Vanderbilt Law Review

Volume 28
Issue 6 *Issue 6 - November 1975*

Article 1

11-1976

Private Copyright and Public Communication: Free Speech Endangered

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VANDERBILT LAW REVIEW

VOLUME 28 NOVEMBER 1975 NUMEER 6

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TABLE OF CONTENTS

I. INTRODUCTION

Similar revolutions create similar situations, even when they occur four hundred years apart. The revolution in communications brought about by electronics in the United States during the twentieth century thus bears a striking analogy to the revolution brought about by the printing press in fifteenth and sixteenth century England. Indeed, moveable type and electronic signals may have produced the only two communications revolutions in the history of Western Civilization; the impact on the education, entertainment, culture, and politics of their respective societies made by the new

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means of reproducing books and by radio and television broadcasting is unparalleled.

No other communications systems have been subjected so readily to a government sanctioned monopoly, the printing press because of political unrest, and radio and television because of the limited airwaves. That the government sanctioned monopoly of broadcasting in this country has a pragmatic basis, however, does not alter its impact on public and political affairs, particularly in the case of television. Just as the illegal pamphlets and books in Tudor England threatened the stability of an authoritarian government, so arguably did the reporting by television of the Viet Nam War threaten the stability of a free government.

Apart from their potential for providing people with information, the printing press and broadcasting offered the opportunity for new profits in communicating ideas. Thus the entrepreneurs of the printing press developed the concept of copyright. The issue of copyrighting a broadcast, almost ignored with radio,[1] looms very large for television, for the entrepreneurs of television now seek to appropriate copyright for the new mode of communication.[2] History, however, compels us to pause at this juncture, for the early copyright

1. Therefore, the principal concern here is with television rather than radio, which instead has relied primarily on the law of unfair competition for protection of broadcasts. *See, e.g.*, Pittsburgh Athletic Co. v. KQV Broadcasting Co., 24 F. Supp. 490 (W.D. Pa. 1938). Radio scripts, of course, can be copyrighted as writings, but courts have held that a radio broadcast of material does not constitute a publication which destroys the common law copyright. *E.g.*, Uproar Co. v. NBC, 8 F. Supp. 358 (D. Mass. 1934), *modified*, 81 F.2d 373 (1st Cir.), *cert. denied*, 298 U.S. 670 (1936); CBS v. Documentaries Unlimited, Inc., 42 Misc. 2d 723, 726, 248 N.Y.S.2d 809 (Sup. Ct. 1964). A major factor in the lack of concern over copyright for radio may be that radio, strictly aural in nature, has not had an impact on society comparable to that of television, which is both an aural and visual medium of communication. The Copyright Bill, S. 1361, 93d Cong., 1st Sess. (1974), apparently ignores copyright for radio as such. Presumably, however, copyright would be available for radio programs as sound recordings. *See id.* § 102(7). The bill contains extensive provisions on audio-visual works.

2. CBS now places a copyright notice on many of its programs, although the copyright statute, 17 U.S.C. § 1-216 (1970), contains no provisions relating to television. The statute does provide for the copyrighting of motion pictures. 17 U.S.C. § 5(1), (m) (1970). Copyright Office regulations further provide for the copyrighting of *filmed* television programs under the classification of motion pictures. 37 C.F.R. § 202.15(a),(b) (1975). Television programs, however, are usually recorded on videotape rather than film. One commentator has questioned the copyrightability of videotape under existing law. 1 M. NIMMER, COPYRIGHT 1, § 25.3, at 116 (1975). There is also serious doubt as to whether a live television broadcast can be copyrighted at all, since it "is not a writing and is therefore not *per se* eligible for federal copyright protection." *Id.* § 8.32, at 20.1.

Both of these issues are involved in a pending case, CBS v. Vanderbilt Univ., Civil No. 7336 (M.D. Tenn., filed Dec. 21, 1973), in which CBS is claiming that the Vanderbilt Television News Archive infringes its alleged copyright on the *CBS Evening News With Walter Cronkite* by taping the newscast off-the-air in order to preserve it for study, research, and history. The VTNA tapes the ABC and NBC national evening newscasts as well.

In accordance with principles of complete disclosure, it should be noted that Dean Patterson is one of counsel representing Vanderbilt in this litigation.—ed.

in England was an instrument of governmental censorship as well as a property concept, and despite our traditions of free speech, copyright still retains the monopolistic characteristics that made it a useful device for controlling the press. To permit copyright as it presently exists for television broadcasts would give, for the first time in our history, the power of censorship to licensees of the federal government.[3]

The threat that copyright for television broadcasts poses to the public's first amendment rights is obscured by the idea that copyright is an author's right, since the proprietary right to control one's own creations for profit seems to present little danger of censorship.[4] The idea that copyright is merely an author's right, however, is a legal fiction. To appreciate the reality underlying the fiction one must go back to the antecedents of American copyright law in England some four hundred years ago.

Modern copyright law owes its origins to Elizabethan and Jacobean policies of press control in the sixteenth and seventeenth centuries, when the political unrest caused by the Protestant Revolution made copyright and censorship contemporary and complementary developments as the monarchy in England vacillated between Catholicism and Protestantism. One result of these policies was that Mary, a Catholic, granted a charter in 1557 to the members of the booktrade, the Brotherhood of Stationers,[5] which thereby became the Stationers' Company, a royal company with an absolute monopoly on printing.[6] The Protestant Elizabeth renewed the charter in 1559,[7] and it was the Stationers' Company, composed of bookbinders, printers, and booksellers (or publishers), but not of authors,

3. The Federal Communications Commission, of course, licenses all radio and television stations. 47 U.S.C. §§ 301, 307(a) (1970). The licenses must be reviewed every three years. 47 U.S.C. § 307(d) (1970).

4. The problem of copyright and free speech has only recently been recognized. *See* Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970); Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 U.C.L.A.L. REV. 1180 (1970); Rosenfield, *The Constitutional Dimension of "Fair Use" in Copyright Law*, 50 NOTRE DAME LAW. 790 (1975).

5. According to the charter's preamble, Mary incorporated the stationers to provide a suitable remedy against seditious and heretical material printed by schismatical persons, because such material moved subjects not only against the Crown, but also against the "Faith and Sound Catholic Doctrine of Holy Mother Church." The charter is printed in 1 E. ARBER, A TRANSCRIPT OF THE STATIONERS' REGISTERS, 1554-1640 A.D., xxviii-xxxii (1875) [hereinafter cited as ARBER 1].

6. "No other company, it is true, ever attained the same degree of monopoly as that which the State thought it expedient to confer on the Stationers . . ." G. UNWIN, THE GUILDS AND COMPANIES OF LONDON 261 (3d ed. 1938). For a history of the Stationers' Company, see C. BLAGDEN, THE STATIONERS' COMPANY (1960).

7. Printed at 1 ARBER, xxxii.

that created the stationers' copyright which eventually evolved into the modern American copyright. The monopolistic company created a monopolistic copyright not for authors, but for its members; the purpose was to protect the members' property not from the public, but from each other.

With the end of censorship in England in 1694[8] came the end of statutory support for the stationers' copyright. The efforts of the monopolists to secure new legislation resulted in the Statute of Anne,[9] commonly called the first copyright statute. In fact, the act was primarily a trade regulation statute designed to destroy and prevent the booksellers' monopoly of the booktrade. In their efforts to overcome the effects of the legislation, however, the booksellers sought to convince the courts that copyright was an author's natural right, rather than what it had been in fact: a publisher's right based on ordinances of the Stationers' Company, acts of censorship, and later, parliamentary legislation as well.

The booksellers succeeded in convincing the House of Lords in the landmark case of *Donaldson v. Beckett*[10] that copyright was an author's right. They failed to persuade the House of Lords, however, that it could exist in a published work other than when provided by statute. The *Donaldson* case, together with the earlier case of *Millar v. Taylor*,[11] thus provided a natural law theory for copyright. Since copyright before these cases had always been based on legislation of one kind or another, it had been in fact a positive-law concept. The result after these two decisions was that henceforth copyright had two inconsistent theories of law as its basis. It could be viewed either as a limited monopoly created by statute or as a natural right of the author by reason of the fact that he created the work.

The complex and curious nature of American copyright can be traced to this dual conceptual basis created by the two English cases. And, the threat which copyright for television broadcasts poses to first amendment rights arises from the fact that the divergent directions of the conceptual basis of copyright has resulted in a confused body of law.[12] The copyright clause,[13] plainly intended to apply only to printed material, is a limitation as well as a grant of

8. This was the date of the final lapse of the Licensing Act of 1662, 13 & 14 Car. 2, c. 33. Originally limited to a term of two years, it was renewed periodically until 1694. 16 Car. 2, c. 8 (1664); 17 Car. 2, c. 4 (1665); 1 Jac. 2, c. 14 (1685); 4 & 5 W. & M., c. 24 (1692).

9. The Copyright Act of 1710, 8 Anne 1, c. 19.

10. 1 Eng. Rep. 837 (H.L. 1774).

11. 98 Eng. Rep. 201 (K.B. 1769).

12. COPYRIGHT LAW REVISION, STUDIES PREPARED FOR THE SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE SENATE COMM. ON THE JUDICIARY, S. DOC. No. ____, 86th Cong., 1st Sess. (1960) [hereinafter cited as COPYRIGHT LAW REVISION STUDIES].

13. U.S. CONST. art. I, § 8, cl. 8.

congressional power. Thus, despite three major revisions of the statute,[14] countless bills, and numerous amendments,[15] the confusion over copyright is so fundamental that courts have had little difficulty in treating black as white and white as black. Section 4 of the copyright statute, for example, provides protection for "all the writings of an author."[16] But courts have said that a work cannot be copyrighted unless it is listed in the classification of works in Section 5, despite the language of Section 5, which provides that the classification "shall not be held to limit the subject matter of copyright as defined in section 4 . . . ."[17] Prudence would seem to require that we at least understand the reasons for the confusion before making television a subject of copyright.

The difficulty is twofold: the idea of copyright as a statutory monopoly granted by the grace of the legislature is inconsistent with the concept of copyright as a natural right of an author; neither theory has been wholly accepted and neither has been wholly rejected. The resulting positive law-natural law dichotomy represents confusion as to the source of copyright, and this confusion creates uncertainty concerning the appropriate premise lawmakers, legislators, and judges, should use for the development of the law. The fundamental problem in copyright law is how to secure a property right in the expression of an idea that does not at the same time give a property right in the idea itself. Where to draw the line in determining the scope of copyright protection is difficult enough without having opposing premises from which to reason. At least part of the confusion in copyright law created by the dual conceptual basis results from the fact that legislators and judges tend to draw the line at different places.

The history of copyright in this country, in fact, has been a story of competition between the positive law and the natural law theories of copyright. During the early days of the nation, the positive-law theory predominated, but it began to give way to the natural law theory in the latter part of the nineteenth century. The change was brought about by the courts; Congress has naturally adhered to the positive-law view.[18] Neither, however, has been

14. 4 Stat. 436 (1831); 16 Stat. 198 (1870); 35 Stat. 1075 (1909).

15. *See* T. SOLBERG, COPYRIGHT IN CONGRESS, 1789-1904, Copyright Office Bull. No. 8 (1905).

16. 17 U.S.C. § 4 (1970).

17. 17 U.S.C. § 5 (1970). *See* Mazer v. Stein, 347 U.S. 201 (1954).

18. The House Report on the 1909 Act stated: "The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings, for the Supreme Court has held that such rights as he has are purely statutory rights . . . ." H.R. REP. No. 2222, 60th Cong., 2d Sess. 7 (1909).

wholly consistent, and it is not at all clear that either the judges or the legislators made a conscious choice of either theory in the development of this complex body of law. Indeed, they had little opportunity to make an informed choice since the history of this legal concept, with a dual basis composed of two antithetical theories of law, is a complicated one, reaching back into eighteenth century England and carrying forward to the twentieth century United States with the enactment of the present copyright statute in 1909.[19]

The 1909 act marked a crucial point in the competition between the positive law and natural law theories. Prior to that act, the exclusive rights of the copyright proprietor were to print, reprint, publish, and vend, and the basic problem in copyright was the relatively simple one of limiting the monopolistic control of works for the market. The 1909 act added to the exclusive rights of the copyright proprietor the right to copy the copyrighted work,[20] and thus enlarged the scope of copyright protection so that copyright now protects a work against the plagiarism of ideas as well as against the piracy of the composition itself.

This result can be explained by the fact that the exclusive right to copy provided the courts with a basis for the further development of the natural right theory without rejecting the positive-law theory. Even so, few if any commentators have noted the significance of the 1909 statute in American copyright law, probably because it was a natural development, and because the practical distinction between plagiarism and piracy can be viewed as one of degree. A pirate is "one who appropriates or *reproduces* without leave, for his own benefit, *a literary, artistic, or musical composition* . . . ."[21] Plagiarism is "[t]he wrongful appropriation or purloining, and publication *as one's own*, of the *ideas*, or *the expression of the ideas of another*."[22] The technical distinction between piracy and plagiarism, then, is primarily in the credit given to the original author and secondarily in the amount of the work used. The pirate gives credit; the plagiarist does not. Piracy will usually involve a whole work; plagiarism will usually involve only parts of a work. As the definitions suggest, however, there is also a distinction in kind between piracy and plagiarism—the distinction between taking the finished composition and taking ideas from the finished composition. This distinction becomes clearer when one realizes that literary piracy, which protects the work against unlawful use by a competitor, is

19. 35 Stat. 1075 (1909), *as amended*, 17 U.S.C. § 1-216 (1970).
20. 17 U.S.C. § 1 (1970).
21. 7 OXFORD ENGLISH DICTIONARY 901 (1909) (emphasis added).
22. *Id.* at 932 (emphasis added).

essentially an offense against the publisher; plagiarism, which protects the ideas contained in the completed work, is primarily an offense against the author.

The distinction in kind is the one that made so important the difference between the exclusive right to print and publish and the exclusive right to copy. Before the 1909 act, copyright infringement was primarily a matter of piracy of the composition; after that act, infringement came to include the plagiarism of the ideas contained in the composition as well. Since copyright is a private monopoly granted by statute to protect the profit to be gained from the public dissemination of the copyrighted work and traditionally justified on the ground that the monopoly is necessary to encourage authors and to promote learning, the change was and remains a significant one. Its greatest significance, perhaps, is that it set the stage for the conflict between copyright and first amendment rights with the development of modern communication technology.

So long as copyright is limited in its subject matter to the kind of material for which it was created—printed communications—the dual theory of copyright creates general confusion in the law, but raises no particular problem of censorship. Printed material is permanent in form and must be published and disseminated to the public to obtain the profit to be gained. This natural sanction provides assurance that the copyright proprietor fulfills the *quid pro quo* for the monopoly of copyright—public access to promote learning. When the subject matter for copyright goes beyond products of the printing press, however, the defects of the dual basis for copyright begin to emerge. It is at this junction that each theory accommodates the self-interest of different groups, enabling each group to find considerable support not only in the literature, but in the cases as well. Thus, while few will disagree that the policy of copyright law is, and should be, to promote learning, many will disagree on what protection for new subject matter will best implement the policy.

The monopoly problem takes on new dimensions with regard to television, for whether copyright law as it has developed for printed communication is appropriate also for the medium of electronic communication is a problem of more and larger implications than meet the eye. At first glance, the extension of present copyright law to television would seem to be a logical development. Historically, Congress has amended the copyright statute to accommodate new developments in technology, and the copyright bill now before Congress provides copyright for audiovisual works. Closer consideration of these points, however, reveals that copyright has been extended to only three kinds of works produced by new technol-

ogy—photographs,[23] motion pictures,[24] and sound recordings[25]—and none of these works constituted the revolutionary system of communication that television represents.

Copyright as it has developed is essentially a private copyright for private communications made public for profit. Theoretically, the right to copyright is derived from the act of creation, and the choice of making his creations public is that of the author. As the copyright clause makes clear, the purpose of the private monopoly of copyright is to encourage the author to make his creations available for public learning.[26] Television, on the other hand, is primarily a medium of public communication that has as a major function the transmission of public information to the public.[27] To apply the present law of copyright to television, as opposed to copyrightable works that may be presented on television, would be to make the act of transmission, rather than the act of creation, the basis of copyright. Reports of news, public affairs, news conferences, public events, and other material now clearly in the public domain would become subject to the monopoly of copyright owned by a communications corporation merely because it transmitted the material to the public. Thus, copyright for television per se raises serious questions about the potential conflict between the free speech and free press clause of the first amendment and the copyright clause.

These issues are not unlike the issues of press control in sixteenth century England. With its ephemeral transmissions, television eliminates not only the fundamental basis of copyright—the act of creation—but also the *quid pro quo* underlying the monopoly of copyright—the dissemination of copyrighted material in permanent form to the public. To give communications corporations a proprietary interest in public information and public domain materials would enhance their power to influence and shape the opinions of millions of people without imposing any means of making them accountable for the responsible exercise of this enormous power.

23. 13 Stat. 540 (1865), *as amended*, 17 U.S.C. §§ 10, 13-15 (1970).

24. 37 Stat. 488 (1912), *as amended*, 17 U.S.C. §§ 5, 12 (1970).

25. 17 U.S.C. §§ 1(f), 5(n) (Supp. II, 1972).

26. "Not primarily for the benefit of the author, but primarily for the benefit of the public, such rights are given. Not that any particular class of citizens, however worthy, may benefit, but because the policy is believed to be for the great body of people, in that it will stimulate writing and invention, to give some bonus to authors and inventors." H.R. REP. No. 2222, 60th Cong., 2d Sess. 7 (1909).

27. The criterion for obtaining a license for a television station is whether "the public interest, convenience, and necessity will be served . . . ." 47 U.S.C. § 309(a) (1970). "The regulatory scheme [for broadcast licensees] evolved slowly, but very early the licensee's role developed in terms of a 'public trustee' charged with the duty of fairly and impartially informing the public audience." CBS v. Democratic Nat'l Comm., 412 U.S. 94, 117 (1973).

Added to the power of prior censorship would be the power of subsequent censorship, and as copyright proprietors the communications corporations could control with impunity subsequent public access to the material they televise.[28]

The point here is not that the television industry is not entitled to protection of legitimate property interests. It is that to apply the present law of copyright to television would be to give the few owners of television facilities protection beyond their legitimate property interests; it would give them a monopoly not only of the expression of ideas, but of the expression of ideas by others and of the ideas themselves, precluding subsequent public access to them. The confusion in the law created by the positive law-natural law dichotomy renders the problem of copyright for television broader in dimension than is readily apparent. History can help us perceive the scope of those dimensions.

II. THE ENGLISH BACKGROUND

The Statute of Anne, the English Copyright Act of 1710,[29] which provided the statutory copyright to succeed the stationers' copyright, is almost surely the source of the ideas contained in the American copyright clause. Apart from the fact that the clause contains the five ideas expressed in the title of the English legislation—authors, writing, exclusive right, limited times, and learning—the English act served as a model for the copyright statutes of twelve of the thirteen states between 1783 and 1786[30] as well as for the Copyright Act of 1790.[31] The Statute of Anne, then, has particular importance for American copyright law, and it will be helpful to analyze that act in the context of conditions in the booktrade in 1710, when it was passed. When this is done, it becomes obvious that, contrary to common understanding, the act did not provide for an "author's copyright" and that, indeed, it was designed more as

28. The issue of subsequent access to material presented on television differs from, and is more fundamental than, the right of access to use the television facilities. On access to facilities, *see* Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967). *See also* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (upholding the constitutionality of the "Fairness Doctrine").

29. The Copyright Act of 1710, 8 Anne 1, c. 19. Under the contemporary calendar, the statute was enacted in 1709 (February) and became effective in 1710 (April), since the beginning of the year in England was March 25. It was not until 1752 that January 1st was designated as the beginning of the year in England by the Calendar Act of 1750. 24 Geo. 2, c. 23. By modern reckoning, the statute hoth was enacted and became effective in 1710.

30. For the compilation of these statutes see COPYRIGHT ENACTMENTS, Copyright Office Bull. No. 3 (Revised) (1973). Delaware was the only one of the thirteen states that did not enact a copyright statute.

31. 1 Stat. 124 (1790).

a trade regulation act to destroy the booksellers' monopoly than as a statute to protect the rights of authors.

A. *The Stationers' Copyright*

The old copyright was the stationers' copyright,[32] so called because it was developed by the members of the Stationers' Company, the London company to which all members of the booktrade belonged. The printing press, which William Caxton had introduced into England in the 1470's, became a powerful threat to the authoritarian Tudor monarchs, particularly in view of the religious differences that Henry VIII precipitated by his break with the Roman Catholic Church in 1530. Wise policy dictated that the press be controlled, and one of the most effective ways to accomplish this was to give a monopoly of printing to a company, which in turn would be responsible for the conduct of its members. Mary's grant of a charter to the Brotherhood of Stationers in 1557 and Elizabeth I's renewal of the charter in 1559 created the Stationers' Company for this purpose.[33]

As a royal company, the stationers could make rules and regulations to govern their affairs, and, of course, the charter secured their monopoly. To the stationers, the right to govern themselves was particularly important because of the nature of their trade. Once a book was printed, anyone with a printing press could reprint it with a minimum of effort. Obviously, rules and regulations were needed to prevent printers from printing the same works, and there is evidence that even before the charter was granted, the Brotherhood of Stationers had such rules.[34] These rules resulted in the stationers' copyright, a term in which the word copy was originally a noun, not a verb, implying not the right to copy a work, but the ownership of a manuscript.[35] As the owner of the copy, a stationer had the exclusive right to print and publish it. The incidents of this ownership, as well as the means of securing it, appear to have remained fairly constant throughout the existence of the stationers' copyright. Briefly, a stationer registered his "copie" in the Register

32. For a detailed history of the stationers' copyright see L. PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE (1968) [hereinafter cited as PATTERSON].

33. *See* note 5 *supra*.

34. An entry in the records of the company under the dates of December 9, 1554, to July 18, 1557, records a fine "for an offence Donne by master Wallye for conselying of the pryntyne of *a breafe Cronacle* contrary to our ordenances before he Ded presente the copye to the wardyns . . . ." 1 ARBER 45. *See* PATTERSON, *supra* note 32, at 42-43.

35. The meaning of the term copy, or "copie" is indicated by the following entry: ". . . entred by commundment from master warden Newberg vnder his own handwryting on ye backside of ye wrytten copie." 1 ARBER 440.

Books of the company and thereafter had the sole and exclusive right to publish that work, a right which was deemed to exist in perpetuity.[36] He could sell or assign his copy, but only to another member of the company. How the stationer first acquired the ownership of the "copie" appears not to have been a matter of major concern to the company, although in time it appears that the stationer would purchase the "copie" from the author.[37] The author, of course, had little bargaining power, because he was not a member of the Stationers' Company and, therefore, could not own the copyright, that is, the right to publish.

The stationers' copyright, then, was a private affair of the Stationers' Company, with which authors had nothing to do. Developed by and for printers and publishers, it was naturally designed to protect their interest, not the interest of authors, who merely supplied the raw material for the finished product. Copyright was, in effect, a trade regulation device to preserve order for printers and publishers and thereby to protect their monopoly. But the stationers must have felt insecure in both their monopoly and the efficacy of their rules and regulations as against non-members, for they continually sought governmental support for their copyright. They received it in the form of Star Chamber Decrees,[38] Ordinances during the Interregnum,[39] and, finally, the Licensing Act of 1662.[40] The government was interested not in protecting the property rights of the stationers, but in controlling the output of the press. Thus, the various acts of censorship merely made it illegal to print works in violation of the stationers' ordinances (and other laws), leaving the proprietary incidents of copyright to the company.[41] The stationers,

36. The early forms of the entries in the Stationers' Registers were for a license to print, with a notation of the fee. "Owyn Rogers ys lycensed to prynte a ballett Called *have pytie on the poore*." 1 ARBER 96. The form evolved into "Lycenced for his copie," *Id.* at 373, and finally, "Entred for his copie." 2 ARBER 513-36. The term copyright was not used in the records until 1701 and then only twice. 3 EYRE & RIVINGTON, A TRANSCRIPT OF THE REGISTERS OF THE WORSHIPFUL COMPANY OF STATIONERS, 1640-1708 A.D. 494, 496 (1914).

37. An example is the contract of John Milton to Samuel Symons for *Paradise Lost*. The contract recites that John Milton "hath given, granted, and assigned . . . unto the said Samuel Symons, his executors and assignes, All that Booke, Copy or Manuscript of a Poem intituled Paradise Lost, . . . now lately Licensed to be printed . . . ." The contract is transcribed in 6 A. MASSON, LIFE OF JOHN MILTON 10 (1946).

38. Star Chamber Decrees relating to the press were issued in 1556, transcribed at 1 ARBER 322; 1586, 2 ARBER 807; and 1637, 4 ARBER 528.

39. The principal ordinances during the Civil War Period and the Interregnum were the Ordinances of 1643, 1647 and 1649. 1 FIRTH & RAIT, ACTS AND ORDINANCES OF THE INTERREGNUM 184-87; 1021-23; 2 *id.* 245-54.

40. 13 & 14 Car. 2, c. 33. The Licensing Act is the Star Chamber Decree of 1637 with slight modifications.

41. For example, the Star Chamber Decree of 1637 in Item II required that works to be printed be first "entred into the Registers Booke of the Company of Stationers." 4 ARBER 530.

of course, were only too glad to serve as policemen of the press in return for the additional power they received from the censorship legislation.

Conditions in the booktrade had changed by 1694, when the final lapse of the Licensing Act of 1662 brought censorship to a conclusion in England. The trade was controlled not so much by the Stationers' Company as by the booksellers, the most powerful group within the company. Their power was derived from their monopoly of books, which was based on the stationers' perpetual copyright. Thus, the demise of legislative support for copyright caused them great concern. Without the support of the Licensing Act, the booksellers' property was in danger, and they naturally sought to have it renewed.[42] After this attempt failed, they tried to secure new legislation, petitioning for bills in 1703[43] and 1706[44] before finally succeeding in 1709[45] with the Statute of Anne. One reason for their failure was resentment against their monopoly;[46] one reason for their

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Item VII provided: "That no person or persons shall within this Kingdome, or elsewhere imprint, or cause to be imprinted, nor shall import or bring in, or cause to be imported or brought into this Kingdome, from, or out of any other His Maiesties Dominions, nor from other, or any parts beyond the Seas, any Copy, book or books, or part of any booke or bookes, printed beyond the seas, or elsewhere, which the said Company of Stationers, or any other person or persons haue, or shall by any Letters Patents, Order, or Entrance in their Register book, or otherwise, haue the right, priuiledge, authoritie, or allowance soly to print . . . ." 4 ARBER 531. Note also these provisions in the Licensing Act of 1662: "And be it further enacted by the authority aforesaid, That no person or persons shall within this kingdom, or elsewhere, imprint or cause to be imprinted, nor shall import or bring in, or cause to be imported or brought into this kingdom . . . any copy or copies, hook or books, or part of any book or books . . . which any person or persons by force or virtue of any letters patents granted or assigned, or which shall hereafter be granted or assigned to him or them, or (where the same are not granted by any letters patents) by force or virtue of any entry or entries thereof duly made or to be made in the register-book of the said company of stationers . . . ." 13 & 14 Car. 2, c. 33, § 5.

42. Petitions were submitted in March, 1694, 11 H.C. JOUR. 288; December, 1697, 12 H.C. JOUR. 3. On January 31, 1698, the House of Lords sent to Commons a bill entitled, "An act for the better Regulating of Printers, and Printing-Presses." 12 H.C. JOUR. 466. It was rejected on February 1, 1698. 12 H.C. JOUR. 468.

43. The petition in 1703 represents the last effort to revive censorship. The bill was to prevent "Licentiousness of the Press," 14 H.C. JOUR. 249, and was apparently finally disposed of on January 18, 1703, when committed to a committee of the whole house. 14 H.C. JOUR. 287.

44. 15 H.C. JOUR. 313 (1703).

45. 16 H.C. JOUR. 740 (1706).

46. The objections to the stationers' monopoly were perhaps most convincingly expressed in a statement, given in connection with the rejection of a bill for "Regulating of Printing and Printing-Presses" in 1695, found in the House of Commons Journal. 11 H.C. JOUR. 305-06. Under the bill, books were required to be entered in the register of the Stationers' Company, and of the eighteen objections stated to the bill, the most pertinent was that the stationers "are impowered to hinder the printing of all innocent and useful Books, and have an Opportunity to enter a title to themselves, and their Friends, for what belongs to, and is the Labour and Right of, others." When the Statute of Anne was finally enacted, it

success was acceptance of the argument that copyright was necessary to protect the author.[47]

B. The Statute of Anne

The Statute as it was enacted failed to give the booksellers exactly what they wanted—legislative support for the stationers' copyright as it existed. On this point, they were in a strong position, because the stationers' copyright was the only existing concept of copyright to use as a model for the new statutory copyright. To expect the draftsmen of the bill to ignore the incidents of a legal concept in existence for over a century and a half and that had been sanctioned by legislation for most of this period, would be unrealistic, and in fact, there is good evidence that the draftsmen used the Licensing Act of 1662 in preparing the bill that became the Statute of Anne. It is not unrealistic, however, to assume that the draftsmen would attempt to remove the objectionable features of the stationers' copyright or that the booksellers would attempt to retain these features. As one would expect, the final product was a compromise.

The objectionable features of the stationers' copyright were not the immediate proprietary rights, the exclusive rights to print, publish, and sell the copyrighted work, but the continued existence of such rights in perpetuity and the limitation of the right to copyright to members of the Stationers' Company. The new legislation thus retained the proprietary features of the stationers' copyright, but limited them in time and made copyright available to all persons. The compromise that appeased the booksellers was the continuation for a period of twenty-one years of the stationers' copyrights then in existence.

The Statute of Anne has for so long been viewed as an act to provide protection for the author by providing for an author's copyright that its real nature as a trade regulation statute to prevent the continuation of the booksellers' monopoly has been forgotten. A close examination of the act, a short one of eleven sections,[48]

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was drafted to deal with monopoly, as well as to bring order to the book trade.

47. The stationers in their lobbying for censorship legislation in earlier times had used the interest of the author as a prime reason for their request. Their reasoning was that if there were no copyright, the author could not be paid by the publisher, and "many Pieces of great worth and excellence will be strangled in the womb, or never conceived at all for the future." Petition of the Stationers' Company to Parliament in 1643, 1 ARBER 584, 587. The same basic argument was used in the petition in 1706 and 1709, the latter concluding with a request for leave "to bring in a Bill, for the securing of Property in such Books, as have been, or shall be, purchased from, or reserved to, the Authors thereof." 16 H.C. JOUR. 740 (1709).

48. Sections V, VI, VIII, and X have little bearing on the point under discussion. Section V provided for copies of copyrighted books to be sent to various libraries, a practice

demonstrates its real purpose.

The title of the statute explains in part the confusion. It is "An act for the encouragement of learning, by vesting copies of printed books in the authors or purchasers of such copies, during the times therein mentioned." The emphasis on authors was a tactical maneuver by the booksellers to overcome the resentment against them and their monopoly in order to secure passage of the act. The point later lawmakers overlooked in interpreting the statute is that the term author, except in one instance, is used in conjunction with a synonym for bookseller; for example, "purchasers of such copies," assigns of the author, or proprietors. In section XI, the renewal term of copyright is available only to the author, and only if he is living. While this was a real benefit to the author, it was also an effective way to limit the term of the copyright of the author's assigns—the booksellers. The one special benefit given to the author is thus wholly consistent with the view that the real purpose of the statute was to destroy or limit the monopoly of the booksellers while providing order for the booktrade. The pattern of the statute supports this view.

Section I of the statute provided for two kinds of copyright: (1) a copyright for books already printed, to last for twenty-one years from April 1710—an extension of the stationers' copyrights that was of no benefit to the author; and (2) a copyright for fourteen years for books not already printed. Acts of infringement included: printing, reprinting, importing, or selling the copyrighted work without "the consent of the proprietor or proprietors thereof" in writing. At most, these acts were only of indirect benefit to the author because the custom was for the bookseller to purchase the manuscript outright. The acts of infringement were clearly designed to protect the bookseller and were almost surely derived from the Licensing Act of 1662.

Section II reflects the influence of the stationers' copyright. Consistent with the rules of the company for securing copyright, it required that the work be entered before publication in "the register book of the Company of Stationers, in such manner as hath been usual . . . ." The language is similar to that in section III of the Licensing Act, which required that works to be published "be first entered in the Book of the Register of the Company of Stationers in *London*."

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that apparently originated in an agreement made in 1610 between the Stationers' Company and Sir Thomas Bodley W. Jackson. RECORDS OF THE COURT OF THE STATIONERS' COMPANY 1602 TO 1640, 48-49 (1957). Section VI provided for actions in the Court of Session in Scotland; Section VIII was procedural, providing for a general issue plea and that a successful defendant could recover his full costs; and Section X provided for a three month statute of limitations.

Section III provides one of the most important pieces of evidence that one aim of the statute was to destroy the booksellers' monopoly. Since copyright theretofore had been limited to members of the company, the real possibility existed that the clerk of the company might refuse to register a copyright for a nonmember. To avoid this risk, section III provided an alternative method for securing copyright by an advertisement in the *Gazette*. It further provided that the clerk refusing entry "shall, for any such offense, forfeit to the proprietor of such copy or copies the sum of twenty pounds . . . ." Section III thus made it clear that copyright was to be available to any person, a benefit to a much larger class than authors.

Section IV includes perhaps the most important piece of evidence of the trade regulation nature of the statute and the concern about monopoly—a provision for a system to control the prices of books. Any person was authorized to complain to certain named officials authorized to make inquiry and provide redress that the price of any book was unreasonable. The provisions were unduly cumbersome, however, and except possibly for their *in terrorem* effect, seem not to have been of any particular consequence since this section was repealed in 1739.[49] Nevertheless, the officials named to control the prices of books were substantially the same as those named to license books in paragraph III of the Licensing Act. Thus, it is almost certain that the draftsmen of the Statute of Anne used the Licensing Act in preparing the new legislation. Furthermore, since the Licensing Act was the Star Chamber Decree of 1637 only slightly modified, the relationship between the statutory copyright and the stationers' copyright is much closer than most have suspected.

Section VII and IX provide further evidence of this point. Section VII provided that nothing in the statute should be construed to prohibit the importation of any books "in *Greek* or *Latin*, or any other foreign language printed beyond the seas." The Licensing Act contained stringent regulations for the importation of books, requiring them to be imported through the Port of London and prohibiting the importation of any books in English. Section VII thus had the effect of dispelling any hint of censorship and of further limiting the monopoly of the booksellers, since the importing of copyrighted books without permission had been made an act of infringement.

Section IX of the statute is the most difficult to understand when read alone because its language appears to be contradictory. It reads:

49. 12 Geo. 2, c. 36 (1739).

> IX. Provided, that nothing in this act contained shall extend, or be construed to extend, either to prejudice or confirm any right that the said universities, or any of them, or any person or persons have, or claim to have, to the printing or reprinting any book or copy already printed, or hereafter to be printed.

The language is understood more easily if the word "right" is read to mean privilege or patent, for then it becomes clear that the paragraph refers to the printing patents granted by the monarch under the royal prerogative. The sovereign granted printing patents freely during the early days of the Stationers' Company,[50] and even the Statute of Monopolies,[51] which was passed in 1623 under James I and limited the granting of patents to a term of fourteen years, made an exception for printing patents. By 1710, however, the practice of granting printing patents had fallen into disuse, and section IX does no more than say that the statute shall not affect the printing patents in any way. That section IX does refer to printing patents, also called privileges, is demonstrated by the fact that its source is almost certainly Section XVIII of the Licensing Act, which reads:

> XVIII. Provided, always, that nothing in this Act contained shall be construed to extend to the prejudice or infringing of any just Rights and Priviledges of either of the two Universities of this Realm, touching and concerning the Licensing or Printing of Books in either of the said Universities.

The provisions of the legislation providing for the new statutory copyright, when analyzed in the context of conditions in the booktrade in 1710, constitute clear and convincing evidence that the copyright was primarily a trade regulation device. The primary purpose of the Statute of Anne was not to benefit authors, but to destroy the booksellers' monopoly and bring order to the booktrade.

C. The Battle of the Booksellers

Despite their failure to obtain all they desired, the booksellers had little cause for immediate concern, notwithstanding the clear intent and purpose of the statute. The new legislation made their monopoly, based on old copyrights, safe for at least twenty-one years, and their power was sufficiently strong that the right of the author, or other persons, to obtain a copyright was of little bother. Except for the renewal term, the booksellers had all the rights under the statute that an author had, and if the author chose not to sell his manuscript outright, the bookseller could choose not to publish.[52] Under the Statute of Anne, the booksellers could, and did,

50. *See* PATTERSON, *supra* note 32, Ch. 5.
51. 21 Jac. 1, c. 3 (1623).
52. "In general, he affirmed, where authors keep their own copyright they do not suc-

continue business as before.

Consequently, the eighteenth century controversy over the nature of copyright, aptly termed the "Battle of the Booksellers," which was to culminate with the decision in *Donaldson v. Beckett*[53] in 1774, did not begin until the 1730's, when the stationers' copyrights expired under the terms of the Statute of Anne. It was during this time that the notion of copyright as an author's right emerged, notwithstanding the total lack of evidence that copyright, despite its almost two hundred year existence, had ever been viewed as such. The question of the basis of copyright, in fact, seems not to have been litigated in any court until after the Statute of Anne. Furthermore, because prior to that act the press was almost continuously subject to regulations of censorship, for which copyright was a principal instrument, the idea that an author had a copyright in his writings based on his natural-law rights struck a hollow sound indeed.

Even so, the notion of an author's common-law copyright based on his natural rights as an author fell on fertile soil in the eighteenth century. This was the time of the natural rights of man, and the booksellers took full advantage of the new philosophy when the final end of the stationers' copyright came in 1731. At first, they attempted to secure new legislation from Parliament,[54] but failing in this, they turned to the courts. Their tactic was simple. The author, they argued, had a common-law copyright in his works separate and apart from the statutory copyright; this common-law copyright existed in perpetuity and, of course, it could be assigned to a bookseller. If their argument had been accepted, the booksellers would have successfully revived the perpetual stationers' copyright, and their monopoly would have been secure. The surprising thing is not that they failed, but that they almost succeeded. Indeed, they did succeed in part, for the House of Lords in the *Donaldson* case recog-

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ceed, and many books have been consigned to oblivion through the inattention and mismanagement of publishers, as most of them are envious of the success of such works as they do not turn to their own account. [Authors] should sell their copyrights, or be previously well acquainted with the characters of their publishers. That some works having a poor sale while the author had the copyright, had a rapid one when it was sold, was asserted by Lackington to be indisputable; they are purposely kept back, he said, that the booksellers might obtain the copyright for a trifle from the disappointed author." A. COLLINS, AUTHORSHIP IN THE DAYS OF JOHNSON 43 (1928) quoting from LACKINGTON, MEMOIRS 229.

53. 1 Eng. Rep. 837 (H.L. 1774).

54. The booksellers presented a petition to the House of Commons on March 3, 1974 (O.S.), 22 H.C. JOUR. 400, which passed a bill in May, 22 H.C. JOUR. 482. On February 11, 1736, the House of Commons gave the booksellers leave to bring another bill. 22 H.C. JOUR. 741. They tried again in 1738, 23 H.C. JOUR. 158 and finally in 1739, they got a bill passed against the importation of books which also amended the Statute of Anne by abolishing the section giving authority to limit the excessive prices of books. 12 Geo. 2, c. 36.

nized and accepted the notion of an author's common-law right in perpetuity until publication.

Several preliminary skirmishes in the Battle of the Booksellers were fought in chancery, in which the Court of Equity granted injunctions in favor of the bookseller,[55] but the two major battles were *Millar v. Taylor*[56] in the Court of King's Bench and *Donaldson v. Beckett*[57] in the House of Lords.

(1) *Millar v. Taylor*

In 1729 Andrew Millar, a London bookseller, purchased James Thompson's "The Seasons," first published in 1727, "for a valuable and full consideration . . . to him and his heirs and assigns for ever . . . ,"[58] and entered it in the Stationers' Register as his "whole and sole property."[59] On May 20, 1763, some thirty-six years after it was first published, Robert Taylor published and exposed to sale 1,000 copies of "The Seasons" without the license or consent of Andrew Millar, who had 1,000 copies remaining in his hands for sale. Millar sued for damages in the amount of two hundred pounds. The court held, in a three to one decision, that the author had a perpetual common-law copyright in his works after publication which was not taken away by the Statute of Anne and which he could assign to a bookseller. For the first time in some two hundred years of existence, copyright received the imprimatur of a common-law court. The booksellers had won a major victory: they had at last achieved judicial recognition of the old stationers' copyright to perpetuate their monopoly.

The *Millar* case, despite the fact that it was partially overturned five years later by the House of Lords in *Donaldson v. Beckett*, is perhaps the most influential case in Anglo-American copyright law. It is to this case that we can trace the positive law-natural law dichotomy that has plagued copyright law.

The case is a classic example of judicial legislation, wherein the

55. The booksellers sought, and were usually granted, preliminary injunctions in chancery without a full hearing. See the cases cited in counsel's argument in Donaldson v. Beckett, 1 Eng. Rep. 837, 842 (H.L. 1774). In Tonson v. Walker, 36 Eng. Rep. 1017, 1020 (Ch. 1752), Lord Chancellor Hardwicke expressed some doubt as to the propriety of granting these injunctions. In 1758, the booksellers resorted to the extreme of a collusive action at law in Tonson v. Collins, 96 Eng. Rep. 169 (C.P. 1761), which was dismissed for this reason after having been twice argued. In 1765, Lord Northington dissolved injunctions obtained by the assignee of an author after the expiration of the two terms allowed by the Statute of Anne. Osborne v. Donaldson, 28 Eng. Rep. 924 (Ch. 1765).

56. 98 Eng. Rep. 201 (K.B. 1769).

57. 1 Eng. Rep. 837 (H.L. 1774).

58. Millar v. Taylor, 98 Eng. Rep. 201, 203 (K.B. 1769).

59. *Id.* at 204.

court rejected the plain intent of a statute and substituted legal fictions in order to achieve a result the judges presumably felt was just—the recognition of the author's natural-law rights in his work. The three majority justices, Willes, Aston, and Lord Mansfield, relied on the Star Chamber Decrees of censorship, printing patents, the Licensing Act of 1662, ordinances of the Stationers' Company,[60] and the chancery cases to sustain the author's common-law copyright. Justice Yates, dissenting, dealt with the precedents in detail, refuted them all, and in summary made some telling points.[61] The appeal for protecting the rights of authors, however, was too strong, and Justice Yates was a minority of one.

To what extent the majority justices actually believed the precedents they relied upon we do not know, but it is almost certain that the real reason for their position was their belief in the justice of recognizing the author's common-law copyright based on natural law. Justice Willes said that the stationers' copyright could "stand upon no other foundation, than natural justice and common law."[62] Justice Aston relied upon "[t]he law of nature and truth, and the light of reason, and the common sense of mankind . . . ."[63] Lord Mansfield said, "The whole then must finally resolve in this question, 'whether it is agreeable to natural principles, moral justice and fitness, to allow him [the author] the copy, after publication, as well as before.' "[64]

The importance of the *Millar* case lies in the fact that it created the positive law-natural law dichotomy in copyright law, but its relevance for us lies in the judges' meaning of copyright, since at the

60. The doubtful status of the Licensing Act of 1662 had led the stationers to enact new ordinances in 1681 and 1694 to protect their property. *See id.* at 203-04.

61. For my own part, I cannot collect from any of these several instruments, any authorities that favour the present plaintiff. They were no security to the copy-rights of authors in general: nor can they account for the want to legal determinations in favour of the plaintiff's claim. The patents were enormous stretches of the prerogative, to raise a revenue, and to gratify particular favourites without the least regard to authors and new compositions. And all the rest of these authorities were founded on political views, to prevent (as they declare) heretical and seditious publications, etc. And the orders 'that all books should be entered in the register of the Stationers Company,' were to prevent improper publications; and have no view to establishing the right of copy to authors. The innocence or delinquency of the work, and not any private property in the authors, were the object of their inquiry. If the licenser did not approve the copy, he could stop the author himself from publishing his own composition. The institution of the licenser's office was, to guard against improper political publications. The by-laws of the Stationers Company protect none but their own members. What security then were all these instruments for the copyright of any author?

Id. at 241.

62. *Id.* at 207.

63. *Id.* at 222.

64. *Id.* at 253.

time the Constitution was drafted, the *Millar* case contained the most complete exposition on copyright then in existence. Although it was the positive law-natural law dichotomy that led to the development of copyright as a protection against plagiarism as well as piracy, it is clear that the majority judges viewed copyright only as a device to protect against piracy and not against the use of an author's ideas. Justice Willes noted that "[t]he name 'copy of a book' . . . has been used for ages as a term to signify the sole right of printing, publishing and selling . . ."[65] and commented that as to the identity of a book, "bona fide imitations, translations, and abridgments are different, and, in respect of the property, may be considered as new works . . . ."[66] Justice Aston asked: "Can it be conceived, that in purchasing a literary composition at a shop, the purchaser ever thought he bought the right to be the printer and seller of that specific work?"[67] Justice Mansfield defined the term: "I use the word 'copy,' in the technical sense in which that name or term has been used for ages, to signify an incorporeal right to the sole printing and publishing of somewhat [*sic*, something] intellectual, communicated letters."[68] Justice Yates, the dissenter, took the position that publication divests the author of his property rights, but the majority's view of the nature of copyright prevailed, and almost surely represents the concept of copyright embodied in our copyright clause. Although the *Donaldson* case overturned the holding in *Millar*, the House of Lords accepted the notion of copyright as an author's right and fixed the positive law-natural law dichotomy in Anglo-American jurisprudence.

(2) *Donaldson v. Beckett*

The case of *Donaldson v. Beckett*[69] was almost anticlimactic. By 1774, the great issue of literary property had been argued and debated for at least a quarter century. The arguments on both sides were familiar, and the *Donaldson* case did not result in any new ones. The issues involved clearly had become more political than legal; this was not a case to decide merely the rights of the litigants, but a case to make judicial legislation on a large scale. The Lords called upon the justices and barons of the common-law courts for advice on the five questions presented.[70] The final result was that

65. *Id.* at 206.
66. *Id.* at 205.
67. *Id.* at 222.
68. *Id.* at 251.
69. 1 Eng. Rep. 837 (H.L. 1774).
70. They were:
1. Whether an author of a book or literary composition had at common law "the sole right of

the Lords recognized the author's common-law copyright based on his natural rights until publication; thereafter, the author had only those rights that the Statute of Anne gave him.

The House of Lords thus divided copyright into two parts: copyright before publication and copyright after publication. The result was the judicial creation of the common-law copyright, based on principles of natural law, in addition to statutory copyright, a monopoly created by the legislature. In fact, the common-law copyright was not a copyright in the traditional meaning of the term—the right to print, reprint, publish, and vend—but a recognition of the proprietary interest of an author in his work before publication. There is, of course, no justification for denying the creator a proprietary interest in his creations, and the ruling on this point created no problem. The difficulty resulted because the author's proprietary interest under statutory copyright was seen as a continuation of his proprietary interest under the common-law copyright. Prior to the *Donaldson* case, no common-law copyright existed, and the stationer's copyright served to protect only the proprietary interest of the publisher; the Statute of Anne was not intended to change the nature of copyright in this respect. The failure of the House of Lords to recognize this point inevitably meant that the theory of common-law copyright in unpublished works as a natural right of the author would compete with the theory of copyright as a statutory monopoly granted at the will of the legislature. Only by distinguishing the common-law copyright as a right of the author from the statutory copyright as a trade regulation device to protect the publisher from rival publishers could the difficulty created by the natural law-positive law theories of copyright have been avoided. There was no other way to deal with the anomaly: the author's natural-law rights in his work by reason of creation become transmuted into monopoly rights protected only by statute once the work is published.

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first printing and publishing the same for sale," and a right of action against a person printing, publishing, and selling without his consent. Held, yes by a vote of 10 to 1.

2. If the author had such a right, whether law took it away when he published the book or literary composition and whether any person thereafter was free to reprint and sell the work. Held, no by a vote of 7 to 4.

3. Assuming the right at common law, whether it was taken away by the Statute of Anne, and whether an author was limited to the terms and conditions of that statute for his remedy. Held, yes by a vote of 6 to 5.

4. Whether an author of any literary composition and his assigns have the sole right of printing and publishing the same in perpetuity by the common law. Held, yes by a vote of 7 to 4.

5. Whether this right was restrained or taken away by the Statute of Anne. Held, yes by a vote of 6 to 5. 98 Eng. Rep. at 257-58.

Given the context of the *Donaldson* case, the monopoly of the booksellers, and the appeal of the natural rights of man, the decision could hardly have been otherwise. It was the only decision that would destroy the monopoly of the booksellers and take the natural rights of man into account. The unfortunate point, perhaps, is that the Statute of Anne did not receive a definitive judicial reading until sixty-four years after it was enacted. This delay meant, of course, that the House of Lords was more concerned about conditions in 1774 than conditions in 1710. Thus, it is not fair to say that the House of Lords misread the Statute of Anne; it is fair to say only that the judges did not read it from the perspective from which it was enacted. For them to have done so would have been almost impossible. At the time Parliament passed the statute, no author's copyright and no common-law copyright existed. Yet, by the time the statute got to the House of Lords, the notion of an author's common-law copyright was a principal issue in the case.

The *Millar* and *Donaldson* cases make more sense if we view them as dealing with questions of ought rather than is: the problem was not whether the author's common-law copyright did exist, but whether it should exist. Had the courts been given an opportunity at an earlier time and under different circumstances, there is little doubt that they would have recognized and developed a true common-law copyright for the author. At the same time, they would have shaped that copyright for the author rather than for the publisher. There is, of course, nothing wrong with a publisher's copyright as such. The *Millar* and *Donaldson* cases, however, gave us the worst of both worlds: a publisher's copyright in substance; an author's copyright in name. The fault of the two cases was not the recognition of the author's copyright, but the inconsistency they created by recognizing a publisher's copyright as an author's copyright, thereby giving copyright both a positive-law and a natural-law basis. The combination of the two disparate theories of law in support of a single legal concept inevitably created confusion in the law, because the theories represented different policies: positive law, the policy of protecting the public against monopoly; natural law, the policy of protecting the author. The consequences of this confusion become apparent when we examine the American background.

III. The American Background

The *Millar* and *Donaldson* cases meant that the English copyright inherited by this country had an unsatisfactory conceptual basis, as manifested by the divided views of the Justices on the

nature of copyright in *Wheaton v. Peters*,[71] the first copyright case decided by the Supreme Court. Justice McLean, speaking for the majority, made it clear that copyright was the grant of a monopoly by the legislature and that the statute was to be strictly followed in securing the benefit of the monopoly. Justice Thompson, dissenting, was equally firm in his conviction that the copyright statute was "to protect and secure a pre-existing right, founded on the eternal rules and principles of natural right and justice, and recognized by the common law."[72]

Justice McLean's positive-law view of copyright and Justice Thompson's natural-law view made the conceptual dilemma created by the English a part of American jurisprudence. One major reason for the persistence of the problem, perhaps, is that the copyright clause of the Constitution[73] can be interpreted to support either a positive-law or natural-law basis for copyright and thus supports both.

The clause gives Congress the power to promote the progress of science by securing for authors the exclusive right to their writings for limited times. The authority to legislate for a particular purpose regarding particular subject matter for a limited class of persons suggests that copyright is solely a statutory right. Yet the limitation of the power to secure the rights of authors to their writings suggests that copyright is predicated on the fact of creation and is intended to protect the already existing natural rights of authors. Moreover, the common-law copyright of the author, his proprietary interest in his work after creation and before publication, is clearly based on natural law.

If either the positive-law or the natural-law theory had prevailed, copyright law would be a much less complex, and less interesting, subject than it is, but in fact, neither did. The major factor that prevented the positive-law theory from prevailing over the natural-law theory was the idea that statutory copyright was both developed and designed to protect the rights of the author, an attractive notion that could never quite dispel the concern over monopoly that was the basis of the positive-law theory. Following the lead of the *Wheaton* case, American courts, until the last quarter of the nineteenth century generally relied on the positive-law view of copyright. Nevertheless, the idea that copyright was a natural right of the author persisted and began to be a factor in the decisions. Even as they became more liberal in construing copyright,

71. 33 U.S. (8 Pet.) 591 (1834).
72. *Id.* at 684.
73. U.S. CONST. art. I, § 8, cl. 8.

however, when the real threat of monopoly was present, the courts retreated.[74]

The point that neither the judges nor the legislatures articulated was that the monopoly about which they manifested so much concern was not the monopoly of the author, but the monopoly of the publisher. The history of English copyright almost inevitably precluded such a recognition, for even though the copyright was usually held by a publisher, all the available source material indicated that copyright was an author's right, and the publisher held as assignee of the author. Consequently, instead of recognizing that copyright is concerned with the interest of three groups—the author, the publisher, and the public—the lawmakers dealt with it in terms of only two groups—the author and the public. Protection for authors meant protection for their natural rights; thus, it was perhaps inevitable that the monopoly of the author's copyright would expand at the expense of the public's rights. As it happened, the publishers, as assignees of the authors' rights, were the principal beneficiaries. The pattern of copyright legislation demonstrates why.

Copyright has been before Congress continually since The Copyright Act of 1790,[75] and the increased scope of the monopoly of copyright can be easily traced in the statutes through the expanded subject matter, the increased term, the nature of the copyright proprietor, and the control of the copyright owner over the use of the subject work. These last two developments, which resulted from the enactment of the employee-for-hire doctrine and the exclusive right to copy in the 1909 act,[76] were the most far reaching and subtle changes.

Prior to 1909, a copyright was available only to the author or proprietor of the work (or to the designer or inventor in the 1870 Act).[77] The 1909 act provided that employers could be classed as authors if the work was done for hire.[78] In form, the change was consistent with practice and with the English Statute of Anne. Under the Statute of Anne copyright was intended primarily for proprietors, that is, publishers, rather than authors; the only provision in the statute unique to authors was the right to a renewal term "if then living."[79] In substance, however, the change was more sig-

74. *See, e.g.*, White-Smith Music Pub. Co. v. Apollo Co., 209 U.S. 1 (1908) (involving the new, if somewhat primitive, technology of pianola rolls).

75. 1 Stat. 124 (1790); *see* T. SOLBERG, COPYRIGHT IN CONGRESS 1789-1904, Copyright Office Bull. No. 8 (1905).

76. 35 Stat. 1034 (1909), *as amended*, 17 U.S.C. §§ 1(a), 26 (1970).

77. 16 Stat. 212 (1870).

78. 17 U.S.C. § 26 (1970).

79. The Copyright Act of 1710, 8 Anne 1, c. 19, § 11.

nificant, for copyright had ceased to be viewed primarily as a statutory monopoly and had come to be viewed as an author's right. The change meant that the benefit of the expanded scope of the copyright monopoly ostensibly intended for the author would accrue to corporations, which usually represent greater concentrations of economic and other power than mere authors or copyright proprietors.

The addition in the same statute of the exclusive right "to copy" the copyrighted work made the employee-for-hire doctrine even more significant, for it was this change which made the copyright monopoly a true monopoly. The way this right came into the statute is both instructive and interesting and warrants detailed consideration. Until the 1909 statute, the copyright acts distinguished the rights of the copyright proprietor from the acts of infringement. The 1790 act limited copyright to maps, (marine) charts, and books, and the rights protected were the rights to print, reprint, publish, and vend.[80] The acts of infringement were printing, reprinting, publishing, vending, *and importing* the copyrighted work. The notion of preventing one from copying a copyrighted work other than by printing first appeared in 1802, in the amendment that added engraving and prints to copyright.[81] This amendment limited the rights to the right to print, reprint, publish, and vend, as in the case of books, but the acts constituting infringement included the copying of these works, a logical extension to insure adequate protection. Section 3 provided sanctions against whoever "shall engrave, etch or work . . . or in any manner copy or sell" the copyrighted work (engravings and prints).[82] In short, the draftsmen of the amendment made sure that copying as an infringement was limited to engravings and prints.

The first major revision of the statute, in 1831,[83] added musical compositions and retained the distinction between the rights of the copyright proprietor and the acts of infringement. The rights of the copyright proprietor of a "book or books, map, chart, musical composition, print, cut, or engraving" were the rights to print, publish, and vend.[84] The acts of infringement for a book consisted of printing, publishing, importing, or selling;[85] the acts of infringement for a print, map, chart, or musical composition were engraving, etching,

80. 1 Stat. 124 (1790).
81. 2 Stat. 171 (1802).
82. *Id.*
83. 4 Stat. 436 (1831).
84. *Id.*
85. *Id.* at 437.

importing, selling, copying, or vending.[86] The nature of the work continued to determine the scope of protection. Thus, the statute was amended again in 1856 to provide copyright for dramatic compositions, and this amendment gave the copyright proprietor the right to print and publish and also the right to act, perform, or represent the same.[87] In 1865, the act was further amended to provide copyright for photographs and negatives, including the same rights as applied "to the authors of prints and engravings."[88]

The second major revision of the copyright act was enacted in 1870,[89] which was enacted as revised in 1873 as Title 60 of "The Revised Statutes of the United States."[90] The 1873 revision did not change the substance of the 1870 act, which had combined both the subject matter of copyright and the rights of the copyright proprietor into one section and added "painting, drawing, chromo, statue, statuary, and . . . models or designs intended to be perfected as works of the fine arts . . ." to books, maps, charts, dramas, musical compositions, engravings, cuts, prints, and photographs and negatives as subjects of copyright. The rights given were the "sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same; and in the case of a dramatic composition, of publicly performing or representing it . . . and authors may reserve the right to dramatize or to translate their own works."[91]

The language of the section seems to apply all the rights of the copyright proprietor to all kinds of works. This was not so, as indicated by the fact that the acts of infringement for books continued to be distinguished from acts of infringement for other works. Thus, for books, damages could be awarded only if an infringer printed, published, imported, or sold the work.[92] For maps, charts, musical compositions, prints, photographs, chromos, paintings, drawings, statuary, models, or designs intended to be perfected as a work of the fine arts, however, the acts of infringement were engraving, etching, working, copying, printing, publishing, importing, or selling the work.[93] Moreover, for dramatic compositions publicly performing or representing the work without the consent of the copyright proprietor was an infringement.[94]

86. *Id.* at 438.
87. 11 Stat. 138 (1856).
88. 13 Stat. 540 (1865).
89. 16 Stat. 198 (1870).
90. 60 U.S. Rev. Stat. §§ 957-60 (2d ed. 1878).
91. 60 U.S. Rev. Stat. § 4952 (1873), *amending* 16 Stat. 212 (1870).
92. *Id.*, § 4964, *amending* 16 Stat. 214.
93. *Id.*, § 4965, *amending* 16 Stat. 214.
94. *Id.*, § 4966, *amending* 16 Stat. 214.

The 1909 statute (the present law) gave the copyright proprietor "the exclusive right: (a) To print, reprint, publish, copy, and vend the copyrighted work;"[95] these are also the acts of infringement. The addition of the exclusive right to copy signalled a significant change in the scope of the copyright proprietor's power. There is, of course, considerable difference between the right to print or publish a book and the right to copy a book. While one who prints and publishes a copyrighted work necessarily copies it, one who copies a work does not necessarily print or publish it. The language of the copyright acts prior to 1909 clearly protected the copyright proprietor only against the use of a work by a *competitor*; the 1909 act, with the addition of the exclusive right to copy, gave the copyright proprietor the power to control the use of books by an individual purchaser.

The granting of the exclusive right to copy in the 1909 act remains the single most significant change in copyright law in this country, yet the draftsmen of the statute apparently had little awareness of its importance. The Committee Report on the Bill states merely:

> Subsection (a) of section 1 adopts without change the phraseology of section 4952 of the Revised Statutes, and this, with the insertion of the word 'copy' practically adopts the phraseology of the first copyright act Congress ever passed—that of 1790.[96]

The somewhat bland assertion in the committee report is indicative of the reception given to the change. Perhaps one reason for the lack of concern is that the draftsmen of the change assumed that the right to vend limited the rights to print, reprint, publish, and copy. Thus, if the statute had been construed to mean that the copyright proprietor had the exclusive right to print and to vend, to reprint and to vend, to publish and to vend, or to copy and to vend, the addition of the right to copy would not have resulted in a major change in the law. Such an interpretation would have been consistent with the terms print, reprint, and publish. Moreover, the policy in the copyright clause of promoting learning implies that the *quid pro quo* of copyright is making copies available to the public.

Although the nineteenth century case law on copyright is so rich in variations on the same theme that one can find cases to support almost any proposition relating to copyright, a reasonable synthesis suggests that copyright functioned to protect the copyright proprietor against competitive injury. The right to print, re-

95. 17 U.S.C. § 1(a) (1970).
96. H.R. REP. No. 2222, 60th Cong., 2d Sess., 4 (1909).

print, and publish invariably were dealt with in the context of protection for profit. While one could print, reprint, or publish a work without vending or attempting to vend it, not many persons would be willing to go to this expense. The judicial treatment of copyright before the 1909 act thus had justified the inference that the right to vend would be a limitation on the exclusive right to copy.

Viewed from this perspective, the addition of the right to copy amounted to a minor correction to make the protection from competitive injury more complete. The notion of copying, after all, had been in the statute since 1802 when Congress made prints and engravings subject to copyright, and a pirated edition of a copyrighted work did involve copying. Even so, giving the copyright proprietor the exclusive right to copy literary works, though a seemingly natural development, changed the nature of copyright law because the right to copy became an absolute right unrelated to the right to vend. Prior to 1909 the primary purpose of copyright was to protect the copyright proprietor against piracy by other publishers; after 1909 copyright was used to protect authors against plagiarism by other authors and, more realistically, to protect publishers against plagiarism by the authors of other publishers and to limit the public's use of the copyrighted work.

In the nineteenth century, literary piracy was equated with copyright infringement,[97] and the meaning of piracy was defined to protect the economic interests of the copyright proprietor. The principle that an abridgment of a work did not constitute an infringement of copyright, for example, was accepted, but the courts limited this principle to bona fide abridgments.[98] As one court explained, "If the leading design is truly to abridge and cheapen the price, and that by mental labor is faithfully done, it is no ground for prosecution by the owner of a copyright of the principal work . . . . But it is otherwise, if the abridgment or similar work be colorable and a mere substitute."[99] As this language implies, there were two requirements for literary piracy: copying and placing the piratical work in competition with the original work. A good statement of the law on this point is found in *Drury v. Ewing*,[100] which can be summarized as follows: if the piratical work renders the original "less valuable by superseding its use in any degree, the right of the author is infringed."[101] It is not necessary to copy the whole work or even a

97. E. DRONE, COPYRIGHT 383 (1879).

98. Gray v. Russell, 10 F. Cas. 1035, 1038 (No. 5,728) (C.C.D. Mass. 1839).

99. Webb v. Powers, 29 F. Cas. 511, 519 (No. 17,323) (C.C.D. Mass. 1847).

100. 7 F. Cas. 1113 (No. 4,095) (C.C.S.D. Ohio 1862).

101. *Id.* at 1116, quoting Story v. Holcomb, 23 F. Cas. 171 (No. 13,497) (C.C.D. Ohio 1847).

large portion of it, for, "[i]f so much is taken that the value of the original is sensibly diminished, or the labors of the original author substantially, to an injurious extent, appropriated by another, that is sufficient in point of law to constitute a piracy *pro tanto*."[102] The test of piracy is "whether the defendant has in fact used the plan, arrangements, and illustrations of the plaintiff as the model of his own book, with colorable alterations and variations only, to disguise the use thereof."[103] The question is whether the piratical work "is intended to supersede the other in the market with the same class of readers and purchasers by introducing no considerable new matter, or little or nothing new except colorable deviations."[104]

The copying of which the courts spoke was not based on the exclusive right of the copyright proprietor to copy, but on the exclusive right to print. When the copying involved considerable mental effort, as a translation, there was no infringement. Thus, in the famous case of *Stowe v. Thomas*,[105] the court held that a German translation of *Uncle Tom's Cabin* was not an infringement and said: "[A]n author's exclusive property in a literary composition or his copyright, consists only in a right to multiply copies of his book, and enjoy the profits therefrom, and not in the exclusive right to his conceptions . . . ."[106] Only a few years later another court stated that after an author has published "the only property which he reserves to himself, and which the law gives him under such circumstances, is the exclusive right to multiply the copies of that particular composition of characters which exhibits to others the ideas intended to be conveyed."[107]

As this brief sampling of the cases suggests, the copyright statute functioned prior to 1909 as a statute of unfair competition, with misappropriation as its rationale. "If he [defendant] has copied any part of the complainant's book, he has infringed the copyright. He has no right to take, *for the purposes of a rival publication*, the results of the labor and expense incurred by complainant, and thereby save himself the labor and expense of working out and arriving at these results by some independent road."[108] As another court explained: "The act of congress secures to the proprietor of the copyright the 'sole liberty' of printing, etc., and vending the copy-

102. *Id.*, citing Folsom v. Marsh, 9 F. Cas. 342 (No. 4,901) (C.C.D. Mass. 1841).
103. *Id.*, quoting Emerson v. Davies, 8 Fed. Cas. 615 (No. 4,436) (C.C.D. Mass. 1845).
104. *Id.*, citing Webb v. Powers, 29 F. Cas. 511, 519 (No. 17,323) (C.C.D. Mass. 1847).
105. 23 F. Cas. 201 (No. 13,514) (C.C.E.D. Pa. 1853).
106. *Id.* at 207.
107. Greene v. Bishop, 10 F. Cas. 1128, 1133-34 (No. 5,763) (C.C.D. Mass. 1858).
108. List Pub. Co. v. Keller, 30 F. 772, 773 (C.C.S.D. N.Y. 1887) (emphasis added).

righted book, and this certainly is inconsistent with a right in any other person to *print and vend* material and valuable proportions of such work taken *verbatim* therefrom."[109] The misappropriation rationale explained the attitude toward the purchaser's use of a book:

> [T]he effect of a copyright is not to prevent any reasonable use of the book which is sold. I go to a bookstore, and I buy a book which has been copyrighted. I may use the book for reference, study, reading, lending, *copying passages from it at my will. I may not duplicate that book, and thus put it upon the market,* for in so doing I would infringe the copyright. But merely taking extracts from it, merely using it, in no manner infringes upon the copyright.[110]

This statement expresses a fair and reasonable position on copyright law, and we can justifiably assume that Congress did not intend to change the law in this respect by the addition of the exclusive right to copy. Unfortunately, the right to copy became an absolute right, unrelated to the problem of unfair competition to which it was directed. So construed, it increased the power of the copyright proprietor to control the use of the work by the individual purchaser, as demonstrated by this copyright notice found on many books:

> All rights reserved including the right to reproduce this book or parts thereof in any form.

Xerox, IBM, and other copier manufacturers have provided new dimensions to the problem of the right to copy,[111] but the law makers of 1909 did not have photocopying in mind, and the change in the nature of copyright law occurred long before Xerox arrived on the scene. Moreover, if printing a work constitutes copying, in this instance copying constitutes printing; thus, the problem of photocopying would exist without the exclusive right to copy in the statute. The fundamental question remains the same: does photocopying of copyrighted materials constitute unfair competition?

The change made by the right to copy was more basic than this. It meant that copyright was no longer to be limited either in theory or in fact to the protection of the expression of ideas, but was to extend to the protection of ideas themselves. While, earlier cases protected ideas, they did so on the basis of unfair competition. With the right to copy as an absolute right, unfair competition ceased to be a controlling factor, and copyright infringement ceased to be a

109. Reed v. Holliday, 19 F. 325, 327 (C.C.W.D. Pa. 1884) (emphasis added).

110. Stover v. Lathrop, 33 F. 348, 349 (C.C.D. Colo. 1888) (emphasis added).

111. *See* Williams & Wilkins Co. v. United States, 172 U.S.P.Q. 672 (Comm'r Ct. Cl. 1972), *rev'd*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd*, 402 U.S. 376 (1975) (the Court was equally divided).

matter of piracy or plagiarism of words and became a matter of the piracy and plagiarism of ideas.

Since ideas are most commonly expressed in words, it is difficult to articulate the distinction between the expression of ideas, which the courts say copyright protects, and the ideas themselves, to which the courts deny copyright protection. The comprehensive nature of copying makes it impossible to maintain the distinction unless the term copying is defined or limited in some way. The 1972 sound recording amendment to the copyright statute provides an example of both the distinction between the expression of ideas and the ideas themselves and the effect of limiting the term "copying." That amendment provides for a copyright of recordings that protects only the sounds as they are actually fixed; it does not prevent another producer from making a similar recording.[112] The copyright of sound recordings, in other words, specifically protects from piracy the expression of the ideas, but it expressly permits the use of the idea, which is plagiarism, in the making of a similar recording. But this limitation is unique to recordings and does not apply to other copyrighted works.

The extent to which copyright today does protect against the plagiarism of ideas is indicated by the doctrine of liability for unconscious copying. Announcing this doctrine in *Fred Fisher, Inc. v. Dillinghams*,[113] only fifteen years after the copyright act of 1909, Judge Learned Hand, recognized as this country's outstanding judge in copyright law, reasoned: "Once it appears that another has in fact used the copyright as the source of his production, he has invaded the author's rights. It is no excuse that in so doing his memory has played him a trick."[114]

Another of Judge Hand's famous opinions, *Sheldon v. Metro-Goldwyn Pictures Corp.*,[115] further demonstrates the extent to which copyright protects ideas. In that case, defendant's movie infringed plaintiff's play, which had been based on Madeleine Smith's trial for the murder of her lover in Scotland in 1857, the proceedings of which had been published in book form in 1927 and which also had been used for a novel. Judge Hand said: "True, much of the picture owes nothing to the play; some of it is plainly drawn from the novel; but that is entirely immaterial; it is enough that substantial parts were lifted; no plagiarist can excuse the wrong by showing how much of his work he did not pirate."[116] Similarly, in *Detective Com-*

112. 17 U.S.C. § 1(f) (1971).
113. 298 F. 145 (S.D.N.Y. 1924).
114. *Id.* at 148.
115. 81 F.2d 49 (2d Cir. 1936).
116. *Id.* at 56.

ics, Inc. v. Bruns Pub., Inc.,[117] Augustus N. Hand held that Wonderman infringed Superman.

The point is not that the decisions were wrong, but that copyright does give the copyright proprietor a monopoly of the ideas expressed in the work. The problem is that the exclusive right to copy is not merely a rule of law; it is a principle that gives the copyright proprietor an unnecessarily broad power of control. Thus, the right to copy can be analogized to another principle of law often viewed as a rule: the tort principle that one is liable when his negligence results in damage to another. The difference is that negligence is a social evil, while copying may or may not be; there are no specific guidelines by which to distinguish desirable from undesirable copying. By implication, the appropriate guideline seems to be misappropriation for profit, for in both the *Sheldon* and the *Detective Comics* cases the defendant was guilty of a consciously designed course of conduct to appropriate plaintiff's ideas for profit. Regardless of whether this should be permitted, definitive guidelines should be available for the implementation of the principle. The guidelines were present in the copyright law before the 1909 act, but the exclusive right to copy had the effect of removing them. The reason for this apparently unintended result seems to have been the prevalent fiction that copyright is designed primarily to protect the author. To protect a publisher from the use of ideas in the work he merely prints and sells to the public is one thing; to protect an author from the use of ideas in the work he creates is an entirely different situation. Judge Hand's use of the term "author's rights" in the *Fred Fisher* case is more instructive on this point than a casual reading suggests.

Six years before the 1909 act Justice Holmes decided that copyright protection was not to be limited to the fine arts when he decided that a circus poster could be copyrighted. His language illustrates the power of the idea of protecting the creative work of the author:

> Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone. That something he may copyright unless there is a restriction in the words of the act.[118]

The act, of course, did contain restrictive words, which provided: "in the construction of this act, the words 'engraving,' 'cut,' and 'print' shall be applied only to pictorial illustrations or works

117. Detective Comics, Inc. v. Bruns Pub., Inc., 111 F.2d 432 (2d Cir. 1940).
118. Bleistein v. Donaldson Lith. Co., 188 U.S. 239, 250 (1903).

connected with the fine arts." Some fifty years after Justice Holmes' eloquent languange, we find echoes in a rather similar case, *Mazer v. Stein*,[119] in which the issue was the copyrightability of a statuette of a Balinese dancer used for lamp bases. The court said:

> The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in "Science and useful Arts." *Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.*[120]

Thus, despite the positive-law theory to which Congress purported to adhere, the natural-law theory in the interest of the author proved to be the principle through which copyright developed. It led to vesting in the copyright proprietor the exclusive right to copy, which proved to be the most fertile basis for the courts' reasoning in expanding copyright protection. Yet, the idea that copyright is an author's right was a product not of authors, but of publishers who were seeking to protect their monopoly, and it was this idea that obscured the nature of copyright as a law of unfair competition.

IV. Copyright and the Law of Unfair Competition

The copyright clause gives Congress the power to secure to authors the exclusive right to their writings for limited times. In this country, therefore, copyright has been viewed as a matter of course to be an author's right. The epithet has made it appear that copyright law is a unique and *sui generis* body of law devoted to encouraging and protecting creative endeavors. In fact, since Congress first exercised the power in 1790, the statutes have been better designed to encourage the development of the publishing industry than to protect creative efforts. The copyright act of 1790, for example, expressly excluded the works of foreign authors from the protection of the statute,[121] a definite boon to publishers but small encouragement to authors. The limitation of the early American copyright to the rights to print, reprint, publish, and vend, with the corollary that other versions of a copyrighted work, such as abridgements and translations, did not constitute infringement demonstrates a pecu-

119. 347 U.S. 201 (1954).

120. *Id.* at 219 (emphasis added).

121. 1 Stat. 124 (1790). The statute permitted residents to obtain a copyright, § 1, but provided that nothing in the act was to prevent the importing and publishing within the United States of books published by a noncitizen in foreign parts or places, § 5. The source of this provision may have been § VII of the Statute of Anne, whicb provided that nothing in the act should prohibit the importation of books in foreign langnages printed beyond the seas. The Copyright Act of 1710, 8 Anne, c. 19 (1709). More likely, the source is 12 Geo. II, c. 36, passed in 1739 to prohibit the importation of books as a protection for the booktrade.

liar type of concern for the interest of the author in his work. While almost all would agree that an unauthorized abridgement or translation of a work should be an offense against the author, it does not follow that it should be an offense against a publisher. Furthermore, it is difficult to see how classifying employers as authors benefits the author.

The point, of course, is that copyright statutes from the time of the Statute of Anne have been trade regulation statutes. Moreover, if "unfair competition" is a term of art, as most agree it is,[122] copyright law itself is a highly specialized law of unfair competition based on statutory grounds rather than common law. The extent to which this is so is shown in the use of copyright law to extend protection to objects of commerce bearing little, if any, relation to learning. The copyrighted articles listed by Mr. Justice Douglas in *Mazer v. Stein*—"statuettes, book ends, clocks, lamps, door knockers, candlesticks, inkstands, chandeliers, piggy banks, sundials, salt and pepper shakers, fish bowls, casseroles, and ash trays"[123]—may all deserve the protection of copyright, but by most standards they contribute little to the promotion of knowledge.

The traditional basis of unfair competition, of course, is "passing off,"[124] and the traditional basis of copyright infringement is misappropriation, that is, the printing of another man's copy.[125] Since protection against unfair competition was the basis of both federal copyright and the state law of unfair competition, one would expect to find cases in which the courts would resort to common-law doctrines, in the absence of copyright protection. This happened in many cases,[126] but the most important example of substituting the law of unfair competition for copyright protection is found in *International News Service v. Associated Press*,[127] in which the Supreme Court relied on the misappropriation rationale of copyright as a basis of the common law of unfair competition. The Court in the *INS* case used the law of unfair competition to grant relief for what was in fact a copyright problem because the subject matter of

122. 1 CALLMAN, THE LAW OF UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 4.1, at 108 (3d ed. 1967) [hereinafter cited as CALLMAN].

123. 347 U.S. at 221 (1954).

124. 1 CALLMAN, § 4.1, at 108-28.

125. This is true not only for statutory copyright, but for common law copyright as well. As Judge Learned Hand pointed out in his dissent in Capitol Records, Inc. v. Mercury Records Corp., 221 F.2d 657, 666-67 (2d Cir. 1955), to allow unfair competition protection is in effect granting state copyright benefits without the protection of federal limitations.

126. *See, e.g.*, Application of Cooper, 254 F.2d 611 (C.C.P.A. 1958); Grove Press, Inc. v. Collectors Pub., Inc., 264 F. Supp. 603 (C.D. Calif. 1967); Bond Buyer v. Dealers Digest Pub. Co., Inc., 25 App. Div. 2d 158, 267 N.Y.S.2d 944 (1966).

127. 248 U.S. 215 (1918).

the suit involved news dispatches, which are writings. The litigation developed because International News Service took news stories from a competing news-gathering organization, the Associated Press, and sent them to its own subscribers as INS news reports. INS had resorted to this practice because its war correspondents had been excluded from the war zones for breaching security regulations. The different time zones in the country made INS efforts practical, and presumably profitable, to the discomfort of its rival.

Theoretically but not practically, the AP could have copyrighted its news reports, and from a legal standpoint, its failure to do so placed those reports in the public domain after publication. Indeed, this point was not only established law, it was a fundamental principle of copyright—the very point decided in England in the *Donaldson* case in 1744 and affirmed in the United States in the *Wheaton* case in 1834. The Supreme Court in *INS*, of course, was fully aware of the absence of a copyright and also of the public interest with which news reports are invested. Even so, the Court recognized a quasi-property interest in the reports *as between competitors* and granted relief to the AP on the ground that INS had misappropriated AP's property. The relief granted was not wholly consistent with the rights of a copyright proprietor, but in view of the subject matter, one is justified in assuming that a copyright would have made little difference.

The consequences of assimilating the misappropriation doctrine of copyright infringement into the common law of unfair competition would not be apparent until the tape piracy cases of the 1960's. In the meantime, the Supreme Court decided *Sears, Roebuck & Co. v. Stiffel Co.*,[128] and *Compco Corp. v. Day Brite Lighting, Inc.*,[129] which denied states the use of the passing-off doctrine of unfair competition. Although the issues in those cases involved patent law, the question as framed by the Court was: "whether a State's unfair competition law can, consistently with the federal patent laws, impose liability for or prohibit the copying of an article which is protected by neither a federal patent nor a copyright."[130] The Court said no, and Justice Black in his opinion brought copyright within the scope of the Court's holding that the state law of unfair competition could not do what federal copyright law would not do. The cases have caused much comment, and in view of recent decisions, their implications are in doubt,[131] but it seems reasonably

128. 376 U.S. 225 (1964).
129. 376 U.S. 234 (1964).
130. 376 U.S. 225 (1964).
131. *See* Kewanee v. Bicron Oil Co., 416 U.S. 470 (1974); Goldstein v. California, 412 U.S. 546 (1973).

clear that the Court was doing no more than recognizing copyright as a law of trade regulation and statutory unfair competition. For both state and federal law to provide complementary systems of monopoly on similar bases was too much.

In view of the Supreme Court's rulings in the *Sears* and *Compco* cases, it is interesting to note that courts generally had not given the misappropriation rationale of the *INS* case a favorable reception. The law of copyright already was fulfilling the function of the misappropriation doctrine. Moreover, the copyright statute provided definitive guidelines on the legal rights of a plaintiff, whereas the common law of unfair competition did not. To have adopted the misappropriation rationale would have been to grant a common-law monopoly on the basis of subjective standards. What practices were unfair depended on the legal rights of the plaintiff, but the scope of these legal rights had to be determined by what was unfair. The problem presented a classic case of circular reasoning, and many judges refused to get on the merry-go-round.

In one sense, the misappropriation doctrine was a solution in search of a problem; the new technology of recording provided it. In the absence of copyright protection, the record producers prevailed upon the courts to give them relief on the basis of the *INS* rationale. The misappropriation doctrine had, in fact, been used prior to the *INS* case to prevent piracy,[132] but it was not until the 1960's, when the technology of recording had developed sufficiently to make piracy both easy and profitable, that the courts began to use the doctrine extensively.[133] Before then the most significant case adopting the misappropriation rationale was *Metropolitan Opera Ass'n, Inc. v. Wagner-Nichols Recorder Corp.*,[134] in which the court enjoined the defendant from recording "off-the-air" the Metropolitan Opera radio broadcasts and selling records of the broadcast.

The *Metropolitan Opera* case was similar to the *INS* case in that the conduct of defendants in both cases reached the level of unfairness that many would characterize as parasitical thievery. In neither case did the defendant make any contribution to the final product other than the effort required to reproduce it. Each simply appropriated the plaintiff's finished product and sold it, and it was this fact that enabled courts to avoid the impact of the subsequent *Sears-Compco* doctrine in granting relief against the tape pirates as

132. Fonotipia, Ltd. v. Bradley, 171 F. 951 (E.D.N.Y. 1909).

133. Capitol Records, Inc. v. Spies, 130 Ill. App. 2d 429, 264 N.E.2d 874 (1970); Capitol Records, Inc. v. Erickson, 2 Cal. App. 3d 526, 82 Cal. Rptr. 798 (2d Dist. 1969), *cert. denied*, 398 U.S. 960 (1970); Capitol Records, Inc. v. Greatest Records, Inc., 43 Misc. 2d 878, 252 N.Y.S.2d 553 (Sup. Ct. 1964).

134. 199 Misc. 786, 101 N.Y.S.2d 483 (Sup. Ct. 1950).

that problem began to come before them with increasing urgency. To overcome the *Sears-Compco* doctrine that the state law of unfair competition could not prohibit the copying of an article unprotected by federal patent or copyright law the state courts merely held that tape piracy was not copying, but misappropriation. Had the records been copyrighted, as they can be today, the courts would have had no difficulty in finding infringement by copying, just as the Supreme Court would have had no difficulty in finding infringement by copying had the news dispatches in the *INS* case been copyrighted.

The technology of recording has proved to be the most difficult problem of copyright for the law makers. One reason for the reluctance of Congress to act in this area is that sound recordings were the first unique products of new technology appropriate for copyright, and thus they have no analogue in the traditional subject matter of copyright. Only two other subjects of copyright resulted from new technology: photographs in 1865,[135] and motion pictures in 1912.[136] Photographs, of course, were analogous to and often a part of printed material; motion pictures were, in effect, merely a collection of photographs. Another reason for Congress's reluctance was the concern over monopoly, which was a very real threat in the recording industry when the present copyright bill was enacted in 1909.[137] When Congress finally did provide copyright protection for sound recordings in 1972,[138] the protection granted was limited to misappropriation and did not include imitation of the sounds recorded, a form of copying. In short, the statutory protection of copyright for sound recordings is the same as the common-law protection provided by the courts.

Historically, the courts looked to the legislature for solutions to copyright problems; in this instance, the legislature looked to the courts. Thus, the difficulties in copyright for sound recordings provided judges with the first opportunity in our history to grapple with problems in the area of copyright in the traditional manner of the common law without first being circumscribed by a statute. This opportunity, in turn, has demonstrated the extent to which copyright law functions as a law of trade regulation and unfair competition. Although a sound recording may involve as much artistic, creative, and intellectual effort as the writing of a book or the paint-

135. Act of March 3, 1865, ch. 126, 13 Stat. 540 (codified at 17 U.S.C. § 5(j) (1970)).

136. Act of Aug. 24, 1912, ch. 356, 37 Stat. 488 (codified at 17 U.S.C. §§ 5(l), (m), 11, & 25 (1970)).

137. *See* discussion of this point in H.R. REP. No. 2222, 60th Cong., 2d Sess. 7-8 (1909).

138. Pub. L. No. 92-140, 85 Stat. 391 (1971) (codified at 17 U.S.C. §§ 5(f), (n)).

ing of a picture, the cases express no concern for the author's right. The copyright of sound recordings, like the stationer's copyright, is strictly the copyright of the entrepreneur, in this case the producer rather than the publisher.

The experience with the technology of sound recording thus provides guidelines on how to deal with other new technologies of communication, particularly television. As the developments in relation to sound recordings demonstrate, the root problem is the concern over monopoly. The issue is how to provide protection for property rights and at the same time to insure the freedom of the use of ideas.

The solution to the problem depends on the premise we choose, and we have a choice of two: copyright is an author's right; or, copyright is a device for regulation of trade and unfair competition. As history amply demonstrates, the former premise precludes a rational solution to the problem except in terms of the legal fiction that an author makes a gift of his work to the world when he publishes it without statutory copyright, or an absolute monopoly. The trade regulation premise provides a basis for a rational solution in terms of the policies in the copyright clause. The copyright proprietor has a right to protect his profit against unfair competition by competitors, but he does not have a right to prevent the individual user from using the work for all reasonable purposes.

This conclusion suggests the doctrine of fair use, a doctrine judicially developed to mitigate the monopolistic effect of copyright. The doctrine can be traced to Justice Story's dicta in *Folsom v. Marsh*,[139] but the fair use of which Justice Story spoke was fair use between competitors. It was not until the 1909 act broadened the scope of copyright by giving the copyright proprietor the exclusive right to copy that it was necessary to expand the doctrine of fair use to mitigate the effect of the enlarged monopoly of copyright. Even so, the doctrine itself is so nebulous that it does little to dispel the *in terrorem* effect of strict liability for copyright infringement insofar as the individual user is concerned. *Williams & Wilkins Co. v. United States*,[140] for example, leaves the issue of photocopying in limbo by reason of the Supreme Court's four-to-four affirmance of the Court of Claims decision permitting the photocopying of copyrighted articles. Moreover, the lower court never reached the basic policy issue regarding the extent to which copyright law should be used to create profits for a publisher by reason of the purchaser's

139. 9 F. Cas. 342 (C.C.D. Mass. 1841).

140. 172 U.S.P.Q. 670 (Comm'r, Ct. Cl. 1972), *rev'd*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd*, 420 U.S. 376 (1975) (an equally divided Court).

noncommercial use of the work.

The major problem in developing a satisfactory doctrine of fair use is the dual conceptual basis of present copyright law. The doctrine cannot be predicated properly on the theory of copyright as both a positive-law and natural-law concept. The courts must make a choice, and the most appealing one obviously is the natural-law theory. But the premise that copyright is an author's right is an unsatisfactory one; this premise means that the fair use doctrine involves two issues: the fair use of an author's property, and the fair use of a publisher's property; or to put it another way, an author's property as both a cultural and an economic unit. If we simplify those premises by treating copyright not as a device to protect the author, but as a means to protect the finished work from predatory competitors as a matter of positive law, the doctrine of fair use becomes more rational. The issue then becomes not the use of the work but the economic consequences to the copyright proprietor. This, in effect, returns to the original basis of copyright infringement—misappropriation of the work by a competitor. Accepting the positive-law theory and rejecting the natural-law theory for copyright would be consistent with a copyright statute under which an author may not be an author (under the employee-for-hire doctrine) and with a legal and economic system in which corporations are entitled to all the rights of an author. This narrower view of copyright, however, would not preclude the courts from developing a body of law to protect authors' rights separate and apart from the law of copyright. Indeed, such a development is long overdue, for the fiction of copyright as an author's right makes the current law of copyright poor protection for the interest of the author.

There is here a subtle paradox. The fact that the copyright clause speaks of authors and writings makes it appear that it is contrary to the constitutional mandate to treat copyright law as a law of unfair competition concerned primarily with commercial trade rather than creative endeavors. Yet, it has been the treatment of copyright law as a law of unfair competition that has prevented the conflict of copyright with the free speech clause of the first amendment for this has meant dealing with speech as an economic, rather than a political or cultural commodity. At the same time, this treatment of copyright has tended to subvert the policy of promoting science as the primary policy of the copyright clause, by emphasizing the secondary policy of property, and making it equal, if not superior, to the former. The paradox is that if the policy of property continues to predominate, there is a real risk of endangering the right of free speech in this country. This is particularly true in electronic communication, in which technology limits access to the

materials presented on television. The monopoly of copyright for television would give communications corporations a *de jure* as well as a *de facto* control of access. In light of these large issues, it will be helpful to re-examine the policies of the copyright clause.

V. The Policies of the Copyright Clause

The records of the constitutional convention reveal little about the copyright clause,[141] but we can assume that the men in Philadelphia were aware of the Statute of Anne. Indeed, if they were not familiar with the English act, the similarity of the copyright clause to the provisions of that statute is a remarkable coincidence; the five principal ideas in the clause—promotion of learning, limited times, exclusive right, authors, and writings—are all contained in the English legislation. To what extent the *Millar* case, decided eighteen years earlier, and the *Donaldson* case, decided thirteen years earlier, were available to the draftsmen of the copyright clause, we do not know.[142] We do know, however, that both cases are consistent with the policy stated in the clause and that American courts relied upon both in interpreting the early copyright statutes. The disagreement between the *Millar* and *Donaldson* cases concerned neither the meaning of the concept of copyright nor the policy underlying copyright. They disagreed about the source of copyright—natural law or positive law—and about the best way to implement the underlying policy.

English materials thus provided ample source material to aid interpretation of the copyright clause, and they support the conclusion that the major policy of the clause is as stated—the promotion of learning. The subordination in the clause of the policy of protection of private property—exclusive rights for limited times—to the goal of learning was not merely a matter of style. In England prior to the Statute of Anne the policy of promoting learning had no relation to copyright; the protection of property was the major, and for the stationers, the only policy. Parliament thus legislated with the benefit of experience that had demonstrated that the primacy of property rights results in a monopoly that can actually impede learning. The impediment had been not in the use of books by the purchaser, but in the availability of books to the purchaser because

141. Fenning, *The Origin of the Patent and Copyright Clause of the Constitution*, 17 Geo. L.J. 109 (1929).

142. See J. Whicher, The Creative Arts and the Judicial Process, 85-232 (1965). Whicher argues that Madison, intimately associated with the drafting of the copyright clause, was aware of *Millar v. Taylor*, but not that it had been overturned by *Donaldson v. Beckett*. He argues against the position taken in J. Taubman, Copyright and Antitrust 13-14 (1960), that Madison was aware of both cases. Whicher, *supra* at 139-50.

of monopolistic control. The lesson of which Parliament took advantage was that to make property the primary policy of copyright was to give publishers the power to control access to ideas for personal profit. Thus, it was necessary that the exclusive right of the copyright proprietor be defined and that it be directed against the source of the monopoly problem, the competitive publisher, not against the individual user of the book. The property right of the copyright proprietor had to be consistent with, but subordinate to, the promotion of learning.

The copyright embodied in the Statute of Anne, limited in time to two terms of fourteen years, and limited in scope to the right to print, publish, and sell, achieved a reasonable balance between the publisher and the purchaser. The nature of copyright as property was clearly and sharply defined to protect the natural profit to be gained but not to limit the purchaser's use of the work for learning. This meant, of course, that the term "author" in the Statute of Anne did not mean author as author, but author as copyright proprietor.

The English background provides the basis for interpreting two key terms in the copyright clause: "exclusive right" and "authors." The terms "limited times" and "to promote science" are clear in their meanings. The direct evidence in the English materials is that the term "exclusive right" of authors in the copyright clause means only the right to print, reprint, publish, and vend a given work, all for commercial purposes. This was the meaning of copyright in the Statute of Anne, and it was the meaning consistently stated by the majority in *Millar v. Taylor*.[143] Moreover, this was the concept of copyright used in the Copyright Act of 1790, enacted only three years after the copyright clause was drafted.

The more important question remains: does "author" in the copyright clause mean author as author, *i.e.* as creator, or author as copyright proprietor? The *Millar* and *Donaldson* cases, with their natural-right theories, confused the issue. Consequently, the evidence on this point is circumstantial rather than direct. If we consider what was done rather than what was said, however, the circumstances are persuasive. In the Statute of Anne and the acts subsequent to the effective date of the copyright clause, the Copyright Act of 1790 and its successors, the term "author" was used as a synonym for proprietor, except in one instance—the grant of the renewal term. Even in this instance, however, the original purpose had been to limit the monopoly of publishers, and the courts have

143. 98 Eng. Rep. 201 (K.B. 1769).

interpreted the language of the statute to deny any special benefit to the author when he assigns the copyright to the publisher.[144]

If the subsequent judicial treatment of the term author in the copyright statutes is relevant, the most persuasive evidence of the limited meaning of the term are those cases in which courts use the copyright of the entrepreneur to deny the author any rights as author—those personal rights commonly called moral rights,[145] the principal components of which are the paternity right and the right to the integrity of the work. Since under the copyright statutes and these cases "[t]he doctrine of moral right as such is not recognized in the United States as the basis for protection of personal rights of authors as a class,"[146] the copyright clause has relevance for the author only as copyright proprietor. The argument that although the moral right of the author is not a part of the law of copyright, the author's personal rights are protected by other doctrines of law (the law of defamation, privacy, and so forth) proves the point: in the law of copyright, the term author means author as copyright proprietor rather than author as author. That the author can protect these rights if he retains the copyright does not prove otherwise; so can the publisher who owns the copyright.

An author need not obtain a copyright in order to publish his works, he must do so only if he wishes to profit from their sale. The power granted to Congress by the copyright clause, in short, does not apply merely to authors, but to authors in a special class—authors who choose to publish and copyright their works. Whether an author wishes to join that class is his own choice. The author of a play, for example, may not choose to copyright his play because the presentation of a drama on stage does not divest him of his common-law copyright. The view of copyright as a trade regulation device is thus wholly consistent with the policies stated in the copyright clause because the use of the term author as a synonym for copyright proprietor reflects the primary policy of promoting learnings and the secondary policy of protecting property.

The traditional learning, of course, is that the term author in the copyright clause means author as creator. Nevertheless, the traditional *treatment* of copyright, including the copyright statutes Congress has enacted from the beginning, suggests that the term means only author as copyright proprietor. To conclude that it does

144. Fred Fisher Music Co. v. M. Witmark & Sons, 318 U.S. 643 (1943) (author's assignment of renewal interest before copyright renewed is binding on the author).

145. *See* Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554 (1940).

146. Strauss, *The Moral Right of the Author*, COPYRIGHT LAW REVISION STUDIES, Study No. 4, at 128 (1959).

not we must assume that the English background meant nothing to the drafters of the copyright clause, that they chose to ignore the historical context of the term author as it was used in the Statute of Anne, and that Congress has acted unconstitutionally in passing legislation that makes copyright available to corporate entities by classifying employers as authors for copyright purposes.

The most important reason for treating copyright as merely a trade regulation device based on positive law is that this view is necessary to avoid development of the latent conflict between the copyright clause and the free speech and free press clause of the first amendment.[147] The potential conflict between these two constitutional provisions has existed in theory since their adoption; as early copyright law so clearly demonstrates, the monopoly of copyright gives the proprietor a power of censorship. An unexercised power, however, attracts little notice, and the fact that copyright proprietors have given priority to profit over propaganda has kept the issue out of the courts. Moreover, custom and compensatory rules generally have limited copyright to the proprietary context. The copyright statutes, for example, deny the federal government the right to copyright government publications,[148] and under section 10 of the copyright statute, a work must be published in order to secure the benefits of the copyright monopoly,[149] which promotes the policy of learning by insuring public access.

The legislative treatment of copyright as a trade regulation device based on the positive-law theory thus has helped avoid the conflict of copyright and free speech, but the growth principle of copyright law, the natural-law theory, threatens to remove the conflict from the realm of theory. The natural-law theory has led to the continual expansion of the copyright monopoly, which cannot continue without leading to conflict with the free speech and free press clause of the first amendment. Paradoxically, the natural-law theory promotes the policy of property at the expense of the policy of learning.

147. See the discussion of first amendment limitations on copyright in 1 NIMMER, COPYRIGHT, § 9.2, at 28 (1975). *See* Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970).

148. "No copyright shall subsist in the original text of any work which is in the public domain . . . or in any publication of the United States Government, or any reprint, in whole or in part, thereof . . . ." 17 U.S.C. § 8 (1970). There are minor exceptions. For example, the U.S. Postal Service may secure copyright in puhlications authorized by 39 U.S.C. § 405 (1970), 17 U.S.C. § 8 (1970). In addition, the Secretary of Commerce may secure copyright on behalf of the United States in certain standard reference data he prepares. 15 U.S.C. § 290(e) (1970).

149. 17 U.S.C. § 10 (1970). Section 12 permits an unpublished copyright for certain types of works. 17 U.S.C. § 12 (1970).

So long as the primary policy of the copyright clause is the promotion of learning, it is consistent with the free speech and free press clause of the first amendment. The copyright clause and the free speech clause, in fact, represent complementary constitutional doctrines, and both are intended to achieve the similar goal of public access: the copyright clause public access to materials for learning, the free speech clause public access to ideas.[150] The copyright clause achieves this goal by giving Congress the power to protect the profit gained from publication of books and thereby encourage their dissemination. The free speech clause achieves this goal by denying Congress the power to make any law regulating speech or the press.

While the free speech clause ostensibly protects only the right of the individual to speak and write, its obvious essence is the right of the public to hear and to read, the right to public access.[151] The threat of censorship is directed not to the speech or writing of the individual, but to the dissemination of the speech or writing to the public. The individual's guaranteed right to speak and to write would be of little value either to the individual or to the public if this right did not include the right to be heard and to be read. The right of free speech, in other words, is not merely a public right; it is a right of the public.

The problem of reconciling copyright and free speech is more subtle than it is difficult, for one is a property right, the other a political right. In a free and competitive society, the former often looms larger than the latter, as the copyright revision bill so amply demonstrates. The thirty-four studies on copyright prepared for Congress, consisting of almost 1500 closely printed pages contain no

150. "It is now well established that the Constitution protects the right to receive information and ideas. 'This freedom [of speech and press] . . . necessarily protects the right to receive' . . . ." Stanley v. Georgia, 394 U.S. 557, 564 (1969). "This freedom embraces the right to distribute literature . . . and necessarily protects the right to receive it." Martin v. City of Struthers, 319 U.S. 141, 143 (1943). Prior restraint on the press is presumptively unconstitutional. As Chief Justice Burger said: "[I]n *New York Times Co. v. United States* every member of the Court, tacitly or explicitly, accepted the *Near* and *Keefe* condemnation of prior restraint as presumptively unconstitutional." (citation omitted). Pittsburgh Press Co. v. Pittsburgh Comm. on Human Relations, 413 U.S. 376, 396 (1973) (Burger, C.J., dissenting).

151. The problem of access *to* the media and access *by* the media has been frequently litigated. *See, e.g.*, CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973) (broadcaster not required to accept paid editorial advertisements); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (upholding the fairness doctrine); Oliver v. Postel, 30 N.Y.2d 171, 331 N.Y.S.2d 382, 282 N.E.2d 306 (1972) (trial court's order closing criminal trial to press and public not justified); Oxnard Publishing Co. v. Superior Court of Ventura County, 68 Cal. Rptr. 83 (1968) (trial court not justified in excluding press). The issue of public access to material transmitted by electronic communication apparently has not been decided by the courts, but it is being litigated now. CBS v. Vanderbilt University, Civil No. 7336 (M.D. Tenn., filed Dec. 21, 1973).

reference to the problem of copyright and free speech. This lack of perception may be a tribute to the tradition of free speech in our society. More likely, it is a reflection both of the fact that a copyright in this country is a private copyright and of the failure of lawmakers to perceive the revolution in public communication that television has created.

VI. Private Copyright and Public Communication

New problems demand new perspectives, and the new technology of electronic communication provides new problems. Television is the first new comprehensive system of communication since Gutenberg provided for mass production of the Bible. The implications of this new communications system require that we look anew at the principal body of communications law, the law of copyright. When we do this, obvious truths take on new importance.

The most obvious truth is that copyright is a private monopoly for private communications. The right to copyright is derived from the act of creation, and the choice of making a creation public is that of the author; the private monopoly of copyright is designed to encourage him to make his creations available for public learning. Indeed, the copyright clause is unique in that it is the only express grant of constitutional power enabling Congress to provide for the making of private law for the individual. The traditional law for this purpose, the law of contracts and corporations, for example, is left to the states, and the federal copyright statute is analogous to state statutes providing for the making of contracts and the chartering of corporations. As the state statutes are procedural in nature, enabling the individual to make a private contract or to charter a private corporation, so the federal statute provides the procedure for the individual to secure a private copyright.

The second obvious truth is that television is primarily and principally a medium of public communication. Unlike the printing press, which preserves material for permanent public access, television is a vehicle for transmitting material to millions of people simultaneously and instantaneously, but temporarily. Thus the basis of a television copyright would be the fact of transmission rather than the fact of creation; copyright for television, in effect, would be a copyright of electronic signals and therefore would constitute a monopoly of the medium of communication as well as a monopoly of the material communicated. It is this point that explains the Supreme Court's decision in *Fortnightly Corp. v. United Artists Television, Inc.*,[152] in which the Court held that a CATV station did

152. 392 U.S. 390, *motion for rehearing denied*, 393 U.S. 902 (1968).

not infringe the copyright of a televised motion picture by boosting the electronic signals. A contrary ruling would have recognized a copyright for the medium of communication itself in addition to copyright for the subject work.

These two truths mean that copyright for television would confer on communications corporations a private monopoly of public information that it transmits to the public. Reports of news, public events, statements of government officials, public affairs programs, and so forth are staples of the television diet. The constitutionality of the current concept of copyright could be sustained only by the fiction of treating the act of transmission as the act of creation. Moreover, the ephemeral presentation of material on television can hardly be said to promote learning in the constitutional sense. The television viewer has only momentary access to the materials and has no control over access to it before, during, or after the transmission.

This is the point at which copyright for television comes into conflict with first amendment rights. The conflict, of course, does not arise concerning a creative work—a drama or motion picture, for example—for two reasons: first, these works are not vested with a major public interest; and secondly, they are copyrightable independently of their presentation on television. In short, there is a sharp distinction between copyright for creative works presented on television and copyright for television *per se*. It is copyright for television in its function as an agent for transmitting public information to the public that conflicts with the first amendment. Most Americans, for example, receive their news and information on the conduct of governmental affairs from television; it is said that some sixty million Americans watch the national network newscasts each evening. The impact of these newscasts on public opinion is unmeasured, but one can venture to guess that television was a major factor in the protests against the Viet Nam war, the decision of President Johnson not to seek re-election, and the resignation of Richard Nixon as President of the United States.

Yet, despite its vast impact on the affairs of the nation and its influence on society's thinking, television is limited as a medium of communication, constrained not only by the airwaves, but by the clock and expensive technology as well. Paradoxically, these limitations enlarge the conflict between television copyright and first amendment rights because they increase the power of the entrepreneurs of television. The owners of television facilities have the free use of the public airwaves as government licensees; their license, as well as expensive technology, protects them from competition; and the clock requires that they choose and select the information they

transmit. To say that this power is a power of censorship is not to impugn the integrity of those who own and control television, for conditions require that choices be made and judgments be exercised. But to give those owners the power to avoid any accountability for the exercise of this power by enabling them to control subsequent public access to this material through the device of copyright (as it currently exists) is to grant them an unnecessary power of censorship contrary to all traditions of the first amendment.

It is ironic that the factors that make television so profitable for the entrepreneurs, the capacity to transmit information temporarily, simultaneously, and instantaneously to millions of people via electronic signals, also make the current concept of copyright for television conflict with first amendment rights. Profitability gives rise to property rights, and property rights derived from the power to control the transmission of information contain the power of censorship. The exercise of the power of control as a matter of self-interest, in short, is the exercise of censorship to the detriment of the public interest. Nor is it necessary to attribute Machiavellian or malevolent motives to the entrepreneurs of television in the exercise of this censorship. Repeating the material is a practical impossibility, and providing public access is a costly endeavor that would constitute an intrusion into profits. Thus, before Vanderbilt University established the Vanderbilt Television News Archive in 1968 to preserve videotapes of the three national network evening newscasts, no videotapes of the newscasts were preserved by anyone, including the networks, presumably because of the expense of retaining them.

The perspective of history can be useful in dealing with the issues involved, for the problems of copyright for television are not unlike the problems of copyright for books in sixteenth century England. The Stationers' Company had a monopoly of the printing press; the television networks have a monopoly of the airwaves to transmit information via electronic signals. In neither case, however, was or is the monopoly complete. The stationers had to compete with the printing patents and the printing of books at the universities; the commercial networks must compete with independent stations and educational television. The stationers operated in effect as government licensees, as do television stations. Copyright for the stationers was a device to maintain order in the book trade to protect members against the predatory practices of other members. Copyright for television, in effect, would serve primarily to protect television stations against the predatory practices of their competitors. Copyright for the stationers was owned by the publisher to protect his profit, with which the author had nothing to do.

Copyright for television would be owned by a corporation, for in most instances there would be no author or creator other than the cameraman and other technicians, clearly employees for hire.

The circle of history has, in a sense, come full turn, but in the interim the controversy over the nature of copyright in eighteenth century England has added a new factor, the theory of copyright as an author's natural right, creating the positive law-natural law dichotomy in copyright law. The provisions of the copyright bill[153] now before Congress reveal the importance of this dichotomy; while in form they purport to deal with copyright as a right of the author, in substance they give the monopoly of copyright to the entrepreneur. Under that bill, copyright would be available for live television broadcasts, as well as those presented on videotape. Thus, the bill provides that "[a] work consisting of sounds, images, or both, that are being transmitted, is 'fixed' for purposes of this title if a fixation of the work is being made simultaneously with its transmission."[154] Moreover, the bill provides that "an 'anonymous work' is a work on the copies or photorecords of which no natural person is identified as author."[155] The bill further states: "Copyright protection subsists, in accordance with this title, in *original works of authorship* fixed in any tangible medium of expression . . . . [W]orks of authorship include . . . (6) motion pictures and other audio-visual works . . . ."[156] Additionally, the copyright proprietor would have the exclusive right "to reproduce the copyrighted work in copies or photorecords."[157] The initial ownership of copyright would rest in "the author or authors of the work,"[158] but in the case of a work made for hire, "the employer or other person for whom the work was prepared is considered the author for purposes of this title . . . ."[159] The fiction of copyright as an author's right continues to provide a basis for the expansion of the copyright monopoly, in this instance creating a potential conflict with first amendment rights.

Television entrepreneurs clearly are entitled to some measure of protection for their efforts, and it is at this point that history provides a helpful perspective by revealing a not so obvious truth: copyright has more to do with conduct than with property because it falls within that classification known as intangible property, which consists only of legal rights. The stationers had difficulty with

153. S. 1361, 93d Cong., 2d Sess. (1974).
154. *Id.* at 101.
155. *Id.*
156. *Id.* at § 102(a) (emphasis added).
157. *Id.* at § 106(1).
158. *Id.* at § 201(a).
159. *Id.* at § 201(b).

this abstraction and equated copyright with the ownership of the manuscript—the ownership of the "copie"—and it was not until near the end of the duration of the stationer's copyright that the term copyright was used.[160] Even so, censorship regulations made their ownership of the manuscript irrelevant if the work did not receive the imprimatur of the licenser, and their concern was only in preventing others from publishing the manuscript that they were entitled to publish. In fact, at one time during the stationer's reign a printer's right was recognized, which meant to the printer what copyright meant to the publisher—the exclusive right to print a work.[161] The printer's right and the copyright in the same work could be held by two different persons, which demonstrates the nature of copyright as an intangible and limited right.

Copyright, in short, is not a right of ownership in a given work, but a right, or series of rights, to which a given work is subject. All of this is clear on reflection, but the obscuring development has been the view of copyright as an author's natural right derived from his creation of the work. The idea that every cow is entitled to her calf was a strong one: as the cow owns her calf, the author owns his book.

Although the copyright statute purports to make clear that copyright consists only of a series of intangible rights, including the exclusive right to print, reprint, publish, copy, and vend, the rights are so comprehensive that they create a concept of complete ownership. Thus, we have the monopoly of copyright and confusion as to the scope of the monopoly, which is best illustrated perhaps by this common question concerning the doctrine of fair use: whether fair use is an infringement that is excused, or is no infringment at all.

Whether one views copyright as the ownership of a work or as a series of rights to which a given work is subject, has a great deal of impact on the scope of control that a copyright proprietor is thought to have over a copyrighted work. Moreover, one's perception of copyright is determined by his perception of the positive-law and natural-law theories; a clouded perception results if the two are combined, a clear perception if they are not.

The point of all this is that in light of the first amendment and technology, copyright can properly be provided for television only if the copyright consists of a limited right, or series of rights, to which the material is subject, rather than ownership of the material itself. This means rejecting the natural-law theory and accepting the positive-law theory of copyright. To return to an earlier point,

160. *Supra* note 36.

161. For a discussion of the printer's right see PATTERSON, *supra* note 32, at 49-51.

there are two premises to choose from: copyright is an author's natural right or copyright is a device of trade regulation and unfair competition. The premise that copyright is an author's natural right cannot be accepted without continuing either the vexing problem of ownership of the copyrighted work or the legal fiction that the natural rights of the author become transmuted into monopoly rights when the work is published. The fundamental problem with the natural-right premise is that it provides no natural boundaries for copyright, because under that premise all copyrighted works fall into two classes of property: cultural property and economic property. The premise of copyright as a device of trade regulation and competition, on the other hand, does provide natural boundaries. Under this premise the issue of infringement turns on the existence of conduct that interferes with the profit of the copyright proprietor and not with the rights of ownership. Use by another for profit would constitute infringement, but a nonprofit use would not. Thus copyright would provide protection against competitors, but would not preclude any reasonable use of the work by the public.

The ostensible disadvantage of this approach, that the limits of protection would vary with the nature of the work, is on reflection, its primary advantage. One of the principal problems in copyright law is the uniform measure of protection for all copyrighted works in similar categories—comic books and telephone directories get the same protection as Pynchon's *Gravity's Rainbow* and Eliot's *The Waste Land*. The problem can be characterized as the trivialization of copyright law. It is not, however, a trivial problem; otherwise television newscasts would be entitled to the same protection as the game show, *Let's Make a Deal*. Undifferentiated and comprehensive copyright protection for all works leaves no room for the implementation of fundamental policies—the promotion of learning and free speech—because it makes property rights the primary policy of copyright. To promote the policies of copyright on the basis of profit and property rights poses a major threat to the political rights of the people, a threat no less dangerous than it is subtle.

The central problem in the suggested approach, of course, would be predictable efforts by entrepreneurs of all kinds, publishers as well as men of television, to classify as competitive *all* uses of the work, not merely the limited uses for which they sell it. The issue then becomes to what extent the copyright law is to be used to create, rather than to protect, profit. The issue of photocopying copyrighted materials is the prime example. Once we have dismissed the notion of copyright as a monopoly giving complete ownership of a work, however, even this issue assumes proper proportions in the context of the primary policy of promoting learning.

The approach suggested in this article is contrary to the traditional view of copyright and the fiction of copyright as an author's right, but it is consistent with history, the copyright clause, and the fact that copyright functions as a publisher's right. More importantly, however, it provides a basis for providing television with appropriate protection without creating first amendment problems. Subjecting public communication to protection from the predatory practices of a competitor is one thing; protecting it from use by members of the public is another. The potential confiict between copyright and free speech is inevitable if the present provisions of the copyright bill providing copyright for television are enacted. Public communication of public information is too important to the welfare of a free and democratic society to be subjected to the private monopoly provided by the current concept of copyright.