COPYRIGHT, PATENTS AND TRADEMARKS:

THE PROTECTION OF INTELLECTUAL AND INDUSTRIAL PROPERTY

by Richard Wincor
and Irving Mandell

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Chapter I

HISTORICAL BACKGROUND-COPYRIGHT LAW

Literary piracy, while less romantic than its nautical counterpart, has the advantage of being infinitely more in fashion. The Jolly Roger has been hauled down. In its place, as the term "piracy" is used today, we have the solemn trappings of respectability. A modern buccaneer may lunch at Sardi's and browse afterwards in the Public Library. Despite this, his offense (which is simply what we used to call "cribbing") is far more villainous than robbery at sea. This is because it takes from a man what he has least of, picking not alone his pocket, but his brains.

Plagiarism of all sorts has a distinguished history. It begins in ancient times, when there were no copyright laws, and continues into our own day in which the development of motion pictures, television and other forms of transmission has greatly increased the value and the vulnerability of works of art. In some degree the law has kept pace with the new art forms. In the United States at present there is a dual system of protection for your work. Before you publish it (and what constitutes publication will be considered later) you need do absolutely nothing at all; if anyone steals from it you can sue him, since unpublished works are protected by the great corpus of Anglo-American common law developed over the course of centuries in the courts. This automatic protection of unpublished works is called common law copyright. Once you publish, however, you must comply with certain formalities required by the Copyright Act. This second phase, statutory copyright, is the result of legislative enactment. One is the creature of tradition, the other of Congress. The rights you have under the two systems are not the same. How this came to be, and what significance

it has, are the subjects of one of the most portentous and fantastic debates of all time.

The proposition that no one else may copy one's creation is relatively new. Quite obviously the author has complete ownership of his physical manuscript, just as he has complete ownership of his desk, his chair, his headache powders. But what about the contents of his manuscript? These are intangible; they are harder to conceive as a property susceptible of being owned. For this reason the history of authors,' artists,' and composers' rights is a chronicle of misfortunes. The creative artist is one of history's favorite whipping-boys, and his contribution to society is too often thought of as less sacred than the products of the workbench and conveyor belt. These unhappy notions have retarded the promotion of culture with deadlier thoroughness than those other favorites, the pillory and the burning of the books. All, in fact, have their origin in the same impulse.

The initial problem appears quite simple: for how long, if ever, does a creative artist own all the rights in his creation? Among those who have attempted answers, with varying degrees of vituperation, are Milton, Swift, Hume, Addison and Steele, Lord Mansfield, Johnson, Boswell, Macaulay, Arnold and Disraeli in England; Madison, both Websters, and many others in the United States. The question became crucial with the development of printing in the sixteenth century. It remains to this day a subject of debate and UNESCO, whose mission is to promote culture through the free exchange of ideas, has created a special Copyright Committee for the study of this problem Our Department of State is concerned with it. Authors' societies, producers, typographical unions and the Copyright Office in Washington have a multitude of views. In this field, discard is the norm.

ORIGINS OF COPYRIGHT

In the English-speaking countries, according to an ancient legend, copyright was first enforced in the year

567 A.D. In that year the ecclesiast Columba made a copy of a psalter in the possession of his teacher Finnian. A controversy arose and the cause was adjudicated by King Diarmud in the Halls of Tara, who held in favor of the plaintiff Finnian with the phrase, "To every cow her calf." Despite this small unpleasantness Columbia shortly afterwards was made a saint in honor of his splendid efforts in converting the Pictish Druids. The phrase "to every cow her calf" was also canonized, though in a different way. It is quoted in nearly every work on copyright, having as it does the kind of agricultural charm that appeals to city lawyers. The phrase, however, has a distinct significance. It recognizes, perhaps for the first time on record, the existence of such a thing as literary property.

For centuries thereafter the status of literary property is shrouded in British fog. Presumably the traditional common law of the realm protected new forms of property as well as old, creations of the mind along with acquisitions of the hand. No one knows. Whatever may have been the case, an alarming thing happened in the sixteenth century. The New Learning, so called, menaced both church and state with heresy. At that time the celebrated Stationers' Company of London, a publishers' association, held one of the royal patents without which it was forbidden to print books for sale in Great Britain. Accordingly the authorities availed themselves of the company files to keep track of heretical authors, who might then be put in the stocks. Sir Edward Arber, who compiled the transcript of the Stationers' Registers in 1875, had this to say about it: "As books became more and more a power, and therefore dangerous things unless fully authorized by the Ordinary, the book entries became a permission and imprimateur rather than a cash receipt." A series of Star Chamber decrees made things even more unpleasant for the author. Milton's *Areopagitica* was the most famous protest against these sorry practices. Copyright registration and deposit are defended nowadays on the ground that they enrich the national library with good

books. Be that as it may, the formalities of official copyright had a bad beginning. Those old files of the Stationers' Company are a monument to the absurd pretenses of censorship.

THE STATUTE OF ANNE

Literary piracy continued to plague authors where censorship left off. By the turn of the eighteenth century it was becoming a national outrage. Swift, Addison and Steele and certain publishers who owned copyrights told friends in Parliament that the traditional common law remedies were not enough. Accordingly in 1709, when Anne was Queen of England, an Act of Parliament[1] was passed giving special protection for fourteen years against the piracy of published works. Its sponsors little dreamed that it would set off a debate destined to reverberate throughout that century and up to the present day. That, however, is what happened. In the case called *Donaldson* v. *Becket*,[2] an interpretation of Anne's Act by the House of Lords in 1774 caught the unsuspecting author with his quill down and set the stage for a supreme comedy of errors.

THE GREAT DEBATE

A great debate began when Donaldson, a Scotch publisher, brought out an edition of James Thomson's *The Seasons* without the owner's consent. *The Seasons* had been published and then protected for the prescribed term by the Statute of Anne. That term, however, had now expired and most British authors and publishers assumed that the work was still protected by common law as it was before publication. The defendant maintained that the Statute of Anne replaced and destroyed the old common law protection; that while such protection would be perpetual, protection under the Statute of Anne was limited to a term of years, which had run out. Anybody, then, could publish *The Seasons* as he pleased. Furthermore, said counsel for the defendant, common law copyright never existed anyway, even before publication. At

this all of literary England chose sides and a controversy raged. Authors, lawyers, churchmen, nearly everyone who read and thought plunged headfirst into the affray. The kingdom was deluged with pamphlets inventing the most ingenious and metaphysical arguments to prove that there was or was not such a thing as perpetual "Literary Property." Every man was his own Aquinas. A clear statement of the author's position, which was doomed, is that of Hargrave writing at Lincoln's Inn in 1774: "I argue that the publication instead of destroying or diminishing the brief right of the author to the sole printing and selling of his works tends to render that right more firm and actually introduces many and additional pretensions for asserting it."

It was in 1774 that the case went before the House of Lords as the supreme judicial body of Great Britain. On January 29 Dr. Johnson wrote to Boswell in Scotland, saying, "The question of Literary Property is this day before the Lords. Murphy drew up the Appellant's case, that is, the plea against the perpetual right." The giant's lines convey a portly rustle of excitement. When the Lords assembled, all eyes were on Lord Mansfield, the most eminent of jurists, who had declared himself in favor of the perpetual right in earlier decisions. At that time it was considered bad etiquette for a peer to support his own lower court decisions in the House of Lords. Unfortunately for authors Lord Mansfield was afflicted with good manners and kept silence. As a result the forces on the other side carried the day. One of their champions was Sir John Dalrymple who argued that publication destroyed the rights at common law, saying, "Now an ogle is a ladies' own whilst private, but if she ogles publicly, they are everyone's property." This unrealistic and ungrammatical quip led the peers into a receptive frame of mind for Lord Camden's tirade against the monopoly of publishers and authors. *Donaldson* v. *Becket* went for the defendant. The judges' vote held that literary property existed at common law but that once an author pub-

lished, he was protected only for the term specified in the Statute of Anne, and not a minute longer. In the next century a parallel situation arise in the United States and our Supreme Court followed the English decision with proper reverence for authority.[5] Thus a decision by the Lords in 1774 determined the sage principles that relate to motion pictures, mechanical records and television in our own day.

One thing which the peers did not accomplish was the ending of the great debate. It raged on, sometimes academically, sometimes in connection with new copyright bills. Macaulay said that copyright was a monopoly; Herbert Spencer said that it was not. In 1879 a New York lawyer with the soporific name of Drone chose to reopen the entire question of Literary Property, saying, "Its ownership like that of all property is transferred only with the consent of the author. It is no more lost by publication than the ownership of land is lost by a grant of the privilege of hunting, felling timber, or digging minerals within its borders." Drone, however, lived and wrote too late. It may be that some policy against "monopoly" might have caught up with authors if the House of Lords had not, but that notion is disposed of by a witty member of a later British Parliament, Mr. Augustine Birrell, who wrote, "But how annoying, how distressing, to have evolution artificially arrested and so interesting a question stifled by an ignorant legislature, set in motion not by an irate populace clamoring for cheap books (as a generation later they were to clamor for cheap gin) but by the authors and their proprietors, the booksellers."

PUBLIC BENEFIT

It cannot be maintained, however, that the perpetual rights of authors were destroyed simply by a single determination in the House of Lords. The public may be less concerned with cheap books than with cheap gin, but the public was nevertheless the chief figure in this chronicle. The pressure felt through its aspirations, its demand for the good things of life, brought about a limitation on the

rights of creative artists. It was against the public interest that a masterpiece should be susceptible of permanent monopoly; at the same time it is sheer banditry to take away from someone that which he creates in the exercise of his own talents. Fortunately, the two interests can be reconciled. Our present copyright laws, with all their flaws, are evidence that this is true. They take away the author's perpetual rights after he publishes his work but they grant him a new set of rights for a term of years to encourage him through rewarding his self-interest. This in turn redounds to the general welfare. Dr. Johnson stated the matter aptly in these terms:

"For the general good of the world, therefore, whatever valuable work has once been created by the author, and issued out by him should be understood as no longer in his power, but as belonging to the public; at the same time the author is entitled to receive an adequate reward."

Legislative history in the United States affords the clearest proof that public benefit is the true theory of our copyright laws. Twelve of the original thirteen states passed copyright acts before the Federal Constitution was adopted. The titles of these acts were in nearly all cases phrased in terms of the general welfare. The Connecticut Statute was called "An Act for the encouragement of Literature and Genius." New York passed "An Act to promote Literature"; and so go the others. Their preambles, or general statements of purpose, are in the same vein. The Massachusetts Act is a good example:

"Whereas the Improvement of Knowledge, the Progress of Civilization, the public Weal of the Community, and the Advancement of Human Happiness, greatly depend on the efforts of learned and ingenious Persons in the various Arts and Sciences: as the principal Encouragement such Persons can have to make great and beneficial Exertions of this Nature, must exist in the legal Security of the Fruits of their Study and Industry to themselves ,and as such Security is one of the natural Rights of all Men,

there being no Property more peculiarly a Man's own than that which is produced by the Labour of his Mind:

"Therefore, to encourage learned and ingenious Persons to write useful Books for the Benefit of Mankind,

"Be it enacted . . ."

This extraordinary passage reflects the paradox implicit in all copyright protection. Creations of the mind are peculiarly a man's own; yet in the public interest they must be taken away after publication, with proper rewards to the author, however, to encourage him to create more works of art for the public.

In our Constitution the concepts of twelve states have been made into a statement of national policy. Article I, Section 8 proclaims:

"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."

With this authorization the Congress has passed successive Copyright Acts. The House Report accompanying the present Act, which dates back to 1909, reaffirms the purpose of such legislation in these words: "Not primarily for the benefit of the author, but primarily for the benefit of the public, such rights are given."

This is the history of our dual system of copyright. Under the common law one's property in his work is unqualified and perpetual. It may be that common law copyright will be superseded, as in England now, by statutory provisions regarding unpublished as well as published works. One reason this may happen is the public interest in the unpublished works of deceased authors such as Mark Twain, which are withheld from it by the absolutism of common law protection. In the case of *Chamberlain* v. *Feldman*,[4] the plaintiffs, as successor trustees under the will of Samuel L. Clemens (Mark Twain) sued to restrain the defendant Feldman from publishing, producing, or reproducing a story by Clemens entitled "A Murder, A

Mystery, and A Marriage." This story was written by Twain in 1876 with the plan of enlisting the aid of other famous authors, such as Bret Harte, each to write his own final chapter for the work. Twain submitted the manuscript to William Dean Howells, editor of the *Atlantic Monthly,* but the plan fell through. When Twain died in 1910 the manuscript was not found among his effects and had never been published anywhere by anyone. In 1945 the defendant Feldman purchased it at an auction sale in New York of rare books that had belonged to Dr. James Brentano Clemens (no kin of Mark Twain). Eager to publish it, Mr. Feldman sought permission of the trustees under the author's will, and being refused, went ahead with the publication anyway. The trustees' suit to enjoin such publication met with final success in 1950 when the Court of Appeals in the State of New York agreed that Mark Twain had never parted with his common law copyright, which is a thing separate from physical possession of the manuscript. The court hinted that it had doubts as to the advisability of "permitting literary flowers so to blush unseen," and that it would prefer the work to go into the public domain for all to enjoy. This result, however, could be accomplished only by the Legislature. Accordingly the unhappy Feldman was enjoined from publishing the work.

At this time, therefore, the common law still governs and protects unpublished works. After publication one's work is given only limited protection and solely on condition of compliance with the Copyright Act. This requirement we have seen, had its origins in censorship and was subsequently confirmed in a celebrated debate influenced by the growing pressure of public interest in the arts. The public interest in its turn became paramount, and nowadays is the true fabric of Anglo-American copyright law.

Piracy, however, still menaces the arts. The opportunities are endless, the booty unprecedented. It may appear that this account of events past is impractical in a world of

pirates, but quite the opposite is true. The history of legal weapons is a guide in their proper use. So armed, you are on the way to catching the would-be pirate in his crime, and making him haul down his flag.

1. 8 Anne ch. 19 (1710)
2. 4 Burrows 2303 (1774)
3. Wheaton v. Peters, 8 Pet. 591 (1834)
4. 300 N. Y. 135 (1950)

Chapter II

LEGAL DOCTRINE OF THE PUBLIC DOMAIN

The public domain is the People's bailiwick. In it are those creations of the human intellect which are owned by nobody; they are the common property of the world and can be used or reproduced by all. Thus the public domain includes most of the world's masterpieces. Falstaff is there, waiting perpetually to be revived without royalties to his maker. Bruege's Icarus recounts the pathos of man's aspirations on museum postcards. Mozart's "Hunt" quartet can be performed by the local chamber music society, free of charge. Material in the public domain being unprotected by law, its reproduction is in no way piracy. Of course there is always the possibility that arrangements, abridgments, or other special versions of works in the public domain may have enough originality for ownership by someone living. Such embellishments can be copyrighted, but the original work remains the property of everyone. Most of the world's treasures, then, are in the public domain.

There is nothing surprising in the fact that Shakespeare's plays are not "copyrighted." To those of you who write, however, it may come as a surprise to learn that your idea, your theme, format, plot, setting, and probably your characters and title are also in the public domain. They are not yours because they are incapable of being owned. The person who copies them acts fully within his rights. If this seems outrageous, remember that each of the elements cited is bound to be unoriginal; only the specific treatment given it can be unique, and accordingly, this specific treatment is all that the law protects. If these principles were understood, the allegations of piracy today would generally be on a higher level.

Ideas and Information

The enormity of the public domain cannot be overemphasized. Suppose, for example, you had a bright idea for an advertising scheme and revealed it without agreement as to reward. Suppose further you conceived a design for a new building, or the rules for a game, or a scientific theory that would shake the world. In any such case your idea would be protected only by silence, not by law. There is no property in an idea until its reduction to concrete and tangible form. The idea for a new building must become an architectural sketch; the scientific theory must be developed in a learned monograph. Until such time, anyone else can use your idea to his own profit if he learns about it. So universally is this established that lawsuits for theft of an "idea" no longer clutter up the court. Instead nowadays the victim always founds his action on the breach of an implied contract to pay for disclosure of an original idea or abuse of a fiduciary relation, which are different things from copyright. The results, however, tend to be just as unfortunate. Contracts to pay for ideas are hard to get and harder to prove. Accordingly the next time you have a valuable idea, such as writing about life in an opium den, keep it to yourself and write it first. Then you can show it to anyone because the text, as it takes on specific form, will be protected by common law. Others can thereafter write up their own experiences in opium dens, but your version must not be copied. The same principles apply to "information." Scholars may well consider the words of an Alabama court:

"It must be understood, however, that where the information is accessible to others there can be no ownership of the information itself, but only of the memorial thereof —the *collective form* into which it has been cast by the labor of the claimant."[5]

Themes

By the same token a theme or motif in art is also in the public domain. Thus a drama on dual personality has

been held not to infringe a copyrighted play dealing with the same subject matter.[6] In another case a copyrighted story about wild horses was held not to have been infringed by a motion picture with the same theme, which the court defined as "the underlying thought which impresses the reader of a literary production, or the text of a discourse."[7] Similarly it was held that a play called "Depends On The Woman" was not infringed by the movie operetta "I Dream Too Much," the court saying, "The only possible similarity between the works is that of the theme, which is not subject to exclusive copyright."[8] Only the means of expressing a theme or idea can be protected. In a famous case one judge put the matter in these words:

"Just as a patent affords protection only to the means of reducing an inventive idea to practice, so the copyright law protects the means of expressing an idea; and it is as near the whole truth as generalization can usually reach that, if the same idea can be expressed in a plurality of totally different manners, a plurality of copyrights may result, and no infringement will exist."[9]

Plots

Plots are as incapable of ownership as ideas or themes. In fact one critic, Polti, writes that only thirty-six dramatic plots exist. The courts have gone even further, saying that specific incidents, effects and atmosphere, even similar phrases in dialogue were not copyrightable. Some well-known plays have been involved in these lawsuits: "Death Takes a Holiday,"[10] "They Knew What They Wanted,"[11] and "Of Thee I Sing"[12] are some of them. In the last case, "Of Thee I Sing" was held not to infringe "U.S.A. With Music" and the court, apparently annoyed by the unfounded claims of piracy, delivered itself of an unkind but pointed reflection. "In this cause," the opinion reads, "as is usual in plagiarism causes, obscurity is taking a long shot at success."

The Thing of Value

By this time it should be clear that a good portion of