

Copyright Law

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Foundation Press

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CONCEPTS AND INSIGHTS SERIES®

FOUNDATION PRESS
2012



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1 New York Plaza, 34th Floor

New York, NY 10004

Phone Toll Free 1-877-888-1330

Fax 646-424-5201

foundation-press.com

Printed in the United States of America

ISBN 978-1-59941-251-1

Mat #40555494

With gratitude to our instructors:

*Benjamin Kaplan and Arthur R. Miller
in the classroom,*

Alan Latman in the law office,

*and to the generations of students
who have enriched our thinking about
the substance and ideals of copyright law*

PREFACE

In the years since the authors began studying and teaching copyright law, the field has emerged from what may have seemed the Elysian territory of a few artistically-inclined jurists. Copyright now, as portrayed in popular media and much of academia, unfolds on a ubiquitous battleground arraying the aging business models of “hegemonic” “content industries” against freedom of speech and the progress of technology. While this sort of caricature attests to copyright’s dramatic evolution from romantic backwater to public preoccupation, it neglects a signal feature of this area of the law: Copyright inspires idealism among both those who seek to foster creativity and those who promote public access to the fruits of that creativity—indeed, the same actors often endeavor to achieve both those aspirations. Moreover, though bellicose polemics too often prevail over informed analysis, copyright abounds in intellectual fascination, and one aim of this manual is to enrich the public debate by assisting its participants—law students, teachers, lawyers, judges and other public servants—to understand the principles, content and operation of the U.S. copyright law. The law’s too often excessive complexity makes a book like this one a useful contributor to rigorous discussion of legal norms, for a well-grounded appreciation of the positive law should precede the advocacy of policy goals.

Many of this book’s readers are likely to be law students. While the chapters in this manual are organized to correspond with Robert A. Gorman, Jane C. Ginsburg & R. Anthony Reese, *Copyright: Cases and Materials* (8th ed. 2011), we believe that students whose teachers have chosen a different casebook, or, for that matter, those readers who consult this book as a free-standing reference, rather than as an adjunct to a law school course, will also find this book to be both stimulating and helpful.

The authors are tremendously grateful to John L. Schwab, Columbia Law School class of 2012, for expert research assistance and excellent editorial suggestions. We also express great appreciation to Prof. R. Anthony Reese, our “new” co-author on the copyright casebook, whose deep knowledge and moderating perspective have illuminated our discussions of all aspects of the field, from basic principles to the latest technological challenges.

BIBLIOGRAPHIC NOTE

The purpose of this manual is to serve as an introduction to, and a starting point for research about, the law of copyright. It cannot feasibly be minutely detailed in its text or heavily annotated in its footnotes. Fortunately, there are a number of longer works of high quality that can be recommended to serve those latter purposes. For nearly fifty years, the masterful multi-volume treatise, constantly cited by the courts, has been that of the late Professor Melville Nimmer: Melville & David Nimmer, *Nimmer on Copyright*. It has since been joined by an equally outstanding multi-volume treatise by Professor Paul Goldstein, titled simply *Copyright*. Both works are regularly updated. William F. Patry's multi-volume treatise, *Patry on Copyright*, also regularly updated, is another entrant in the lists.

There are two research services that provide current updates on copyright developments and decisions. These are published by Commerce Clearing House and by the Bureau of National Affairs (*BNA Patent, Trademark & Copyright Journal*), the latter in an online service as well. The *United States Patent Quarterly* also publishes advance sheets containing decisions in the fields of patents, trademarks, and copyright. The relatively few federal district court copyright decisions that are not published in the *Federal Supplement* can usually be found in full text in either the CCH or USPQ reports.

The Copyright Office website contains a wealth of information about the substance and administration of the Copyright Act (<http://www.copyright.gov>). One can find there not only the text of the Act, but also pending copyright bills, the rules and regulations promulgated by the Copyright Office, news of the activities of the Office, its very useful reports and studies, speeches and statements by the Register of Copyrights, the various application forms, informational circulars, and access to registration records.

The law journal articles written about copyright have vastly proliferated over the past decades, and are published in general law reviews as well as in an increasing number of specialty journals devoted to intellectual property or to allied fields (such as computer law and entertainment law).

BIBLIOGRAPHIC NOTE

Throughout this manual, the provisions of the copyright statute now in effect—the 1976 Copyright Act, most of the provisions of which went into effect on January 1, 1978—are referred to by their section numbers within title 17 of the U.S. Code.

Many courts and scholars have come to regard the report of the House Committee on the Judiciary, H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. (1976), as the most comprehensive, exhaustive, and authoritative legislative source of the history and purposes of the Copyright Act. This monograph makes frequent reference to this significant document, which is denoted simply as “House Report.”

Excerpts from most of the cases discussed in this book, and from the House Report, can conveniently be found in Robert A. Gorman, Jane C. Ginsburg & R. Anthony Reese, *Copyright: Cases and Materials* (8th ed. 2011).

The coverage of this manual is complete as of January 23, 2012.

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Chapter 1

HISTORY AND BACKGROUND

Copyright is the law of literary and artistic property. It regulates the ownership and exercise of rights in creative works. The basic purpose of U.S. copyright is to enrich our society's wealth of culture and information. The means for doing so is to grant exclusive rights in the exploitation and marketing of a work as an incentive to those who create it. The Founding Fathers phrased this more elegantly—and provided the constitutional source for Congress's power to enact copyright laws—in Article I, section 8, clause 8 of the Constitution: "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." This provision is both a source of and a limitation on Congress's power to enact copyright and patent statutes. It recognizes both the general public interest in fostering creativity, and the individual rights of creators—for limited times—over the fruits of their intellectual labors. The Framers perceived, as James Madison urged in *Federalist* 43, that "The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals. The States cannot separately make effectual provision for either of the cases, and most of them have anticipated the decision of this point, by laws passed at the instance of Congress."

Further examination of the copyright clause yields themes that recur throughout copyright law, and inform this book. Copyright may also call into play other parts of the constitution as well, notably the supremacy clause and the First Amendment, and we will consider those issues in due course. For now, however, we highlight the framework questions that emerge from the copyright clause. Does the opening phrase "to promote the progress of science" state a general aspiration for a copyright system, or does it constrain Congress' power by authorizing only laws which result in the advancement of learning? How would a court judge what kinds of legislative measures are consistent with that objective? Must Congress's measures provide incentives to create new works? To disseminate works, new or old? If the aim to progress does not generally cabin the content of copyright laws, is that goal relevant to the determination whether any particular author, work or category of work may enjoy a copyright? (Are assessments whether copyright afforded an

incentive to creation, or whether a work promotes knowledge, any less elusive when applied to individual authors or works rather than to the copyright system as a whole?) Does the promotion of progress play a role in the evaluation of defenses to copyright infringement? Does the promotion of progress furnish the sole rationale for copyright protection in the U.S? If not the only justification, the dominant one?

Pursuing the inquiry past the preamble, what does “limited times” mean? The phrase appears to envision a public domain free of proprietary claims, but how “limited” in time is the period of proprietorship, and how immutable is the public domain? The clause empowers Congress to “secur[e]” authors’ exclusive rights; does the term imply the reinforcement of a pre-existing right? Did the Framers thus assume the existence of an author’s natural property right in the fruits of his intellectual labor? And who is an “author?” The work’s human creator? The person or entity who hired the human creator? The person or entity who purchased or operated the machine or device that generated the work? The rights Congress has power to secure are “exclusive;” does Congress therefore lack power to substitute in whole or in part a system of remuneration which would compensate authors but deny them the control over their works that exclusive rights afford? Finally, what is a “writing?” Does the term imply that the work must exist in some material form before a federal copyright law may cover it? Does the term exclude certain kinds of works from the subject matter of copyright? Does the term, standing alone or in conjunction with “authors,” imply any threshold of creativity, quality or purpose to the work?

I. The Copyright Statutes

A. *British antecedents and the 1790 Act*

U.S. copyright law traces its source to British censorship laws of the sixteenth century. Following the invention of printing, a system of printing privileges, paired with government control over the content of the works, developed in many European States, particularly in Venice, the Papal States, and France. The governing authority, having verified the work’s political and religious orthodoxy, granted the petitioner, usually a printer-bookseller, but sometimes the work’s author, a time-limited monopoly over the printing, selling, and importation of copies of the work.¹ England departed from this scheme in vesting in the publish-

1. On printing privileges see, e.g., Elizabeth Armstrong, *BEFORE COPYRIGHT: THE FRENCH BOOK-PRIVILEGE SYSTEM 1498–1526* (Cambridge University Press, 1990); Pierina Fontana, *3 INIZI DELLA PROPRIETÀ LETTERA-*

RIA NELLO STATO PONTIFICIO (saggio di documenti dell’Archivio vaticano) *Accademie e Biblioteche d’Italia* 204–21 (1929); Rudolph Hirsch, *PRINTING, SELLING AND READING, 1450–1550* (1974); Angela Nuovo and Christian

ers themselves the control over the dissemination of books. In 1556, the King granted to the Stationers' Company, made up of the leading publishers of London, a monopoly over book publication, thus placing in the hands of the guild the power to restrain the publication of seditious or heretical works. Publishers were given an exclusive and perpetual right of publication of works that passed muster with the Government and the Church (by way of the Star Chamber).² As with many systems of printing privileges, the English monopoly primarily promoted investment in the material and labor of producing and distributing books; protecting or rewarding authors was generally an ancillary objective.³

After nearly a century and a half, licensing laws were left to expire and publishers sprang up independent of the Stationers' Company. The Company turned to Parliament for protective legislation and in 1710 the Statute of Anne was enacted. As we shall see, however, the resulting law was not entirely made to the Company's order. The basic philosophy and contours of the Statute of Anne have dominated the U.S. law of copyright for most of our history as a nation. Its purpose was stated to be "for the Encouragement of Learning," which was threatened by the damage done to authors and their families by unauthorized copying of their books. This purpose was to be promoted by granting to authors an exclusive right of publication to last for 21 years for existing works and for 14 years for works published in the future. Moreover, were the author still living at the end of the first 14-year term, the exclusive right would revert to the author for an additional 14 years. A condition of statutory copyright was the registration of the title at Stationers' Hall and the deposit of nine copies at official libraries.

The Statute of Anne thus became the first law explicitly and systematically to vest copyright in the work's creator. Two factors, one philosophical, one economic, motivate this shift in orientation. First, making authors the owners of the exclusive right reflects the Enlightenment tenet that property derives from labor. From ownership of the physical fruits of agricultural and other labors, it is not a long step to ownership of the incorporeal fruits of intellectual labor. Indeed, if John Locke voiced the former argument in his *Treatises on Government*, he

Coppens, *I GIOLITO E LA STAMPA NELL'ITALIA DEL XVI SECOLO* (Geneva, Droz 2005). See also sources cited, *infra*, note 3.

2. See John Feather, *A HISTORY OF BRITISH PUBLISHING* 31–32 (1988) (describing how the Stationers Company "became an equal partner with the Crown in the suppression of undesirable books").

3. See, e.g. Cyprien Bladgen, *THE STATIONERS' COMPANY: A HISTORY 1403–1959* (London 1960); *CAMBRIDGE HISTORY OF THE BOOK IN BRITAIN* (Lotte Hellings & J.B.

Trapp eds., 3d ed. 1998); Mark Rose, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* (1993); John Feather, *A HISTORY OF BRITISH PUBLISHING* (1988). Authors could directly hold privileges, however, and in some systems of printing privileges, particularly the Papal privileges, but to a lesser extent in Venice and France as well, authors in fact frequently applied for and received monopolies over their works' publication and distribution.