherited and it can be the subject of devise by will. It has all of the attributes of property.

Literary property has its own peculiar liabilities in that the published word may become the subject of adverse law, including libel, privacy and censorship.

In its wisdom the law presumes that all men know the law. Of course one cannot assume that this is a fact. To make such an assumption would be absurd. But the presumption suffices as a basis for holding persons liable for violation, breach or non-compliance with law and agreements. There is, therefore, an essential need for a work which can serve both for reference and for understanding of the problems arising in the fields of writing and publishing.

Forty years have passed since the first of my books on Literary Property was published. The passage of time and of a much-changed copyright statute, as well as new formulations by the Supreme Court, made revision essential.

This new edition, then, of *The Protection of Literary Property* sets forth the provisions of the Copyright Law passed by Congress in 1976 to take effect on January 1, 1978. Addi-

tionally, it deals with many aspects of literary law with regard to libel, privacy and censorship that have been altered by new decisions rendered by the courts. In the international field, with the new Copyright Law, the United States law has been brought more nearly into accord with the Berne Convention, of which we have never been a member country, although we participated in its drafting. The new United States Copyright Law, the first general revision since 1909, has made important changes, not only in the term of copyright, but in the conditions of its being, and hence the need for an up-to-date edition of this book for the use of people confronted with the modern world of publishing and allied fields.

This new edition of *The Protection of Literary Property* was made possible by the cooperation of

JAMES VENIT

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Philip Wittenberg

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THE PROTECTION OF LITERARY PROPERTY

Chapter 1



THE CONCEPT OF LITERARY PROPERTY—A BRIEF HISTORY

The seeds of law and its processes of germination lie old and deep in a matrix of use and custom. The law of literary property evolved not only from the creative impulse of man, but also from the inhibitions and prohibitions with which writing has ever been involved. From creation for pleasure and aesthetic enjoyment came the notion in acquisitive societies of payment and profit. From autocracy and despotism came prohibition and censorship. All of these commingled to give rise slowly to law governing literary property.

To understand that law one must know its nature and sources. The use of the history of that law is to cast light upon its present statement and interpretation. So contemporary law opens its meanings best when one goes back to the seed. In the manuscripts and their accumulation in ancient libraries, in the universities and abbeys, on the streets of London, in the invention of printing, and in the laws both encouraging it and restricting it which came with the Reformation, in the practices of Stationers' Hall, in the rise of Grub Street, in all of these are intertwined the basis of property in literature and the recurrent attacks and limitations placed upon that property.

As early as 200 B.C., books were burned in China. Though for centuries thereafter a singer might be paid in food and lodging, it was less than two hundred and fifty years ago that

England first gave its authors a copyright. In the interval many forms of protection were struggled for.

During the first century B.C. at Alexandria, then the center of Greek culture, large libraries were in the process of accumulation and building. A great number of scribes were engaged in making copies of existing books, either for themselves or for employers. But the destruction of the learning, the lore, and the poetry collected by the Greeks over centuries was completed when the Moslems conquered Alexandria in the year 642.

In the march toward that culture which was later to be ours, the Roman libraries next appear. Libraries, both public and private, were encouraged in a revival of learning so widespread that books were reproduced in thousands of copies and distributed throughout the provinces as well as in Rome itself. The wealthy householder, with his retinue of educated slaves, caused engrossed copies to be made for himself and had not only his writing slaves, but his reading slaves, so that he could absorb his culture painlessly. Atticus, responding to the demand for many copies of the works of the popular authors, went into the mass publishing business. He had a reader work with a large number of trained slaves who took the dictation directly in book form so that a thousand copies of a small volume of epigrams or poems could be produced in a day. The books thus produced were both plentiful and cheap, selling for as little as what would now be seventy-five cents. "Everyone," says Martial, "has me in his pocket; everyone has me in his hands."

*Laudat, amat, cantat nostros mea Roma libellos;
Meque sinus omnis, me manus omnis habet.*

Pliny wrote that Regulus ostentatiously mourned for his son and that no one wept like him—"He composes an oration which he is not content with publicly reciting in Rome, but must needs enrich the provinces with a thousand copies of it."

The law had not yet, however, learned to think of property

in letters. Since men had property in things, the publisher owned the parchment and the slaves, the profits went to him. Indignantly Martial wrote:

*Omnis in hoc gracili xeniorum turba libello
Constabit nummis quatuor empti tibi.
Quatuor est nimium, poterit constare duobus.
Et faciet lucrum bibliopola Tryphon.*
(*Epigrammata*, lib. xiii., ep. 3.)

*Qui tecum cupis esse meos ubicunque libellos.
Et comites longae quaeris habere viae,
Hos eme quos arcet brevibus membrana tabellis:
Scriinia da magnis, me manus una capit.*

and Horace joined in with:

*Hic meret aera liber Sostiis, hic et mare transit.
Et longum noto scriptori prorogat alvum.*
(*Art. Poet.*, 345.)

Although, among others, Terence was able to sell his plays, there was no law that protected the buyer against piracy. There was, as yet, no notion of copyright. This condition which outraged the author continued throughout the days of the manuscript copy. There were books in a steady stream and the booksellers and publishers copied whatever they wished without so much as a by-your-leave to the author; there were some cases where out of moral consideration, or perhaps because the author withheld his manuscript, the publisher paid a price.

With the decline of Rome and the growth of the Church, the production of books entered a new phase. From about 500 A.D. for seven centuries, the reproduction of literary works was in the hands of the Church. Monasteries spread throughout Europe, and in their cells and in the scriptorium monks labored, making copies of books principally for the purposes of the Church. There were no lay writers and there was very little original writing. With the coming of the twelfth and the thirteenth centuries, the great universities appeared and set up

groups of copyists to supply the newly risen demand for learning. The lay writer again appeared and new works as well as old were encouraged. Both the university and the monastery were active during this period. But such property as existed was in the copies which they produced, i.e., the physical paper, not the literary material. There were not enough writers or readers, nor was there a sufficient demand for books, nor any system of distribution of sufficient magnitude in existence to bring about a concept of property in literature. The monks lived through the ownership and management of their farms. The scribes of the universities were paid, but their payment was for the labor of copying, not for the originality of writing. The universities, like the monasteries, were still instrumentalities of the Church, but others than churchmen could now find their way into the field of letters. A manuscript trade was built up.

Prior to the invention of printing there were, in Orléans and in Paris alone, tens of thousands of persons employed in the making of copies of manuscripts, all without pay to the authors, although the copies fetched fabulous prices.

The authors were not happy. Marmontel in his *Memoirs* tells of an interview with Bassompierre, a bookseller of Liége. The bookseller had done a right good business in selling Marmontel's works. So much so, that when the author visited his town, the bookseller called upon him to thank him for the services he had rendered the community. Marmontel, like Horace, wanted more than praise; he was angry. "What," he cried. "You first rob me of the fruits of my labors, and then have the effrontery to come and brag about it under my nose!" The bookseller was amazed; he had never given a thought to an author's right to share in the proceeds. "Monsieur," he said, "you forget Liége is a free country and we have nothing to do with you and your privileges."

The minds of authors were fermenting. Just as the Latin poets and dramatists had been unwilling to sing unless they

were provided with the necessary bird seed, so the authors of the day were beginning to feel that their works published in large editions ought to yield them more than a meed of praise. The authors of works were unwilling to have them copied without payment. The necessity for some kind of property protection for the author in the form of copyright was forming.

In this connection the most-often-told tale is that of the quarrel between Saint Columba and his teacher, Finnian of Moville. Legend has it that in 567 Saint Columba, sitting up all night, furtively made a copy of Finnian's Psalter, which Finnian had lent him. The good abbot protested and claimed not only the original but also the copy as his property. The violent dispute was carried before King Diarmid, then sitting in Tara's halls. The noble king gave judgment for the abbot, saying: "To every cow her calf, and accordingly to every book its copy." Columba refused to take the verdict and raised a band of followers who fought the king. Columba lost, and went into exile. So ended our first copyright case. The tradition that this was the first case has been voted unworthy of belief, although, as Augustine Birrell put it: "This, in the teeth of the fact that the identical copy of the Psalter in Saint Columba's well-known handwriting was so recently as 1867 in the possession of an Irish baronet and exhibited in the Museum of the Royal Irish Academy at Dublin!"

Almost a thousand years was to elapse after this precedent until, in 1533, we find the first authentic recorded complaint of piracy in English law. When Wynkyn de Worde in 1533 sued for the protection of his right to print a treatise on grammar by Robert Witinton, Wynkyn de Worde obtained a "privilege" for the second edition which prevented further misappropriation, and because Peter Trevers had reprinted it from the edition of 1523, De Worde complained of piracy.

The cow and its generative habits seem to be suggestive to those who write about writing. Many years later, when Dr. Johnson was discussing piracy, Boswell reported, "He said, our

judges had not gone deep in the question concerning literary property. I mentioned Lord Monboddo's opinion, that if a man could get a work by heart, he might print it, as by such an act the mind is exercised. *Johnson*: 'No, sir, a man's repeating it no more makes it his property, than a man may sell a cow which he drives home!' I said, printing an abridgment of a work was allowed, which was only cutting the horns and tail off a cow. *Johnson*: 'No, sir, 'tis making cow have a calf.' "

Joshua Bloch tells an interesting story that parallels the Finnian tale. Quoting the proverb "Men do not despise a thief, if he steal to satisfy his soul when he is hungry" (Proverbs 6:30), rabbinical authorities gave it as their legal opinion that one is allowed to copy the text of a book without the knowledge of its owner. Bloch tells the story: "A certain Rabbi Aaron, a respectable gentleman, had passed through the Umbrian town of Perugia. He had with him a collection of fine books, 'a load for a team of mules.' He said that for seven years he had lived at Toledo, which at that time was the capital of Spain, and had brought from there many precious books. He showed to Immanuel and his friends a list of them consisting of about a hundred and eighty titles. The books were hidden and sealed in barrels. As he had to go to Rome he left his books in the care of Immanuel and his friends until his return. He enjoined them that 'no hand shall touch them, but he shall surely be stoned or shot through; for behold, I swear by Him who was and shall be, whether it be man or beast, it shall not live' (cf. Exodus 19:13). But no sooner had the man left the city than Immanuel and his friends opened the barrels and 'as soon as they released the books from their prison they selected the choicest items, ten volumes, and copied their texts, which represented the best works of wisdom and philosophy. About a month later Rabbi Aaron returned from Rome. When he saw what they did with his books he became very angry and wanted to destroy the copies which were made. Immanuel appeased him with a letter written in rhymed prose full of keen wit and

humor blended with caustic satire, often bordering on frivolity and want of delicacy of expression. Among other things, he wrote: 'We broke thy barrels of books and thou grewest angry, but when Moses our teacher broke the two tablets he was told: thou didst well to break them.' "

Others who own books might grumble at the copying, but among the Jews it was deemed a blessing to permit the scribes to make copies and their owners would say, "Are books then made [copied] for keepsake? No, let people study from them and make copies of them." But these were all books of the Law and its exegesis.

During the period of the monasteries and the universities, the booksellers were called *stationarii*, a word which was ultimately to yield us Stationers' Hall. The word probably derives from the booksellers adopting a stationary point or booth in the streets as distinguished from the practice of itinerant vendors. They were, in a large sense, brokers, to whom were entrusted illuminated and other manuscripts for sale. They also rented out manuscripts for high prices.

In England the first merchants in books, the stationers, dealt in books imported from abroad and such books as were made in England. The works they were engaged in making and printing were illuminated on parchment and some of them were great, unwieldy works which could scarcely be handled unless they were placed on large lecterns or tables. They were valuable and were frequently chained to their posts. The chief trade was in religious works, including Paternosters, Aves, Creeds, and Amens. Their favorite stations on the streets of London still bear the names Paternoster Row, Amen Corner, and Ave Maria Lane.

The trade in books was becoming of sufficient importance so that those engaged in it felt called upon, for their mutual interest, to form a voluntary association. As early as 1357, in the days of Chaucer and William Langland of England, they formed a Brotherhood of Manuscript Producers. Sometime

about 1403 the brotherhood of printers, booksellers, publishers, and the like, under the name of the Craft of Writers of Text-Letters, commonly known as "Limners," was given a charter by the Lord Mayor and the Court of Aldermen of the City of London. They established rules and ordinances "for the good government of their Fellowship."

In or about 1440 printing from blocks was introduced to the western world. Johannes Gutenberg of Mainz, Germany, was the innovator. Block printing had been used in China as early as 868 and printing from movable type had been done in China in about 1040. The 868 book is still in existence.

The art of printing spread from Mainz throughout the Continent to Italy, France, Switzerland, and Spain. The first English printer was William Caxton, who had learned the art on the Continent and moved to Westminster in 1476. He set up a press at The Red Pail in Almanary. He and his successors, Wynkyn de Worde, Richard Pinson, Julian Notary, John Rastall, Thomas Godfrey, et al., were a few of the increasing number of men engaged in printing and publishing. Out of that multiplication of printers there sprang the necessity for a publicly recognized craft of printing. These printers associated themselves with the Brotherhood. In the world of trade associations, this association was known at that time not as the Craft of the Printers, but as the Stationers.

These first printers were and had to be men of great learning and ingenuity. They either wrote or translated most of the material they produced. They built their own presses, cut their own type, made the necessary incidental parts, and bound their own works. There was, as yet, no division of labor among the various artificers whose work contributed to the complete book. The type was cut on wooden blocks and printed on a massive structure of heavy beams, which constituted the press. Since the Continent was the place of origin, many of the first printers went there to study their art and there was an influx of printers into England from abroad. So eagerly were books

sought that in 1483 an enactment by Richard III encouraged their importation, and restrictions on aliens were made inapplicable to "any artificer, or merchant stranger, of what nation or country he be, for bringing into this realm, or selling by retail or otherwise, any books written or printed, or for inhabiting within this said realm for the same intent, or any scrivener, alluminor, reader, or printer of such books."

Production exceeded the demand. There was no popular education; there were insufficient readers for the number of books that could be produced, and so these first printers struggled and many of them became bankrupt. In 1533, fifty years after the Statute of Richard, under Henry VIII, the privileges of aliens were wiped out. An act was passed which provided that no persons "resident or inhabitant within this realm shall buy to sell again any printed books brought from any parts out of the King's obeisance ready bound in boards, leather or parchment."

Its preamble restated the grievance which had arisen since the laws of Richard, and set forth

. . . there hath come to this realm sithen the making of the same, a marvelous number of printed books, and daily doth; and the cause of the making of the same provision seemeth to be, for that there were but few books, and few printers within this realm at that time, which would well exercise and occupy the said science and craft of printing; nevertheless, sithen the making of the said provision, many of this realm, being the King's natural subjects, have given them so diligently to learn and exercise the said craft of printing, that at this day there be within this realm a great number cunning and expert in the said science or craft of printing, as able to exercise the said craft in all points, as any stranger in any other realm or country; and furthermore, where there be a great number of the King's subjects within this realm, which live by the craft and mystery of binding of books, and that there be a great multitude well expert in the same, yet all this notwithstanding, there are divers persons that bring from beyond the sea great plenty of printed books, not only in the Latin tongue, but also in our maternal English tongue, some bound in boards, some in