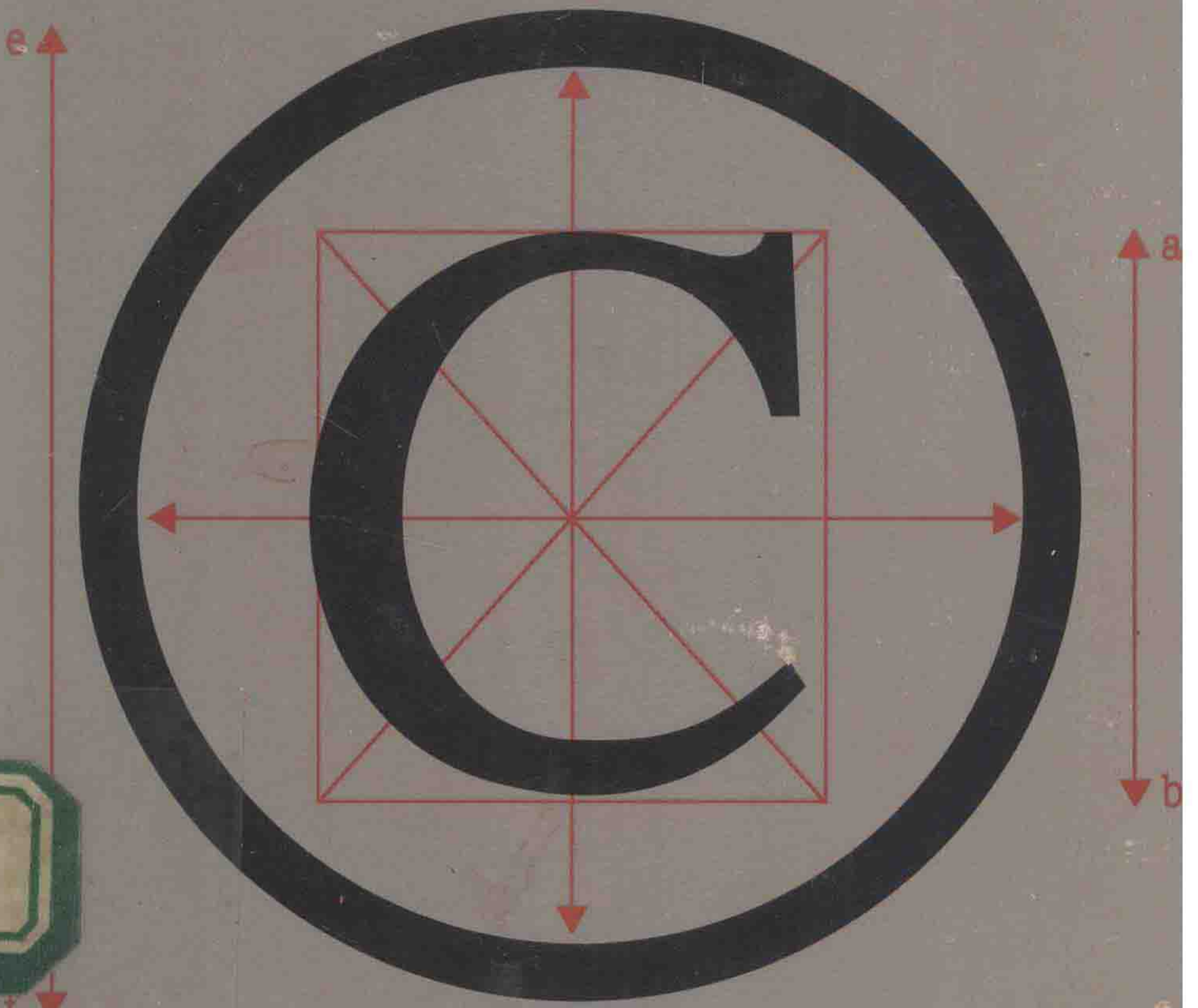
THE NATURE OF COPYRIGHT

A Law of Users' Rights

L. Ray Patterson & Stanley W. Lindberg

Foreword by Robert W. Kastenmeier



"*The Nature of Copyright* is a lucid and dispassionate illumination of the mysteries of copyright—its origin, its anomalies, its future. It is the ideal user's guide."
—Arthur Schlesinger, Jr.

"Patterson and Lindberg intelligently and articulately sound the alarm against acceptance of inflated claims for copyright protection that are based on misunderstandings and misreadings of copyright's history and purpose."
—Howard B. Abrams,
University of Detroit
Mercy School of Law

This forthright and provocative book offers a new perspective on copyright law and the legal rights of individuals to use copyrighted materials. Most Americans believe that the primary purpose of copyright is to protect authors against the theft of their property. They are wrong, say L. Ray Patterson and Stanley W. Lindberg. Guaranteeing certain rights to authors (and to the entrepreneurs who publish and market their creations) is only an incidental function of copyright; it exists ultimately for the public's benefit.

The constitutionally ordained purpose of copyright, the authors remind us, is to promote the public welfare by the advancement of knowledge. In this volume they present an extended analysis of the fair-use doctrine and articulate a new concept that they demonstrate is implicit in copyright law: the rule of personal use.

Although copyright as a concept has existed for 450 years, *The Nature of Copyright* represents the first significant, in-depth examination of its basic philosophical premises. The authors' ideas and opinions, certain to be viewed as controversial, have implications not just for the print media but for all areas of mass communication and entertainment, from television to music. By focusing on the basic policies and principles of copyright, rather than on case precedents, the authors present a strong argument for preserving the integrity of copyright law and the free flow of information and ideas.

L. Ray Patterson is Pope Brock Professor of Law at the University of Georgia and author of *Copyright in Historical Perspective.* Stanley W. Lindberg is editor of *The Georgia Review* and a professor of English at the University of Georgia.

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The Nature of Copyright

Foreword

This is a book that needed to be written and now needs to be read. It does something that no other law book I know of has done: it provides a framework to serve as a basis for interpreting the 1976 Copyright Act against the backdrop of copyright history and its constitutional roots. This is the unique perspective set forth by L. Ray Patterson and Stanley W. Lindberg, the former a nationally respected professor of law and the latter an esteemed author and editor. I am personally familiar with the dedication of Professor Patterson to the study and understanding of copyright law and to his measurable contributions to copyright policy-making and literature. And I am pleased to become familiar with the work of Professor Lindberg in this book.

As a former national legislator who devoted more than three decades of professional life to the enactment of copyright legislation, I have been acutely aware that while the legislative branch enacts laws, the judiciary interprets them. My experience has been that—at least in the field of copyright—courts do not always interpret the law that legislators thought they enacted, for legislators and judges necessarily view legal issues from different perspectives. The legislator makes laws for society as a whole; the judge decides disputes between specific individuals. In enacting copyright legislation, Congress starts with the intellectual-property clause of the Constitution. In deciding copyright cases, however, a judge starts with the facts of a single case and goes back to (and usually stops with) the Copyright Act. Most judges give Congress the benefit of a doubt, presuming that Congress acted within its constitutional grant of power in passing the statute. But that presumption

goes too far if it serves as a substitute for analyzing provisions of the Act. Congress can properly enact copyright statutes only as the copyright clause permits, and courts can properly interpret those statutes only in light of that clause.

We must remind ourselves that the legislative and judicial branches are separate and autonomous, but each is subject to different pressures and processes in a democratic society. The Congress is majoritarian in its decison-making, whereas the courts are antimajoritarian. In passing legislation, Congress is always subject to political pressures and the lobbying of special interests. The copyright industry is composed of and represented by politically active, sophisticated, and knowledgeable people; in attempting to persuade Congress, they are doing only what every citizen has a right to do. To say that lobbyists and lawyers shape the language of many copyright bills is only to recognize reality, but some of the shaping is very subtle, and judges have not only a right but a duty to consider the impact of particular influences in the legislative process.

Furthermore, the question of statutory interpretation often involves the question of what Congress *did*, not what Congress *intended*. But to determine the former it is often necessary to consider the latter. Most words have multiple meanings, and a single word of several meanings may make a great deal of difference in the interpretation of a statute. Yet courts have been strangely reluctant to engage in a contextual reading of the 1976 Copyright Act. The major reason, I believe, has been the lack of any framework of fundamentals to serve as a basis both for drafting and for interpreting copyright legislation. Therein lies the importance of this book, which provides that framework.

When I speak about copyright fundamentals, I mean those basic propositions, policies, and principles that underlie all copyright issues. Although Anglo-American copyright has a 450-year history, its fundamentals have rarely been recog-

nized or articulated. Even the most basic issue of copyright—the nature of copyright itself—remains a matter of dispute. The question is whether copyright is a natural-law property right of authors or society's grant of a limited statutory monopoly. There are proponents of both theories, and each side can bring forth many arguments to support its position. The authors of this book take the position that only copyright as the grant of a limited statutory monopoly can serve as the basis for a soundly integrated copyright law. They have made a very persuasive case, based on the simple but fundamental insight that copyright is a body of law which must accommodate the interests of three groups in our society: authors, distributors (including publishers), and consumers.

Persons in all three of these groups use copyrighted materials, of course, but for different purposes. The author uses copyrighted material in the creation of new works; the distributor disseminates copyrighted material in the marketplace; the consumer uses copyrighted material in the home, in the classroom, and in the office. In general terms, then, we can say that the author makes a creative use, the distributor a commercial use, and the consumer a personal use of copyrighted materials (which may or may not have commercial implications).

Since the creative and personal use of copyrighted materials may come into conflict with the goal of distributors and entrepreneurs to control commercial use, the balancing of competing interests is no small task. To complicate matters, members of the various groups may have different positions at different times. An author, for example, may wish to be free to quote others liberally, but may not want to be so quoted without compensation. A publisher may wish to publish portions of another's book, but not wish to return the favor. Only the consumer's position is consistent: he or she wishes to be free to use material. The problem, of course, is made all the more

complicated by the fact that copyright is a law that deals with the flow of information, the lifeline of a free society. And all the while economic implications are expanding rapidly in a global marketplace.

The complexity of these problems requires that we deal with the issues in terms of the basic policies and principles. The authors argue that copyright cannot be treated as being primarily a property right, because property is essentially a bilateral concept—between the property owner and everyone else. Only if copyright is viewed as a statutory grant can it be seen as more regulatory than proprietary. I suggest that the authors must be right if we are to avoid the consequences of the paradox of copyright: a legal concept that is intended to encourage the dissemination of information being used instead as an instrument of censorship.

These issues find their most controversial manifestation in the doctrine of fair use, which may be the most difficult problem Congress faced in enacting the 1976 Copyright Act. In retrospect, we may have relied too much on a nineteenth-century concept to deal with twentieth-century problems. Even so, if we approach the problems in terms of fundamentals, the fair-use provision that was enacted into law can serve well. This can be done if courts will recognize fair use as a generic term encompassing three species of use: creative use, competitive use, and consumer use.

This foreword is not the place to delineate these concepts, which are developed more fully in this book. I will say only that if the 1976 Copyright Act is read as a whole, and is read in light of the intellectual-property clause of the Constitution, it will support them. One who reads this book with care will understand.

Professors Patterson and Lindberg do not provide here all the answers to copyright problems, but they do something even more important—they enable readers to ask the right

questions. The book serves generally to promote the understanding of copyright law, but more importantly it offers direct assistance to participants in the lawmaking and judicial processes, whether they represent private or public interests.

Some of the authors' questions are provocative, and so are some of their tentative answers. I do not agree with everything that they have written. But I strongly feel that this book contributes to a sound and informed debate on the issues, a debate necessary for wise and balanced congressional decision-making and fair judgments by the federal courts consistent with the bedrock copyright law.

I commend the book to copyright lawyers, to legislators and their staffs, to judges, and to all those whom copyright is ultimately intended to benefit—the American citizens who use copyrighted materials for the promotion of their own learning, but who have no lobbyist in the halls of Congress to plead their case for the right of personal use in their homes, schools, libraries, and offices.

Robert W. Kastenmeier

Acknowledgments

As is usual in any undertaking of this scope, we are indebted to many others who helped at various stages. We are grateful in particular to C. Ronald Ellington, Dean of the Law School, and William F. Prokasy and Delmer D. Dunn, Vice-President and Associate Vice-President for Academic Affairs at the University of Georgia, for their steadfast support and encouragement, and to Margaret K. Park and Stephen Corey for their sound advice and criticism. Special thanks are due to Craig Joyce of the University of Houston Law Center for his challenging and perceptive assessments of our manuscript as it evolved—and to Roberta Carver, whose patience and secretarial skills monitored the manuscript through its many drafts. None of these kind people, nor any of the others who offered support, can be held responsible, of course, for any errors or excesses that survive in the version now presented—and, of course, copyrighted—by the coauthors.

Contents

Part Four. Conclusions

Knowledge is, in every country, the surest basis of public happiness.

–George Washington

Property has its duties as well as its rights.

–Benjamin Disraeli

1 The Role of Copyright in American Life

Copyright plays a significant role in the life of nearly everyone in our society. Magazines and books, music, plays, movies, television broadcasts, even computer programs—all are copyrighted, and how we use them is often influenced by our perceptions of copyright. Yet despite copyright's impact on our lives, relatively few people have sufficient knowledge or understanding of what it is—and far too many hold major miscon-

ceptions about what copyright means. The term *copyright* itself is often erroneously viewed as being self-defining, meaning "the right to copy," and related misinterpretations have begun to receive wide public circulation. A recent article in *Newsweek*, for instance, asserts confidently, "The primary purpose of copyright law is to protect authors against those who would pilfer their work."[1] But this is *not* copyright's announced purpose—even though protecting authors is indeed one of the incidental functions of copyright. Moreover, such oft-repeated fallacies, many of them now generally accepted, pose serious dangers to the integrity of copyright law.

The primary purpose of copyright—as stated explicitly by the framers of the U.S. Constitution and subsequently interpreted by federal courts and Congress—is to promote the public welfare by the advancement of knowledge.[2] With the specific intent of encouraging the production and distribution of new works for the public, copyright provides incentive for creators by granting them exclusive rights to reproduce and distribute their work. But these rights are subject to important limitations—nearly all of them related to the basic purpose of advancing knowledge for the general welfare of society. From its statutory beginnings in early-eighteenth-century England, copyright has been the product of a precarious attempt to balance the rights of the creators—and those of their publishers—with the rights of users, present and future.

The most frequently mentioned (but least understood) limitation on the rights granted to copyright holders is the doctrine of fair use, a vital component of the rights many users do not realize they have. There would be no problem, of course, if all people could agree on what is fair, and it is tempting to argue that all we need to resolve the problem is the application of more common sense. As the eminent critic Jacques Barzun points out: