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Copyright as Censorship - Part I

James Gibson
University of Richmond - School of Law, jgibson@richmond.edu

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Prof. Jim Gibson, University of Richmond School of Law
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2010 marks the 300th anniversary of the Statute of Anne, the English legislation that ushered in the modern era of copyright law. The Statute of Anne is celebrated for a number of reasons, and perhaps foremost among them is its rejection of copyright as an instrument of censorship.

Before Parliament enacted the Statute, the distribution of books was controlled by the government through royal charters, which granted monopolies over printing and empowered the chartered firms to seize unauthorized books and bring their publishers before the courts. The Statute of Anne put an end to this practice and replaced it with a system of exclusive rights for individual authors, with the goal being "the Encouragement of Learned Men to Compose and Write useful Books."

Despite this shift, the use of copyright law as an instrument of censorship did not die out in 1710. Instead, censorship continued in at least two ways: (1) direct censorship arising from courts' judgments about the immorality of certain publications; and (2) indirect censorship through courts' embrace of lawsuits in which the copyright owner was motivated by a desire to suppress expression rather than disseminate it. Here I examine the first form of censorship, leaving the second for a future essay.

British Origins

An example of the first kind of censorship can be found just ten years after the Statute of Anne, in the English case of *Burnett v. Chetwood*. The case involved the unauthorized translation of a book from Latin into English; the author's executor sought an injunction against the translation. The court found that the translation did not offend the author's copyright, yet it nevertheless enjoined its publication. Why? Because the book apparently questioned whether certain occurrences in Scripture could stand up to scientific inquiry. The court decided that an educated (*i.e.*, Latin-speaking) audience could handle such "strange notions," but that they had to be kept from the vulgar masses that only spoke English.

Burnett v. Chetwood is a curious case, because although the plaintiff was claiming copyright infringement, it is not clear that the court used copyright law to suppress the allegedly immoral work. The court's authority instead seemed to spring from its general equitable powers. Subsequent cases, however, directly used copyright as an instrument of censorship. In the early 1800s, England's Lord High Chancellor Eldon declined to enforce the copyrights of works that he viewed as seditious, libelous, or blasphemous (including, most famously, Byron's *Cain*).

Other judges soon followed his lead by denying injunctive and monetary relief to the authors of "licentious" works as well – such as Byron's *Don Juan* and a book that recounted "a history of the amours of a courtezan." In this way, the British government continued its pre-1710 policy of disfavoring works that it found morally (or politically) objectionable. Authors of such works could not benefit from the incentivizing effects of copyright protection and the remunerative opportunities it afforded.

American Adoption

American courts were less concerned about using copyright to police libelous and seditious works than were their British counterparts, but the concern about licentiousness crossed the Atlantic in full force. Starting with the 1867 case of *Martinetti v. Maguire*, federal judges not only withheld relief, but refused copyright protection altogether for works that were "grossly indecent," "indelicate and vulgar," and "lascivious and immoral." Indeed, as late as 1963 a state court denied common-law copyright to a comic dance routine that involved too many "bumps and grinds" and "pelvic contractions."

American commentators, however, urged caution in the application of this policy, and courts responded by evaluating each suspect work as a whole and taking care not to foist one generation's views of immorality on another. (As one observer noted, the play in *Martinetti* may have been scandalous in 1867, but by 1920 it would "only make the tired business man tireder.") This approach dovetailed with the development of a robust free-speech jurisprudence that used contemporary community standards to determine what pornographic material fell outside the First Amendment's protection. By the 1970s, that jurisprudence had mostly matured into its present state and the stage was set for a reexamination of copyright's policy toward pornography.

That reexamination arrived in the form of 1979's *Mitchell Brothers v. Cinema Adult Theater*. At issue in *Mitchell Brothers* was a pornographic movie, *Behind the Green Door*, whose exclusive licensee sued a rival adult theater for the latter's unauthorized exhibition of the film. The district court recognized the long line of cases that refused to protect immoral works, noted the Supreme Court's view that obscene materials receive no First Amendment protection, and concluded that "the general feeling … is that obscene matters do not further public welfare or public interest or promote the progress of science or useful arts." It then judged the film obscene and accordingly denied it copyright protection.

The Fifth Circuit reversed, holding that copyright law should disregard the obscenity issue entirely. It cited a number of reasons for its ruling, including the absence of any supporting provision in the applicable statute (the 1909 Copyright Act) and the difficulty of using a national, long-lasting entitlement to police content defined by local standards as of a particular time. A few years later, in *Jartech v. Clancy*, the Ninth Circuit came to same conclusion with regard to today's copyright statute, the 1976 Act. Some 270 years after the Statute of Anne, courts had finally decoupled a work's morality from the issue of whether it deserved copyright protection.

Implications

Two lessons might be drawn from this story. First, refusing copyright protection to immoral works was a dubious policy even for those who believe that the government has a role in policing morality, because the ultimate effect of such refusal might have been *increased* proliferation. After all, granting protection and issuing an injunction would have halted the unauthorized distribution of the work by pirates. Refusing protection thus sent a signal that anyone who wished to assist in the work's further proliferation could so without first seeking a license. In the 1817 case of *Southey v. Sherwood*, Lord Eldon himself recognized this irony: "It is very true that, in some cases, [denying an injunction] may operate so as to multiply copies of mischievous publications by the refusal of the Court to interfere by restraining them." Whether the social cost of increased proliferation was outweighed by the countervailing

benefit – *i.e.*, the disincentive to create licentious works in the first place – is an open question. At the very least, it suggests that policymakers should look closely at proposals to use copyright (and its cousin, patent) to police morality in the innovation sphere.

Second, even if there is a place in our society for government censorship, copyright seems like the wrong instrument. Copyright law is designed to encourage the creation and dissemination of expression, not to stifle it. As the Supreme Court has pointed out, "the Framers intended copyright itself to be the engine of free expression." This issue will be the focus of the second essay in this series. Stay tuned.