Vanderbilt Law Review

Volume 40
Issue 1 *Issue 1 - January 1987*

Article 1

1-1987

Free Speech, Copyright, and Fair Use

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VANDERBILT LAW REVIEW

VOLUME 40 JANUARY 1987 NUMBER 1

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Thomas C. Arthur, Craig Joyce, David L. Lange, and David A. Webster reviewed earlier versions of this Article and provided me with insightful and helpful comments, for which I wish to express my appreciation.

I. INTRODUCTION

The copyright clause provides that "[t]he Congress shall have Power . . . To promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their . . . writings . . . ."[1] The first amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[2]

Three modern developments portend a conflict between these two clauses of the Constitution: (1) the emergence of the doctrine that free speech encompasses the right to have access to, as well as the right to disseminate, ideas;[3] (2) the elimination of the requirement of publication, which historically ensured the right of access, as a condition for statutory copyright;[4] and (3) the codification of the fair use doctrine, traditionally relied on to avoid conflict between copyright and free speech,[5] in a way that inhibits the right of consumer access to copyrighted material.

The felt need to accommodate copyright to new communications technology caused Congress in the 1976 Copyright Act[6] to eliminate publication as the *quid pro quo* for copyright.[7] The new

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1. U.S. CONST. art. I, § 8, cl. 8. The copyright clause is also the patent clause. Here I give the clause a distributive reading. The entire clause reads: "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

2. U.S. CONST. amend. I.

3. "Our precedents have focused 'not only on the role of the First Amendment in fostering individual self-expression hut also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas.' " Board of Education v. Pico, 457 U.S. 853, 866 (1982) (Brennan, J., plurality opinion); *see also* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 756 (1976) ("the protection afforded is to the communication, to its source and to its recipients hoth").

4. Statutory copyright now subsists from the moment the work is fixed in a tangible medium of expression. 17 U.S.C. § 102(a) (1982). Prior to the 1976 Copyright Act, every copyright statute in this country, with one minor exception, 17 U.S.C. § 12 (1976) (the 1909 Act), required publication as a condition for statutory copyright. *See Copyright Enactments, Laws Passed in the United States Since 1783 Relating to Copyright*, C.O. BULL. No. 3 (Revised) (1973) [hereinafter *Copyright Enactments*].

5. *See, e.g.*, Triangle Publications v. Knight-Ridder Newspapers, 626 F.2d 1171 (5th Cir. 1980).

6. 17 U.S.C. §§ 101-809 (1982).

7. Although television gave the initial impetus for change, the problem now extends to electronic communications technology generally, of which computers are the primary example. *See, e.g.*, FINAL REPORT OF THE NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS, JULY 31, 1978 (1979) [hereinafter FINAL REPORT]; U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, INTELLECTUAL PROPERTY RIGHTS IN AN AGE OF ELECTRONICS AND INFORMATION, (Apr. 1986) [hereinafter OTA REPORT].

statute thereby created problems of access not present with the paradigm of statutory copyright—printed material that is published.[8] A part of the pattern that emerged in the 1976 Act was a codified fair use doctrine,[9] which presumably had become necessary for the partial fulfillment of the constitutional purpose of copyright—the promotion of learning—because of the elimination of publication, the traditional means of ensuring access (a *sine qua non* of learning), as a condition of copyright. If indeed the codified fair use doctrine was intended to promote access, however, it has fallen far short of its mark. For fair use as codified has served to enlarge the copyright monopoly by giving copyright owners a basis for increasing their control of access to copyrighted works. And if, as modern doctrine tells us, the right of free speech encompasses the right to hear as well as to speak, to read as well as to publish, it is obvious that Congress made these fundamental changes in copyright law with little regard for their effect on free speech rights. The wisdom of the Constitution's framers in making the copyright clause a limitation on, as well as a grant of, congressional power was ignored, and the long latent conflict between copyright and free speech rights has emerged to become a reality.

The notion that there is a conflict between two provisions of the Constitution—the copyright and free speech clauses—is an anathema to the judicial mind. Consequently, courts have consistently and almost without exception rejected the free speech defense in copyright infringement actions.[10] Equally unacceptable to

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> As more and more works are transmitted electronically, . . . public access to information, originally built into the copyright system, may in fact become more limited. Not only may the individual price of information be higher; now people may have to pay for it every time they wish to use it.
>
> When printing was the dominant technology, this was not the case . . . .
>
> With the electronic distribution of works, however, proprietors have more control . . . . [T]heir works need not be sold in hard copies, and because it is questionable whether individuals can legally copy them, they do not have to compete with resellers, wholesalers, or others who might drive down the price of their products. As the only source of distribution, people must come to the copyright holder on his own terms. Now controlling access to their works, copyright holders can restrict it in order to enhance their profits. If they were to do this, copyright law would no longer perform the function it was designed for under the Constitution.

OTA REPORT, *supra* note 7, at 8. The law has reached the point that Professor Benjamin Kaplan warned of in 1966: "Copyright protection could thus ultimately meet the same constitutional objections as other attempted restraints on expression." B. KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 75 n.115 (1967).

9. *See* U.S.C. § 107 (1982).

10. *See, e.g.*, Sid and Marty Krofft Television Prod. v. McDonald's Corp., 562 F.2d

the courts is the notion that the first amendment creates an exception to statutory copyright.[11] Courts are correct on the latter point. They err, however, by assuming that the first amendment is the sole source of free speech rights and by ignoring the free speech values in the copyright clause. My thesis is that the copyright clause limits the power of Congress to grant copyright because it embodies free speech constraints.[12] The failure of lawmakers, legis-

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1157, 1170 (9th Cir. 1977); Wainwright Sec. v. Wall Street Transcript Corp., 558 F.2d 91 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978); *Triangle Publications*, 626 F.2d at 1171. *Cf.* Rosemount Enter. v. Random House, 366 F.2d 303, 311 (2d Cir. 1966) (Lumbard, J., concurring), *cert. denied*, 385 U.S. 1009 (1967)("The spirit of the First Amendment applies to the copyright laws at least to the extent that the courts should not tolerate any attempted interference with the public's right to be informed regarding matters of general interest when anyone seeks to use the copyright statute which was designed to protect the interests of quite a different nature.").

11. The confusion in analysis that results from this approach is indicated by the following passage:

> The First Amendment exception . . . appears to rest on a theory that while the grant of copyright protection itself is constitutional, it is still only a statutory right which may be superceded by a constitutional right. Once it is decided, however, that the First Amendment operates in the copyright arena, it should be realized that it is a two-way street, for the copyright owner also has First Amendment rights. Indeed, the United States Court of Appeals for the District of Columbia has already held that copyright owners do have a First Amendment right to remain silent.

W. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW 469-70 (1985).

A first amendment right to be silent, however, is irrelevant to copyright. Neither the copyright clause nor the copyright statute requires an author to publish or disseminate his works. The issue arises when the author, or copyright owner, has made the work public. Thus, a free speech problem arises when the copyright owner makes the work public, secures his reward, and then denies any right of further public access, for example with a television newscast. The issue here is not whether this activity infringes free speech rights under the first amendment, but whether it conflicts with the coustitutional purpose of copyright—the promotion of learning. If the promotion of learning is not protected by free speech rights, those rights have little meaning. Furthermore, a copyright that authorizes a copyright owner to control the use of the copyrighted work for purposes of learning, as opposed to profit, is contrary to the copyright clause. In Pacific & Southern Co. v. Duncan, 744 F.2d 1490, 1499 n.14 (11th Cir.), *cert. denied*, 105 S. Ct. 1867 (1985), the Eleventh Circuit Court of Appeals stated: "Where the First Amendment removes obstacles to the free flow of ideas, copyright law adds positive incentives to encourage the flow." This facile statement misses the point. If a copyright gives the copyright owner control of the "positive incentives," it constitutes an obstacle to the free flow of ideas.

12. "[I]t should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas." Harper & Row Publishers v. Nation Assoc., 105 S. Ct. 2218, 2230 (1985). This case's dictum, however, treats the free speech aspect of copyright as applying only to the author because the first amendment gives a " 'concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.' " *Id.* (quoting Estate of Hemingway v. Random House, 23 N.Y.2d 341, 348, 296 N.Y.S.2d 771, 778, 244 N.E.2d 250, 255 (1968)). "Courts and commentators have recognized that copyright, and the right of first publication in particular, serve this countervailing First Amendment value." *Id.* This approach, how-

lative and judicial, to recognize this limitation results in part from the confused and confusing concept of copyright, a concept that has both a proprietary and regulatory basis. While courts have tended to view copyright as primarily proprietary in nature,[13] Congress has treated it as regulatory.[14]

Copyright's basis as a proprietary concept is that it enables one to protect his or her own creations. Its regulatory basis is that when these creations constitute the expression of ideas presented to the public, they become part of the stream of information whose unimpeded flow is critical to a free society. The right to control access to one's own expressions before publication does not engender free speech concerns, but publishers' control of access after publication does. This explains why historically copyright was deemed a monopoly to be strictly construed and to be shaped to serve the public interest over that of the copyright owner. The public interest to be served was reasonable access to the copyrighted work.

Despite the regulatory nature of copyright statutes, courts tend to treat copyright as proprietary in nature, presumably because they are concerned with equity as between the litigants and the equity is most often in favor of the copyright owner. The statutory limitations on copyright, however, enable courts to avoid the fundamental issue of copyright law. That issue is whether copyright is a right of the author by reason of his creation or whether it

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ever, means that the author has the right to control access to the copyrighted work, which is the essence of censorship. Although the Court was speaking of an unpublished manuscript, its dictum is not so limited. When applied to a form of electronic communication, such as television, to which only limited access is provided in the first place, the harm this reasoning can do to the first amendment right of access is apparent.

13. *See, e.g.,* Mazer v. Stein, 347 U.S. 201 (1954). In *Mazer* the Supreme Court held that works of art incorporated into a design of useful articles are copyrightable. In enacting the 1976 Copyright Act, Congress rejected provisions to create "a form of copyright protection for 'original' designs which are clearly a part of the useful article" because of concern that such a copyright "would create a new monopoly which has not been justified by showing that its benefits will outweigh the disadvantage of removing such designs from free public use." H.R. REP. No. 1476, 94th Cong., 2d Sess. 50, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5663.

14. Congress made this point in the House Report accompanying the bill that eventually became the Copyright Act of 1909. In considering its power to enact a compulsory license for recording musical compositions, Congress reported: "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, . . . hut upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted . . . not primarily for the benefit of the author, but primarily for the benefit of the public . . . ." H.R. REP. No. 2222, 60th Cong., 2d Sess. 7 (1909).

is a right created and limited by statute for the public benefit. The 1976 Act has caused the issue to surface. The unresolved question is whether copyright is essentially a proprietary or a regulatory concept.[15]

This Article's position is that copyright functions as a regulatory concept and should be recognized as such. In dealing with the proper characterization of copyright, however, it is important to distinguish between the work that is copyrighted and the copyright. The work is subject to a series of rights that taken together comprise the copyright. To characterize copyright properly, therefore, one must look to the law of copyright and its purpose and function. In other words, one must consider copyright's intended goal and the means chosen to attain that goal.

The law of copyright can be viewed most usefully as statutory unfair competition based on the misappropriation rationale.[16] The law's function is to protect the copyrighted work against predatory competitive practices. Its purpose, however, is somewhat ambiguous. While copyright's constitutional purpose—the promotion of learning—is clear, it is not clear whether this purpose is better served by encouraging the creation or by encouraging the distribution of works. One's choice of the means by which copyright's constitutional purpose is attained is important, because that choice is determined by, or determines, one's view of copyright as proprietary or regulatory in nature. If one chooses to attain this constitutional purpose by encouraging the creation of works, the proprietary view of copyright follows logically because people commonly are deemed to own what they create. If, on the other hand, one chooses to attain this purpose by encouraging distribution, the regulatory nature of copyright follows logically because distribution requires regulation.

My argument is that copyright's constitutional purpose is best

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15. In this regard, Professor Kaplan noted:

> To say that copyright is 'property,' although a fundamentally unhistorical statement, would not be boldly misdescriptive if one were prepared to acknowledge that there is property *and* property, with few if any legal consequences extending uniformly to all species and that in practice the lively questions are likely to be whether certain consequences ought to attach to a given piece of so-called property in given circumstances . . . . But characterization in grand terms then seems of little value: we may as well go directly to the policies actuating or justifying the particular determinations.

KAPLAN, *supra* note 8, at 72.

16. International News Serv. v. Associated Press, 248 U.S. 215 (1918). While this case has been limited to its facts and is thus viewed as a "sport," the application of copyright to new technology has made the case's teachings relevant to modern conditions.

served by encouraging the distribution of works. Learning requires access to the work in which the ideas to be learned are embodied. Because there can be no access without distribution, encouraging distribution is vitally important. The fact that creation is also necessary to the learning process does not alter this conclusion for two reasons. First, if copyright encourages creation, it does so only for the purpose of profit. Profit, however, cannot be obtained without distribution. Second, in creating a work an author harvests his ideas from the public domain. Copyright, which protects the expression of these ideas, is an encroachment on the public domain[17] and can be justified only if it provides the public with some form of compensation. The public can be compensated most effectively by making the author's efforts accessible. Copyright, therefore, can be viewed as being in the nature of a bargain and sale. In return for providing public access to his efforts, the author is given limited protection for a limited period of time. The proprietary view of copyright, however, emphasizes the bargain and minimizes the sale. Thus, the history of statutory copyright in this country reveals that limitations on both the scope and duration of copyright protection have been continually enlarged. Yet, given the function of copyright—protection of the distributed work against predatory competition—it follows that the basic constitutional purpose of copyright—promotion of learning—is best served by encouraging distribution.[18]

This conclusion is contrary to the traditional view that the constitutional purpose of copyright is best served by encouraging the creation of works,[19] but it is well supported by reason and history.[20] First, creativity is not a process amenable to statutory in-

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17. I am indebted to Professor David Lange for his insight that copyright law is an encroachment on the public domain.

18. "The congressional role therefore—as is made very clear in the text of the Constitution—is to define the scope of the limited monopoly that should be granted a creator in order to give the public appropriate access to the creation." H.R. REP. 781, 98th Cong., 2d Sess. 4 (1984).

19.

> 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.

Mazer, 347 U.S. at 219. *See also Harper & Row Publishers*, 105 S. Ct. at 2230 (quoting the above passage); Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).

20. There is a certain irony in the view that the Anglo-American copyright is an author's right, designed to encourage creation. The idea can be traced to the Statute of Anne, 8 ANNE, ch. 19, the English copyright act of 1710. For the first time in English history,

centives.[21] Second, copyright did not come into existence until the printing press facilitated the reproduction and widespread distribution of books. To protect the right to exclusive distribution, publishers created copyright. From this protection the author who created the work gained at best a reward secondary to that of the publisher.[22] Copyright, therefore, originally functioned to encourage not creation, but distribution. In this regard, copyright's function is essentially the same today.[23]

The characterization of copyright as a form of monopoly[24] obscures the primary purpose of copyright as encouraging distribution. The unique aspect of this "monopoly" is that the statute that imposes the limitations also creates the rights, for "apart from its recognition in law," copyright "has no existence of it own."[25] The copyright owner naturally emphasizes the statutory rights and deemphasizes the concomitant regulations. Because the accepted justification for copyright is that it protects an author's creations, the notion that copyright is essentially proprietary rather than regulatory in nature has an emotional appeal that overrides reason.

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the statute enabled an author to obtain a copyright for his work. Prior to the statute, copyright was the stationers' copyright and was available only to members of the Stationers' Company, the London Company of the booktrade. One of the conditions for obtaining a copyright under the new statute was the creation of a new work. Because the author created the work, statutory copyright was deemed to be an author's right. This historical analysis overlooks the fact that the statute was a trade regulation act designed to destroy and prevent the recurrence of the booksellers' monopoly based on the old stationers' copyright. *See* Patterson, *The Statute of Anne: Copyright Misconstrued*, 3 HARV. J. ON LEGIS. 223 (1966). The "new work" requirement was a means of insuring that works which went into the public domain because of the new statutory copyright's limited term could not be recaptured by the booksellers' copyright.

21. This fact may explain why the Supreme Court long ago downgraded creativity to little more than the absence of copying. Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884) (photographs copyrightable); Baker v. Selden, 101 U.S. 99, 102 (1880) ("novelty of the art or thing described has nothing to do with the validity of the copyright").

22.

> Historically, it was not authors who got the Statute of Anne, but publishers—the London booksellers of those days. A publisher may own the copyright free and clear, and take all the gross income; or he may pay royalties, and take most of the gross income. Either way, he usually gets more from a copyrighted book then when he is subject to open competition. Therefore, much of the tax that the Copyright Act imposes on readers goes directly to publishers.

Chafee, *Reflections on the Law of Copyright*, 45 COLUM. L. REV. 503, 508 (1945).

23. "In essence, copyright is the right of an author to control the reproduction of his intellectual creation." HOUSE COMM. ON THE JUDICIARY, 87TH CONG., 1ST SESS., REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 3 (Comm. Print 1961).

24. "Copyright in any form, whether statutory or at common-law, is a monopoly . . ." RCA Mfg. Co. v. Whiteman, 114 F.2d 86, 88 (2d Cir. 1940).

25. Lange, *Recognizing the Public Domain*, 44 LAW & CONTEMP. PROB. 147 (1981).

Strictly speaking, it is copyright law, not copyright, that is regulatory. Characterizing copyright as property obscures copyright law's regulatory nature because the unanalyzed assumption is that property is protected by property law. Therefore, the importance of whether one views copyright law as protecting property or regulating trade is twofold. First, to view copyright as protecting property is to subject its regulatory aspects to proprietary concepts and thus to minimize, if not defeat, the goal of public access. Second, viewing copyright as protecting property implies that copyright is a unitary rather than complex concept.

To view modern copyright as a unitary concept is to iguore reality. Copyright varies in its legal characteristics depending upon the type of work that it protects and whose use it regulates. Although the 1976 Act defines the copyright owner's rights in one section,[26] it subjects those rights to limitations in twelve other sections.[27] For example, the Act distinguishes between the copyright of a musical composition and the copyright of a sound recording. Moreover, the statute contains four compulsory licenses,[28] and the ultimate goal of copyright is that copyrighted works become part of the public domain. Characterizing copyright as unitary and primarily proprietary in nature rather than complex and regulatory thus assumes away issues of considerable importance: whether compulsory licenses, for example, are not an unconstitutional exercise of power over private property or whether forcing works into the public domain is not the unlawful taking of private property. Nonetheless, reality often is iguored, and copyright is viewed as property although it functions as regulation.

Because the issue of copyright as property or regulation remains unresolved, courts have treated copyright as both—sometimes as one, sometimes as the other.[29] The resulting

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26. *See* 17 U.S.C. § 106 (1982).

27. *See id.* at §§ 107-18.

28. *See id.* at §§ 111 (cable television license), 115 (recording license), 116 (jukebox license), 118 (noncommercial broadcasting license).

29. The test for wbether a ruling is proprietary or regulatory is whetber the ruling favors tbe economic interest of copyrigbt owners or the public's right to access. Under this test, a ruling that a hotel performs a musical work by receiving radio broadcasts for its guests' rooms is proprietary, Buck v. Jewell-LaSalle Realty Co., 283 U.S. 191 (1931); a ruling that a commercial establishment receiving radio broadcasts of musical compositions does not commit infringement is regulatory, Twentieth Century Music Corp. v. Aiken, 422 U.S. 151 (1975); a ruling that permits videotaping copyrighted works off-the-air is regulatory, Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417 (1984); and a ruling that the use of copyrighted material in a news report is copyright infringement is proprietary, *Harper & Row Publishers*, 105 S. Ct. at 2218. *Compare Buck*, 283 U.S. at 191, *with* Fortnightly Corp.

confusion over copyright's nature has obscured copyright's relevance to free speech and the fair use doctrine's function. Consequently, the confusion has caused an unnecessary restraint on consumer access to copyrighted material even though public access is the constitutional justification for copyright.

The Copyright Act of 1976 brought these problems to the forefront by extending copyright, as developed for the printing press, to new technology, particularly television and the computer.[30] Applying traditional copyright doctrines to these new means of communication creates doctrinal issues submerged beneath the pragmatic concerns of commerce. The formerly clear-cut distinction between product and process, which underlay traditional copyright, served as a practical limitation on the copyright owner's right to control access to the product. This distinction no longer prevails. The paradigm of copyright is a book. Although the book is clearly the product of the printing press, one never would confuse the book with the printing process. The line of demarcation between the television broadcasting process and the work broadcast,[31] on the other hand, is not so clear.

The interdependence of process and product greatly enhances copyright owners' ability to control consumer access to copyrighted works and thereby creates a threat to copyright's constitutional purpose: the promotion of learning. The new technology, however, is a two-edged sword. Although new technology provides the entrepreneur with the opportunity for new profit, it also provides the consumer with the ability to trespass on the copyright owner's statutory domain by making his own copies quickly, cheaply, and anonymously.[32] This threat of trespass has been deemed to necessitate the copyright owner's greater control of access.

The core of the controversy is how large the copyright owner's domain should be in order to control consumer access to the copyrighted work. This problem is not capable of easy solution, for the issue of the nature of copyright as proprietary or regulatory, when reduced to its essentials, involves both economic and social issues.

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v. United Artists Television, 392 U.S. 390 (1968) (regulatory ruling that cable television company that retransmits for profit television broadcasts of copyrighted motion pictures does not infringe copyright). The point is not that these rulings are correct or incorrect. The point is that they are inconsistent.

30. *See* FINAL REPORT, *supra* note 7.

31. *See, e.g., Fortnightly Corp.*, 392 U.S. at 398 ("[B]oth broadcaster and viewer play crucial roles in the total television process . . . .").

32. Consider, for example, developments in photocopying, satellite transmissions, audio and video recording, and computer-based information storage and retrieval systems.

The premise necessarily determines the conclusion. If copyright is property, the economic arguments prevail. If, on the other hand, copyright is regulation, the social arguments prevail.

Given the complexity of the issues involved, it is not only useful but necessary to return to the origin of copyright in a search for fundamentals. The basic fundamental in American copyright law is the copyright clause. It, therefore, serves as our starting point. An examination of the clause in the context of the events of the day and in light of the origins of Anglo-American copyright provides useful insights concerning copyright's nature.

The clause itself reveals the theory of copyright embodied in the Constitution: an exclusive right, for a limited period of time, of authors to reproduce their writings for sale in order to promote learning. The protection Congress was empowered to grant for economic gain was to be given in return for the author's making the work available to the public. The public purpose of copyright, consumer access to the work, was to be implemented by its private function, rewarding the author for his efforts. The constitutional scheme, however, was more subtle than the clause's language made apparent, for its implementation required a subtle distinction—recognition of the difference between the work that is the subject of copyright and the copyright itself.

The distinction between the work and the copyright of the work is made clear by the definition of copyright—a series of rights to which a given work is subject, for example, the right to print, reprint, publish, and vend the work.[33] With this distinction in mind, it is easy to see that there is a difference between the use of the copyright and the use of the work. One who exercises a right reserved to the copyright owner uses the copyright; one who makes a use of the work without exercising a right reserved to the copyright owner uses the work, but not the copyright. The crucial point is that the two uses are not reflexive. To use the copyright is to use the work, but to use the work is not necessarily to use the copyright.

While it apparently has not been articulated, the distinction between the use of the work and the use of the work's copyright has a sound historical basis and was adhered to substantially until the 1909 Copyright Revision Act.[34] Following the enactment of the

33. These rights were given in the first United States copyright statute, the Copyright Act of May 31, 1790, 1 Stat. 124.

34. 17 U.S.C. §§ 1-216 (1976).

Statute of Anne in England, printing an author's work without his consent—a use of the copyright—was a copyright infringement, but abridging the work and printing the abridgment—a use of the work—was not.[35] The doctrine that abridgements, digests, and translations did not infringe the works upon which they were based was good law in this country during the nineteenth century.[36] In the 1909 Copyright Act, however, Congress abrogated the doctrine[37] and made two fundamental changes in copyright law. First, it unwittingly enlarged the copyright owner's rights in printed works to include—in addition to the rights to print, reprint, publish, and vend the copyrighted work—the exclusive right to copy the copyrighted work. Second, it gave the publisher, or entrepreneur, the right to claim copyright directly, rather than merely as an assignee of the author. These changes in the copyright statute provided a predicate for the corruption of the fair use doctrine. The consequences of these developments for the rights of free speech, however, did not become apparent until Congress, in the 1976 Copyright Act, conferred copyright protection from the moment of fixation, eliminated the requirement of publication, and applied traditional copyright principles to new communication technology. Between 1909 and the adoption of the 1976 Act, the fair use doctrine, which courts view as a means of reconciling copyright and free speech concerns, was corrupted and ceased to be a fair competitive use doctrine. Instead, it became a device for enhancing the copyright owner's control of access to the copyrighted work.

This Article's purpose is to demonstrate that these changes, which arguably were constitutionally impermissible, have created a conflict between copyright and free speech rights. The Article argues that the solution to this problem is a rational fair use doctrine based on the distinction between use of the work and use of the copyright. Recognition of this distinction provides the basis for a coherent theory of copyright consistent with the framers' intention and compatible with modern conditions. I first deal, in Part II of this Article, with the copyright clause and its inherent free speech limitations in light of the origin of Anglo-American copyright and

35. Gyles v. Wilcox, 2 Atk. 141, 3 Atk. 270, 26 Eng. Rep. 489 (H.L. 1740); Tonson v. Walker, 3 Swans. 672, 36 Eng. Rep. 1017 (App. 1752). For a discussion of these and other cases, see W. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW, ch.2 (1985).

36. E. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES 158 (1879).

37. 17 U.S.C. § 1(b) (1976).

the subsequent development of copyright law in this country. Part III then explores the origin of the fair use doctrine and its corruption by the Copyright Act of 1909. Part IV discusses the development of the notion that copyright is property. Finally, Part V explains how American copyright law has gone astray and what must be done to place it back on its proper course.

II. The Copyright Clause and Free Speech

The copyright clause contains no express reference to free speech, and there is little direct evidence of the framers' intention concerning the relationship between the clause and free speech concerns. Proof that the framers intended free speech rights to circumscribe the power of Congress to grant copyright, therefore, is necessarily circumstantial. Three types of circumstantial evidence should be considered: (1) contemporary evidence relating to the clause's adoption; (2) evidence concerning the nature of copyright in 1787 as it had developed in England; and (3) the judicial treatment of copyright in the nineteenth-century United States as the treatment related to free speech doctrines. The plan is to use 1787 as a vantage point and to look backward in England and forward in the United States.

A. The Adoption of the Copyright Clause

The copyright clause, as a part of the original Constitution, predated the free speech clause by several years. The first amendment, however, merely memorialized an understanding about free speech that the text of the original Constitution already embodied. The text of the debate that accompanied the first amendment's adoption acknowledged and explained this understanding.[38] As Madison explained: "[N]o power whatever over the press was supposed to be delegated to the Constitution, as it originally stood, and the [first] amendment was intended as a positive and absolute reservation of [such power]."[39]

If Madison was correct, how does one explain the copyright clause? Two points are relevant. First, the copyright clause is in fact "the promotion of Science" clause:[40] the only provision of sec-

38. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 Colum. L. Rev. 91, 119 (1984).

39. J. Madison, Report Accompanying the Virginia Resolution, *reprinted in* 4 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 572 (J. Elliott ed. 1866 & photo. reprint 1941).

40. As Roger Sherman, a Connecticut delegate to the Constitutional Convention,

tion eight of the Constitution defining the purpose of, and therefore limiting, a power granted to Congress. Second, the promotion of learning is inherently antithetical to censorship. Consequently, the clause gives Congress only the power to secure to authors the right to the writings they create. If Congress could secure to publishers control over the writings they publish, Congress would have the power to control the press and inhibit learning. By excluding publishers from the copyright clause, the framers avoided giving Congress the power to reward or punish the press. The copyright clause, in short, means what it says: It limits the power of Congress to grant copyright to authors.

The argument that the framers intentionally excluded publishers from the copyright clause is supported by three lines of evidence: (1) Madison's association with proposals for state copyright legislation during the confederation; (2) his comment on copyright in the *Federalist Papers*; and, most importantly, (3) the manifest concern that the new national government have no power to control the press. Madison was a member of the committee that offered to the Continental Congress a resolution urging the states "to secure to the authors or publishers of any new books not hitherto printed" copyright protection. As a result of that resolution, eleven states enacted copyright statutes.[41] That the resolution encouraged copyright protection for "authors or publishers" by laws and

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wrote:

> The new powers vested in the United States, are, to regulate commerce; provide for a uniform practice respecting naturalization, bankrupteies and organizing, arming and training the militia; and for the punishment of certain crimes against the United States; *and for promoting the progress of science in the mode therein pointed out.*

XV THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, COMMENTARIES ON THE CONSTITUTION, PUBLIC AND PRIVATE, Vol. 3, 281 (1984) (emphasis added) [hereinafter XV THE DOCUMENTARY HISTORY].

41. The resolution read as follows:

> *Resolved*, That it be recommended to the several States, to secure to the authors or publishers of any new books not hitherto printed, being citizens of the United States, and to their executors, administrators and assigns, the copy right of such books for a certain time not less than fourteen years from the first publication; and to secure to the said authors, if they shall survive the term first mentioned, and to their executors, administrators and assigns, the copy right of such books for another term of time not less than fourteen years, such copy or exclusive right of printing, publishing and vending the same, to be secured to the original authors, or publishers, their executors, administrators and assigns, by such laws and under such restrictions as to the several States may seem proper.

Copyright Enactments, *supra* note 4, at 1. Connecticut already had enacted a copyright statute, and apparently Delaware did not enact one. Thus, twelve of the thirteen states had copyright acts. *Id.* The resolution obviously was based on the Statute of Anne, 8 Anne, ch. 19, because its content reflects the provisions of that statute.

"under such restrictions as to the several states may seem proper" indicates that the committee felt it was appropriate, at least for the states, to grant copyright to both publishers and authors.

After urging the states to grant copyright to both publishers and authors, Madison wrote of the federal copyright clause in the *Federalist Papers*:

> The utility of this power will scarcely be questioned. The copy right of authors has been solemnly adjudged in Great Britain to be a right at common law. The right to useful inventions, seems with equal reason to belong to the inventors. The public good fully coincides in both cases, with the claims of individuals. The States cannot separately make effectual provision for either of the cases, and most of them have anticipated the decision of this point, by laws passed at the instance of Congress.[42]

Madison's mention of the common-law copyright referred to either *Millar v. Taylor*[43] or *Donaldson v. Beckett*,[44] the two major cases interpreting the Statute of Anne, the English copyright act of 1710.[45] The specific reference, however, is not clear, for both cases support Madison's statement. *Millar*, a 1769 King's Bench decision, held that an author had a common-law copyright in perpetuity despite the statute. *Donaldson*, a 1774 House of Lords decision, held that an author had a common-law copyright in his works, but only until publication, after which he must look to the statute for protection. Because *Donaldson* overruled *Millar*, Madison's language suggests that he was referring to *Donaldson*. The specific reference, however, does not affect Madison's argument because the nature of common-law copyright envisioned in both cases was the same—"the sole printing and publishing of a work."[46] In both cases the plaintiff was a bookseller-publisher seeking to secure rights as an assignee of the author.

The resolution in the Continental Congress shows that Madison could not have been ignorant of the publisher's role in copyright. Moreover, the exclusion of the publisher from the copyright clause was contrary to all copyright precedent, including *Millar* and *Donaldson*, the Statute of Anne, and the state copyright statutes. The English background suggests that the omission resulted from a conscious concern for a free press. Why, however, was it proper for the states to grant copyright protection to pub-

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42. THE FEDERALIST No. 43 (J. MADISON).
43. 4 Burr. 2303, 98 Eng. Rep. 203 (K.B. 1769).
44. 4 Burr. 2407, 98 Eng. Rep. 257; 17 Cobbett's Parl. Hist. Eng. 953 (H.L. 1774).
45. 8 ANNE ch. 19.
46. This was the definition used in both *Millar* and *Donaldson*. *See, e.g.*, 4 Burr. 2303, 2311, 98 Eng. Rep. 201, 206.

lishers, but not for Congress to do so?

Professor William Mayton, in a brilliant analysis of the origin of the first amendment,[47] provides the reason: the manifest concern that the national government have no control over the press. Mayton's thesis is that although the first amendment denied Congress any power to make laws regulating the press, this prohibition did not extend to the states, which retained the power, for example, to grant remedies for libel and defamation under their general police power. Under this view, the exclusion of publishers from the federal copyright clause, while states properly provided copyright to publishers, made eminent sense. Giving Congress the power to grant copyright to publishers would have given it the power to make a law regulating the press, to which the press would have been particularly vulnerable because of their economic interests. The power to grant copyright to authors also could have given Congress the power to regulate the press. This result, however, was avoided by limiting copyright protection to the property the authors already had and by giving them a limited right to control the property's distribution for profit.[48] The purpose of copyright—the promotion of learning—also minimized this danger because learning required access.

The Constitution's framers insisted that the original document gave Congress no power to control the press. James Wilson, who played a major role in the Constitutional Convention as a member of the Committee of Detail, which prepared the first draft of the Constitution, and the Committee of Style, which put the Constitution into final form, argued this point in his speech at a public meeting in Philadelphia in 1787. Explaining why the omission of a bill of rights was not a defect in the proposed constitution, he said:

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47. Mayton, *supra* note 38.

48. In the Pennsylvania debates on the adoption of the Constitution, Thomas McKean, explaining why a bill of rights was unnecessary, discussed the powers granted to Congress:

> [T]he power of securing to authors and inventors the exclusive right to their writings and discoveries could only with effect be exercised by the Congress. For, sir, the laws of the respective states could only operate within their respective boundaries, and therefore, a work which had cost the author his whole life to complete, when published in one state, however it might there be secured, could easily be carried into another state in which a republication would be accompanied with neither penalty not punishment—a circumstance manifestly injurious to the author in particular, and to the cause of science in general.

II THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, RATIFICATION OF THE CONSTITUTION BY THE STATES, PENNSYLVANIA 415 (1976) [hereinafter II THE DOCUMENTARY HISTORY].

> For instance, the liberty of the press, which has been a copious source of declamation and opposition, what controul [sic] can proceed from the foederal [sic] government to shackle or destroy that sacred palladium of national freedom? If indeed, a power similar to that which has been granted for the regulation of commerce, had been granted to regulate literary publications, it would have been as necessary to stipulate that the liberty of the press should be preserved inviolate, as that the impost should be general in its operation.[49]

Despite these reassurances, Congress' power to secure to authors the right to their writings caused concern for the liberty of the press and was one of the justifications for the adoption of the first amendment.[50] That amendment makes plain what the copyright clause implies—Congress cannot make a law for the promotion of learning that also can be used to inhibit learning. The copyright clause, in short, incorporates free speech constraints to limit congressional power over the press.

If the copyright clause had empowered Congress to grant copyright protection directly to publishers, objections to the power as a threat to the liberty of the press surely would have been stronger and more well founded. The English experience with using copyright to control the press had involved publishers, not

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49. XIII THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, COMMENTARIES ON THE CONSTITUTION PUBLIC AND PRIVATE, Vol. 1, 340 (1981) [hereinafter XIII THE DOCUMENTARY HISTORY].

50. The concern was voiced in the Pennsylvania debates:

> Tho it is not declared that Congress have a power to destroy the liberty of the press; yet, in effect they will have it. For they will have the powers of self-preservation. They have a power to secure to authors the right of their writings. Under this, they may license the press, *no doubt*; and under licensing the press, they may suppress it.

II THE DOCUMENTARY HISTORY, *supra* note 48, at 454.

This concern was also voiced in a newspaper article's response to James Wilson's speech:

> Does this constitution possess, as you assert, *no influence whatever upon the press?* Is there not a provision in it to secure for a limited time to authors and inventors the exclusive right to their respective *writings* and discoveries. I do not mean to call in question the propriety of this provision, but I would ask, whether under it the press may not be considered subject to the *influence* and controul [sic] of this government?—Will it be denied that this power includes in it (in some measure) *that of regulating literary publications*? [C]ertainly it cannot, unless we suppose what would be very absurd, that authors, who are to be secured the exclusive right of their writings, are at the same time to be deprived of the use of the press. This then, being the case, it clearly follows, and you have admitted it, that *a stipulation for preserving inviolate the liberty of the press* was *necessary* and proper.—And hence too it evidently appears, that the *silence*, which is observed on this interesting subject, was not occasioned by the extremely delicate consideration to which you attribute it. To what cause then is the omission, and your attempts to deceive your fellow citizens, to be ascribed?—The press is the scourge of tyrants and the grand palladium of liberty."

XIII DOCUMENTARY HISTORY, *supra* note 49, at 479.

authors. Because the eighteenth century controversy in England over copyright and the nature of literary property also involved freedom of the press concerns, the framers of the copyright clause surely were aware of this relationship between publishers' copyright and government control.[51] In the House of Lords debate concerning the question of literary property in *Donaldson v. Beckett*, for example, Lord Effingham

> begged to urge the liberty of the press, as the strongest argument against this property; adding that a despotic minister, hearing of a pamphlet which might strike at his measures, may buy the copy, and by printing 20 copies, secure it his own, and by that means the public would be deprived of the most interesting information.[52]

A monopoly of the press, of course, was held by publishers, not authors. The authors created the works, the publishers distributed them. The monopoly potential arose not from the fact of creation, but from the right to control distribution. Lord Mansfield's definition of copyright in *Millar v. Taylor* demonstrates this point: "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 intellectual, communicated by letters."[53] The author's property right per se did not pose any threat of press control because even the most prolific author would produce only a fraction of the press output. By contrast, the publisher, who could control the distribution of the work of many authors, did pose such a threat.

Against this historical background, it is important to remember what copyright entailed and did not entail at that time. At the time copyright owners had the exclusive right to publish works as those works were written, but only for a limited period of time—fourteen years with a possible renewal term of an additional fourteen years. Copyright owners did not have the exclusive right to prepare derivative works, such as abridgements, translations, or digests. The distinction between the use of the copyright and the use of the work, therefore, was fundamental. The extent to which the contemporary nature of a concept embodied in the Constitution should govern the exercise of congressional power in imple-

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51. *See, e.g.*, S. Parks, ed., *Freedom of the Press and the Literary Property Debate: Six Tracts, 1755-1770* (1974), *reprinted in* THE ENGLISH BOOK TRADE, 1660-1853, "156 Titles relating to the early history of English Publishing, Bookselling, the Struggle for Copyright and the Freedom of the Press Reprinted in photo-facsimile in 42 volumes."

52. 17 COBBETT'S PARL. HIST. 1003 (1813).

53. 4 Burr. 2303, 2396, 98 Eng. Rep. 201, 251 (K.B. 1769).

menting that concept is a matter of debate. When the issue is as fundamental as free speech, however, it is reasonable to assume that the framers of the Constitution did not intend to give Congress the power to do indirectly, through copyright legislation, what they denied it the power to do directly in the first amendment. The point is not that Congress cannot provide copyright for derivative works, but that Congress cannot do so in a manner that inhibits free speech rights. In other words, Congress cannot inhibit learning.

The argument that the copyright clause was designed to prevent Congress from infringing free speech rights by incorporating free speech values is both analytical and structural. The analytical argument is based on copyright's purpose of promoting learning. The distinction between the use of the copyright and the use of the work clearly promoted this goal. Congress could promote learning by enacting a content-based copyright statute that provided protection only for a work that promotes learning or by enacting a copyright statute that ensured public access to the copyrighted work. By enacting a content-based copyright statute, Congress would be able to control and censor the press. A copyright statute that ensures public access to the copyrighted work, on the other hand, would be anticensorship in nature.

The structural argument follows from the foregoing analytical argument. First, the framers did not want to give Congress power to control the press. Second, the copyright power eventually granted Congress could be exercised for the author's benefit only, not the publisher's. In view of the framers' concern that the national government be given no power over the press, we can assume that in drafting the copyright clause, they also contemplated the excess baggage of censorship that had burdened the English copyright. One way of jettisoning that baggage was to limit Congress' power to the granting of copyright to creators and to eliminate publishers from the copyright equation. The English background, to which we now turn, demonstrates the legitimacy of the framers' concern.

B. The English Background

The importance of the English background to American copyright law is shown by the title of the Statute of Anne's almost surely providing the source for the language in the copyright clause. The Statute of Anne was entitled "An act for the encouragement of learning by vesting copies of printed books in the au-

thors or purchasers of such copies, during the times therein mentioned."[54] All of the title's elements—authors, writings, limited times, learning, and purchasers of copies—are included in the copyright clause with one exception: the purchasers of copies, or publishers. The immediate question, however, is not why the copyright clause excluded publishers, but why the Statute of Anne included them.

The Statute of Anne included publishers because publishers in England created copyright as a private-law concept designed to benefit themselves, not authors. The copyright created by the publishers was the stationers' copyright. More specifically, the copyright was created by the Stationers' Company, the London Company of the booktrade.[55] The Catholic Queen Mary granted a royal charter to the guild of stationers in 1556,[56] and the Protestant Queen Elizabeth I renewed the charter in 1559.[57] The motivation for chartering the guild in both instances was the same: to secure the stationers as allies in royal efforts to control the output of the press during a time of religious controversy that threatened the government's stability. The charter, therefore, was a boon to the stationers as businessmen because it secured their control of the booktrade. The stationers were more than willing to serve as policemen of the press for the sovereign, whose primary concern was not who printed, but what was printed.

The importance of the stationers' copyright for present purposes is twofold. First, the stationers' copyright was an instrument of monopoly and a device of censorship given legal support by the

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54. 8 ANNE ch.19 (1709).

55. For a detailed history of the stationers' copyright, see L. PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE (1968). C. BLAGDEN, THE STATIONERS' COMPANY: A HISTORY 1403-1959 (1960), is a one volume history of the company. Early records of the company have been transcribed and provide valuable source material for those interested in the details of the stationers' copyright. A TRANSCRIPT OF THE REGISTERS OF THE COMPANY OF STATIONERS OF LONDON 1554-1640 A.D. (E. Arher ed. 1876) (five vols.) [hereinafter ARBER]; A TRANSCRIPT OF THE REGISTERS OF THE WORSHIPFUL COMPANY OF STATIONERS 1640-1708 A.D. (Eyre & Rivington eds. 1914) (three vols.) [hereinafter EYRE & RIVINGTON]. Also transcribed are Court Books B and C, records of the transactions of the Court of Assistants, the governing body of the Company. *See* RECORDS OF THE COURT OF THE STATIONERS' COMPANY, 1576 TO 1602 (W. Greg & E. Boswell eds. 1930) (Court Book B); RECORDS OF THE COURT OF THE STATIONERS' COMPANY 1602 TO 1640 (W. Jackson ed. 1957).

56. I ARBER, *supra* note 55, at xxiv. The charter is transcrihed at I ARBER, *supra* note 55, at xxvii-xxxii.

57. I ARBER, *supra* note 55, at xxxii. The religious controversy in England, precipitated by Henry VIII's break with Rome, was a substantial threat to the stability of the government and was one, if not the only, major reason for press control. Thus, it is not by coincidence that the first amendment protects the freedom of religion as well as the press.

decrees, ordinances, and acts of press control. Second, it served as the model for the Anglo-American statutory copyright. Because the stationers' copyright has been obscured by its statutory successor, discussing the copyright in some detail will be useful.

1. The Stationers' Copyright

The Stationers' Company was a cartel and, as such, faced competition from both within and outside of the company. Because the Stationers' Company was self-governing, the stationers were free to create rules governing who had the right to print what, as long as what was published did not offend the sovereign's interest. Competition from within the company, therefore, was dealt with through the imposition of internal rules.[58] The stationers' regulations, however, were not binding on nonmembers and constituted no protection against outside competition. As a cartel, the company exercised its control over nonmembers through economic might rather than legal right. Consequently, the stationers sought laws, which were more efficacious than company rules, to support their copyright and to sustain their cartel.

The stationers found the support they needed in the laws of press control, which provided protection against outside competition. Throughout the reign of censorship in England, the stationers avidly pressed lawmaking authorities with arguments concerning the importance of censorship to good governance. The stationers' arguments emphasized the efficacy of their copyright as a useful device to assist in controlling the press. For the most part, they succeeded. Beginning with the Star Chamber Decree of 1586[59] and ending in 1694 with the final demise of the Licensing Act of 1662,[60] and even including ordinances during the Interregnum,[61] the laws governing the press also protected the stationers' copyright.[62] The end of press control and, thus, the end of legal support for their copyright and cartel caused the stationers to seek new protective legislation. Fifteen years later the Statute of Anne was passed by

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58. *See, e.g.*, Ordinances of the Company made in 1678, 1681, and 1683. I ARBER, *supra* note 55, at 5-26.

59. Transcribed in II ARBER, *supra* note 55, at 807-12. A more important decree was the Star Chamber Decree of 1637, transcribed at IV ARBER, *supra* note 55, at 528-36.

60. 14 Car. II ch. 33 (1662).

61. The principal acts of censorship during the Interregnum were the Ordinance of 1643, I. C. FIRTH & R. RAIT, ACTS & ORDINANCES OF THE INTERREGNUM 1642-1660 184-86 (1911); the Ordinance of 1647, *id.* 1021-23; and the Ordinance of 1649, C. FIRTH & R. RAIT, ACTS AND ORDINANCES OF THE INTERREGNUM 1642-1660 245-54 (1911).

62. *See* L. Patterson, *supra* note 55, ch. 6, "Copyright and Censorship" (1968).

Parliament.

The stationers' private copyright was directed to the problem of intracompany competition. Because only members of the company could print and publish, their problem was not protecting the right to publish a work against all the world, but only protecting the right as against each other. The solution was simple: a stationer registered the title of his "copie" or manuscript[63] in the company's register books.[64] By registering the title of a work, a stationer acquired the right to publish that work in perpetuity and to assign or devise that right. How a member acquired title to the work he registered was of no concern to the company, and because authors could not be members of the company, they had no rights in the copyright acquired by registration. Copyright was a matter of business for businessmen only.[65]

With the exception of the printing patent, granted by the sovereign under the royal prerogative,[66] the stationers' copyright was

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63. The term copyright is derived not from the verb "to copy," but from the noun "copy," which indicates ownership of the manuscript. The entries in the Stationers' Registers were in the form of "entered for his copie." The term "copy right" was not used in the Registers until 1701, and then in an unusual context. An entry to Timothy Childe dated May 31, 1701, contained the note: "I doe declare yt Mr Awnsham Churchill is and shall been intituled to one moiety of this book & copy right, & also to one moiety of all benefitt and advantage arriseing thereby." III EYRE & RIVINGTON, *supra* note 55, at 494. A similar note between the same parties is dated August 6, 1703. *Id.* at 496.

64. An ordinance providing a penalty for a member who published another's copy recited:

> . . . by ancient Usage of this Company, when any Book or Copy is duly Entred in the Register Book of this Company, to any Member or Memhers of the Company, such Person to whom such Entrey is made, is, and always hath been reputed and taken to be Proprietor of such Book or Copy, and ought to have the sole Printing thereof . . . ."

Ordinances Made in 1681, par. V., I ARBER, *supra* note 55, at 22.

65. In view of the publishers' role in creating copyright, Arber's introductory comment to the Transcripts contains a note of irony: "The time has now come when the English Printer and the English Publisher must take their due places in the national estimation. Hitherto the Author has had it all his own way." I ARBER, *supra* note 55, at xiii.

66. The printing patent was merely one example of letters patent granted under the sovereign's royal prerogative, defined as "the power of the king to do things which no one else could do, and his power to do them in a way in which no one else could do them." ADAMS, CONSTITUTIONAL HISTORY OF ENGLAND 78 (1921). Commonly used to grant monopolies of various kinds, the letters patent also were granted for the printing of various works, for example, the Bible, prayer books, and school books (most notably the ABC Book, the first reading book of Elizabethan children), as well as individual works of specific authorship. The first printing patent apparently was granted in 1518, A. POLLARD, SHAKESPEARE'S FIGHT WITH THE PIRATES AND THE PROBLEMS OF THE TRANSMISSION OF HIS TEXT 3 (1920), the last apparently in 1693, I J. DUNTON, THE LIFE AND ERRORS OF JOHN DUNTON 153 (1818). Arber transcribed several printing patents. *See, e.g.*, II ARBER, *supra* note 55, at 15, 16, 60, 61, 63, 746.

The printing patent and the stationers' copyright served the same function of protect-

the only copyright in England until the Statute of Anne created the statutory copyright. The stationers' copyright served as the basis for the statutory copyright. The stationers' copyright, therefore, is the ultimate source of the modern American copyright, which still contains a vestige of the stationers' copyright—the requirement of registration[67]—as well as a vestige unique to its statutory successor—the termination right of the author.[68] The "author's" copyright, therefore, began as a private-law right of publishers unsanctioned by public law other than the laws of press control.

Its dependence on policies of press control ensured the mortality of the stationers' copyright. The Licensing Act of 1662,[69] which lapsed by its own terms after two years, was renewed periodically,[70] until 1694 when Parliament refused to renew it again. The stationers' copyright thus was deprived of its legal imprimatur. By this time, however, copyrights were concentrated in the hands of the booksellers, or publishers. The booksellers had created their own cartel. Resentment toward this cartel was a major reason why Parliament rejected the booksellers' efforts first to secure renewal of the Licensing Act and then to secure new legislation.[71] When the

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ing a published work from piracy. The similarity of function is indicated by the report of a Royal Commission appointed to inquire into the controversy within the Stationers' Company in the 1580s. The report said that when works are not covered by a privilege (a patent), "the companie do order emongest them selves that he which bringeth a hooke to be printed should vse yt as a priviledge." II ARBER, *supra* note 55, at 784. In case of a conflict between the printing patent and the stationers' copyright, the former prevailed. *See* "John Bill's History of Doctor Fulke's Answer to the Rhemish Testament," III ARBER, *supra* note 55, at 39 (showing how a grant of a patent to the deceased author's daughter prevailed over the stationers' copyright).

A patent for making playing cards, which was an industrial patent deemed by the stationers to be a printing patent because it involved printing, was voided in *The Case of Monopolies (D'Arcy v. Allen)*, 11 Co. Rep. 84b, 77 Eng. Rep. 1260; Moore (K.B.) 671, 72 Eng. Rep. 830; Noy, 173, 74 Eng. Rep. 1131.

The abuse of the royal prerogative finally led to the enactment of the Statute of Monopolies, 21 Jac. I ch. 3 (1623). The statute limited "Letters Patent and Grants of Privilege" to a term of fourteen years, but excluded letters patent "concerning Printing." In the end, however, it was the stationers' copyright, not the printing patent, that survived to serve as the basis for the statutory copyright.

67. 17 U.S.C. § 408 (1982); *cf.* 8 Anne ch. 19, § II (1709).

68. 17 U.S.C. § 203 (1982); *cf.* 8 Anne ch. 19, § XI (1709).

69. 14 CAR. II, ch. 33 (1662).

70. 16 CAR. II ch. 8 (1664); 17 CAR. II ch. 4 (1665); I JAC. II ch. 17, § 15 (1685); 4 & 5 W. & M. ch. 24, § XIV (1692).

71. *See* "The House of Commons Remonstrances against Revival of the Licensing Act of 1662," XI H. C. JOUR. 305-06 (1695). Among the objections was the following: "3. Because that Act prohibits printing any thing before Entry thereof in the Register of the Company of Stationers, . . . ; and the said Company are impowered to hinder the printing all innocent and useful Books; and have an Opportunity to enter a Title to themselves, and their

booksellers succeeded in securing the passage of the Statute of Anne, they received more than they had bargained for—a trade regulation statute designed to destroy their cartel.[72]

2. The Statutory Copyright

The stationers' copyright, which operated as a device of censorship and cartel, was succeeded by a statutory copyright designed as an anticensorship, anticartel device. The draftsmen of the new statute turned to the Licensing Act of 1662 for guidance, and consequently every substantive provision of the Statute of Anne either had a counterpart in the Licensing Act or served to negate the monopolistic and censorial characteristics of the copyright that Act protected.[73] Yet it is not quite accurate to say that "[c]opyright is the uniquely legitimate offspring of censorship."[74] The stationers' copyright existed independently of censorship. Although the laws of press control gave legal support to the stationers' copyright, they were not its legal source. Acts of censorship protected the stationers' copyright, but they neither created nor defined it. Consequently, the demise of press control, in itself, did not deprive copyright—the right to control the printing and publishing of a work—of its efficacy as a device of censorship. The demise merely denied governmental officials the right to use copyright for this purpose.

The essential element—monopolistic control—was and is the source of copyright's power as a device of censorship. The Statute

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Friends, for what belongs to, and is the Labour and Right of, others." *Id.* at 305-06.

For a detailed account of the booksellers' efforts to secure new legislation, see L. PATTERSON, *supra* note 55, at 138-42.

72. *See* Patterson, *The Statute of Anne: Copyright Misconstrued*, 3 HARV. J. ON LEGIS. 223 (1966).

73. Of the eleven sections of the Statute of Anne, three (sections VI, VIII, and X) were procedural in nature and two (section III, which provided an alternative means of securing copyright if registration were refused, and section XI, which gave a renewal term of copyright to the author) were clearly antimonopolistic in purpose. Section I set the pattern of copyright's general scheme and was also clearly antimonopolistic in its fourteen year limit on the term of copyright. The remaining five sections can be traced to provisions in the Licensing Act. Compare § II of the Statute of Anne with § III of the Licensing Act (entry of books' titles in the register book of the Stationers' Company); § IV of the Statute of Anne (public officials to whom complaint could be made about the prices of books) with § IV of the Licensing Act (officials to serve as licensers of books); § V of the Statute of Anne with § XVII of the Licensing Act (delivery of copies of books to libraries); § VII of the Statute of Anne with §§ V and VI of the Licensing Act (relating to importation of books); and § IX of the Statute of Anne with § XXII of the Licensing Act (the saving clause that related to printing patents).

74. Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 982 (1970).

of Anne, therefore, was not intended to benefit authors so much as it was intended to limit the power of publishers. The English act was directed at two evils: the disorder in the booktrade created by the demise of the Licensing Act, and the booksellers' cartel.

The statutory solution to these problems was to destroy the publishers' monopoly and to prevent its recurrence. The statute, however, contained two compromises that in the end proved costly to the cause of copyright law. One compromise, a seemingly small price, was the continuation of the stationers' copyrights for a period of twenty-one years.[75] The other, which entailed a larger price, was that the publishers could enjoy all the rights of the new statutory copyright as assignees of the author. Besides these two compromises, the statute addressed the monopoly problem directly.

First, the statute gave copyright a limited, fourteen-year term,[76] with a fourteen-year renewal term available to the author at the end of the first term if he was "then living."[77] Prior to the Statute of Anne, the stationers' copyright was deemed to provide copyright protection—the exclusive right of publication—in perpetuity. The stationers' copyright, therefore, purported to preempt the public domain. Consequently, works of such authors as Shakespeare, Milton, and Dryden were protected by the copyright monopoly forever. By limiting the term of copyright, the Statute of Anne created, or at least reestablished, a public domain for books, because after the statutory copyright expired, a work was available to all persons for all uses including publication. Furthermore, making the renewal term available only to the author fulfilled two purposes: it benefited authors, and it further limited the publishers' cartel. Second, the statute made copyright available to anyone entitled to it, not merely to stationers or to authors.[78] It ensured this provision's efficacy by providing an alternative means of obtaining copyright: advertising the title in the *Gazette* if the clerk of the company refused to register it in the stationers' register book.[79]

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75. 8 Anne ch. 19, § I (1709).

76. *Id.*

77. *Id.* at § XI.

78. *Id.* at § I.

79. *Id.* at § III. The *Gazette* was

> [t]he official publication of the English government, also called the "London Gazette." It is evidence of acts of state, and of everything done by the Queen in her political capacity. Orders of adjudication in bankruptcy are required to be published therein; and the production of a copy of the "Gazette," containing a copy of the order of adjudication, is evidence of the fact, and of the date thereof.

BLACK'S LAW DICTIONARY 613 (5th ed. 1979).

Third, to prevent the recapture of copyright and thereby protect the public domain, the statute required the creation of a new work as a condition for copyright.[80] Finally, the statute contained an explicit provision for controlling the prices of books.[81]

The justification for this regulatory scheme, and the master stroke, was that the statute's purpose was not to protect the property of either publishers or authors, but to promote learning by encouraging authors to create works. The statute primarily served the public interest. The Statute of Anne created a statutory copyright with three dimensions—cultural, economic, and social. First, by using copyright as an incentive to create, the statute encouraged authors to contribute to the culture of society. Second, by protecting the right to publish a work, it gave entrepreneurs the incentive to distribute the works. Finally, by limiting the rights of the copyright owner to rights that were economic in nature, it gave the user freedom to use the work for the purpose of learning.

The Statute of Anne served as a source for the copyright clause. The question, however, remains: Why did the draftsmen of the copyright clause exclude publishers? The English experience with the Statute of Anne indicates that publishers were omitted for good reason. Publishers fought against, and almost wrecked, the statute's scheme of preventing the use of copyright as a monopolistic device easily used for censorship purposes. The publishers' near success can be explained by the two compromises mentioned above: the extension of the stationers' copyright for twenty-one years and the endowment of the author's assignee with all the rights of copyright.

The first compromise meant that the booksellers' cartel continued as before and that the statute's meaning would not be litigated for at least two decades after its passage. As it turned out, the statute was not definitively interpreted until 1774, more than six decades after its enactment. By that time, the contemporary events that shaped the statute's content were history. It was as if the right to perform a musical composition for profit under the 1909 Copyright Revision Act had been presented to the Supreme Court for interpretation for the first time in 1974. During the period between the statute's passage and 1774, the booksellers' power remained undiminished, enabling them to do battle with full resources some forty years after their cartel was supposed to be

80. 8 Anne ch. 19, § I (1709).
81. *Id.* at § IV.

terminated.[82]

The second compromise—giving the assignee all the rights of the author—played an even more important and ultimately determinative role in creating the confusion in copyright law. This provision enabled publishers to use authors as foils in their quest for recognition of a perpetual common-law copyright. This perpetual common-law copyright, ostensibly for the benefit of authors, could be assigned to the publisher and, therefore, would effectively supersede the statutory copyright.

Given that statutory copyright was an author's right, it followed that the author received the right because he created the work. From this premise, it took only a small leap of logic to conclude that the common law also recognized copyright under a natural law theory. "Ownership . . . is created by production and the producer becomes the owner."[83] The idea "that authors have a natural right to the fruit of their labors is an ancient one."[84] The notion that the statutory copyright was an author's copyright, therefore, was neither unappealing nor without precedent, and the booksellers' claim that the author was entitled to perpetual copyright by reason of creation was neither original nor revolutionary. The publishers' purpose in making these claims, promoted under the banner of the public good and the cause of learning, however, was self-serving and, in a larger sense, antisocial.

The booksellers' strategy was simple and effective. They intended to obscure the cartel problem by focusing on the natural-law property rights of the author. Because the author, by reason of

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82. Despite the copyright statute, "there grew up a tacit understanding among the booksellers of the eighteenth century that there should be no interference with each other's lapsed copyrights." Gray, *Alexander Donaldson and the Fight for Cheap Books*, 38 JURID. REV. 180, 193 (1926). That authors were entitled to copyright their works did not disturb the booksellers.

> In general, he affirmed, where authors keep their own copyright they do not succeed, 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 were 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 (1927) (quoting J. LACKINGTON, MEMOIRS 229 (1793)).

83. E. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES 5 (1879).

84. Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 284 (1970).

the positive law of assignment, could convey the natural-law copyright to the bookseller, the common law would revive the private-law stationers' copyright, and the cartel would continue. The goals of the Statute of Anne thus would be defeated and its limitations overcome. The publishers, of course, had as much concern for authors as a cattle rancher has for cattle. The publishers' ulterior motive was to revive the stationers' copyright in the guise of a common-law copyright in order to perpetuate their cartel.[85] They almost succeeded.

In *Millar v. Taylor*[86] the King's Bench recognized the author's common-law copyright and gave the booksellers what they wanted. The court reached this conclusion even though no author was a litigant in the case; the bookseller, true to form, sued as an assignee of the author. An excerpt from Justice Willes' opinion explains the relationship between the author and the bookseller and the surrounding issues:

> If the copy of the book belonged to the author, there is no doubt that he might transfer it to the plaintiff. And if the plaintiff, by the transfer, is become to the proprietor of the copy, there is as little doubt that the defendant has done him an injury, and violated his right: for which this action is the proper remedy. But the terms of years secured by 8 Ann. c. 19, is expired. Therefore the author's title to the copy depends upon two questions—
>
> 1st. Whether the copy of a book, or literary composition, belongs to the author, by the common law:
>
> 2d. Whether the common law-right of authors to the copies of their own works is taken away by 8 Ann. c. 19.[87]

The majority in *Millar* concluded that the author had a common-law copyright by virtue of his creative act and that the common-law copyright superseded the statutory copyright. Lord Mansfield's reasoning explains the conclusion:

> [B]ecause it is just, that an author should reap the pecuniary profits of his own ingenuity and labour. It is just, that another should not use his name, without his consent. It is fit, that he should judge when to publish, or whether he ever will publish. It is fit, he should not only choose the time, but the manner of publication; how many; what volume; what print. It is fit, he should choose to whose care he will trust the accuracy and correctness of the impression; in whose honesty he will confide, not to foist in additions: with other reasonings of the same effect.[88]

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85. The booksellers' efforts began in 1731, the date their old copyrights expired under the Statute of Anne, and lasted for some forty years. *See* L. PATTERSON, *supra* note 55, ch. 8, "Copyright in England from 1710 to 1774."

86. 4 Burr. 2303, 98 Eng. Rep. 201 (K.B. 1769).

87. *Id.* at 2311, 98 Eng. Rep. at 206.

88. *Id.* at 2398, 98 Eng. Rep. at 252.

Lord Mansfield's argument has three weaknesses. First, under the Statute of Anne an author could exercise all the rights he claimed were appropriate: an author could receive pecuniary profits, he could require the use of his name, he could decide when and whether to publish, and he could control all other incidents of publication. Second, although an author could exercise these rights for up to twenty-eight years, he was mortal. Rights in perpetuity would be of little value to him, but of great value to the booksellers. Third, once an author conveyed his copy, all the rights that Mansfield concluded were "just" and "fit" for the author passed to the bookseller. Lord Mansfield, in short, was speaking for the booksellers' rights hidden in the guise of the author's rights. It may or may not be significant that Mansfield earlier had served as counsel for booksellers "in most of the cases which have been cited from Chancery . . . ."[89]

Recall that the Statute of Anne required a new work as a condition for statutory copyright. The author, as creator of the new work, clearly had the right to "judge when to publish, or whether he will ever publish," and nothing in the statute inhibited this right. The bookseller, however, could own the copyright only by reason of assignment. Ownership by reason of creation and ownership by way of assignment, of course, are subtantially different. Natural-law arguments support the former, but not the latter.

Most important, however, is Mansfield's failure to make the critical distinction between rights in the work and rights in the copyright of the work. This failure is not surprising, because the distinction was foreign to English jurisprudence. In the stationers' vernacular, the term "copy right" meant ownership of the manuscript, and the statutory copyright was essentially a codification of the stationers' copyright. Under the stationers' copyright, the distinction between the ownership of the physical object—the manuscript—and the rights resulting from ownership of the object was not relevant because the physical object and the rights attendant to it coincided: the bookseller held both. The assignment of ownership of the manuscript carried with it the right to publish.[90] Own-

89. *Id.* at 2407, 98 Eng. Rep. at 257.

90. The distinction between the work and the copyright of the work is made clear in the 1976 Copyright Act, 17 U.S.C. § 102 (1976), which provides that the transfer of title to the physical object does not transfer the copyright and vice versa. Courts, however, have not utilized this distinction to recognize the difference between the use of the work and the use of the copyright. For a discussion of the distinction between the ownership of the work and the ownership of the common-law copyright, see Pushman v. New York Graphic Soc., Inc.,

ership of the work would entail a right to protect the integrity of the work by preventing alterations. Ownership of rights to which the work was subject—the right of publication—would not. The stationers' copyright—the "right to the sole printing and publishing" of the work—was limited to publishers, whose concern was not the work's integrity, but its sale.

The distinction between ownership of a work by reason of creation and ownership of the right to control the printing and publishing of a work by reason of assignment—the copyright—is made clear by the fact that the latter remains *in futuro* until the work is published. As Justice Yates wrote: "It would be strange indeed, if the very act of publication can be deemed the commencement of private property."[91] This distinction, however, was not merely irrelevant in the booksellers' case, it was inimical to the booksellers' cause. If the author owned the work and merely assigned the right to publish it, a court might hold that the rights he retained in the work gave him unwanted control over the bookseller's right of publication.

Mansfield skillfully conflated the rights of the author and bookseller and invested copyright with the author's moral rights.[92] The end result was to foreclose the future development of the author's rights in his work independent of copyright because copyright preempted the field. If a copyright encompassed all the rights in the work, the author's rights would become inextricably bound with the publisher's rights in accordance with the publisher's claims. Ironically, this development was detrimental, not beneficial, to the author. It eliminated the opportunity for courts to distinguish between the work and the copyright of the work.[93] By em-

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287 N.Y. 302, 39 N.E.2d 249 (1942)(sale of a painting). *Cf.* Chamberlain v. Feldman, 300 N.Y. 135, 89 N.E.2d 863 (1949) (Mark Twain manuscript).

91. 4 Burr at 2358, 98 Eng. Rep. at 231.

92. Mansfield's discussion of the author's rights remains a good statement of the author's moral rights:

> The author may not only be deprived of any profit, but lose the expense he has been at. He is no more master of the use of his own name. He has no control over the correctness of his own work. He can not prevent additions. He can not retract errors. He can not amend; or cancel a faulty edition. Any one may print, pirate, and perpetuate the imperfections, to the disgrace and against the will of the author; may propagate sentiments under his name, which he disapproves, repents and is ashamed of. He can exercise no discretion as to the manner in which, or the persons by whom his work shall be published.

Id. at 2398, 98 Eng. Rep. at 252.

93. Ironically, Justice Willes had used this distinction in his opinion: "Certainly bona fide imitations, translations, and abridgement are different; and, in respect of the property, may be considered as new works: but colourable and fradulent imitations will not do." *Id.* at

bracing this conflation of rights, common-law jurisdictions forfeited the development of the doctrine of moral rights by default.[94]

The irony of this development is all the sharper because *Millar* was a short-lived precedent. Decided in 1769, *Millar* was not appealed. The same issue and the same works, however, were presented in 1774 to the House of Lords in *Donaldson v. Becket*.[95] In *Donaldson* the House of Lords reached a different result. *Donaldson* traditionally has been interpreted as holding that the author indeed did have a common-law copyright as long as the work remained unpublished.[96] After publication, the author had only the rights that the Statute of Anne granted him. Professor Howard Abrams has demonstrated ably that the House of Lords in fact did not recognize the author's common-law copyright.[97] The contempo-

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2310, 98 Eng. Rep. at 205.

94. *See* Vargas v. Esquire, Inc., 164 F.2d 522 (7th Cir. 1947); Strauss, "The Moral Right of the Author," in STUDIES IN COPYRIGHT 963 (Fisher ed. 1963) (Copyright Law Revision Study No. 4 (1955)); Katz, *The Doctrine of Moral Right and American Copyright Law—A Proposal*, 24 S. CAL. L. REV. 375 (1951); Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554 (1940); Sarraute, *Current Theory on the Moral Right of Authors and Artists Under French Law*, 16 AM. J. COMP. L. 465 (1968); Treece, *American Law Analogues of the Author's Moral Right*, 16 AM. J. COMP. L. 487 (1968); *cf.* Gilliam v. American Broadcasting, Co., 538 F.2d 14 (2d Cir. 1976).

95. 4 Burr. 2408, 98 Eng. Rep. 257 (K.B. 1769); 2 Bro. P.C. 129, 1 Eng. Rep. 837 (H.L. 1774); 17 Cobbett's Parl. Hist. 953 (1813).

96. *See, e.g.*, Capitol Records, Inc. v. Mercury Records Corp., 221 F.2d 657, 664-68 (2d Cir. 1955) (Hand, J., dissenting); M. NIMMER, 1 NIMMER ON COPYRIGHT § 4.02[B] (1986); A. LATMAN, THE COPYRIGHT LAW: HOWELL'S COPYRIGHT LAW REVISED AND THE 1976 ACT 6 (5th ed. 1979). A contrary view is that a majority of the judges believed that the Statute of Anne did not preempt common-law copyright. Whicher, *The Ghost of* Donaldson v. Beckett*: An Inquiry Into the Constitutional Distribution of Powers Over the Law of Literary Property in the United States*, 9 BULL. COPYRIGHT SOC. 102, 194 (1962).

That an issue as important as the existence of common-law copyright should turn on the interpretation of one case suggests that the copyright was not recognized prior to that case. Certainly, it suggests that any authority for the common-law copyright existing prior to the decision was scant. Prior to 1731, when the stationers' copyrights expired under the Statute of Anne, courts had no need, and therefore no occasion, for recognizing the common-law copyright.

Whether the Lords did or did not intend to recognize the common-law copyright, *Donaldson* clearly is the source of the doctrine that a work is protected by the common law as long as it remains unpublished.

97. The House of Lords issued writs of assistance requesting the judges of King's Bench, Common Pleas, and Exchequer to give their opinions on five questions formulated by the Lords. After receiving the opinions, the Lords debated the case and voted against the common-law copyright by a vote of twenty-two to eleven. Professor Abrams' argument is that the confusion between the House of Lord's ruling and the judges' advisory opinions arises from the various reports of the cases. The most commonly cited and used report contains only the judges' advisory opinions, not the text of the Lords' debate or their vote. Abrams, *The Historic Foundation of American Copyright Law: Exploding the Myth of*

rary English meaning of copyright—the sole right of printing and publishing—supports Professor Abrams' view. The term "common-law copyright" was an oxymoron in 1774. What meaning could the sole right of publishing have if the right evaporated upon publication? Thus, it is illogical to say that *Donaldson* recognized the author's common-law copyright unless the term is given an additional meaning: the author's proprietary interest in his works prior to publication. Indeed, this is what happened.[98] Consequently, copyright became a term with two meanings, and because the two meanings were not distinguished for conceptual purposes, they provided copyright with both a proprietary and a regulatory basis.

Although *Donaldson* is the more famous case, *Millar* is the more damaging precedent because *Millar* combined the rights of the author with those of the publisher.[99] Collapsing the author's and publisher's rights into one bundle of rights meant that copyright incorporated the author's creative function as well as the publisher's distributive function. The author's role in creating the work protected by copyright merged with the publisher's role in distributing the work. Despite *Donaldson*'s regulatory basis of copyright, *Millar*'s proprietary basis continued to benefit the publisher, not the author. The result was a dual conceptual basis for copyright. After *Donaldson*, copyright has been known as an author's proprietary right although it continues to function as a regulatory concept.

It is reasonable to assume that the English experience, epitomized in *Millar* and *Donaldson*, caused the framers of the Consti-

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Common Law Copyright, 29 WAYNE L. REV. 1119, 1158-67 (1983).

98. "Under common-law copyright, 'the property of the author . . . in his intellectual creation [was] absolute until he voluntarily part[ed] with the same.'" *Harper & Row Publishers*, 105 S. Ct. at 2226 (1985) (quoting American Tobacco Co. v. Werckmeister, 207 U.S. 284, 299 (1907)).

99. *Millar* "focused future case analysis on the issue of copyright as an author's right. In that respect, it remains a vital watershed in the development of copyright law and theory." Abrams, *supra* note 96, at 1156.

Millar's influence is visible in the 1976 Copyright Act, which implements the concept of copyright as an author's right by conferring copyright protection from the moment of fixation. Ironically, this concept of fixation was necessary to make copyright available for live television broadcasts, which are not published, but performed by transmission over the public airwaves. Thus, a broadcaster of sporting events, for example, now can obtain copyright protection for his broadcast by videotaping the transmission of an event as it is broadcast. Of course, the broadcaster is an author only by fiction, and the concept of fixation is not limited to broadcasts. The concept applies to any copyrightable work fixed in a tangible medium of expression. Thus, except for works that are not fixed, statutory copyright has swallowed up the common-law copyright and thereby has become saddled with common-law copyright's proprietary notions.

tution to exclude publishers from the copyright clause. The framers' use of the Statute of Anne and their omission of publishers, on whose conduct the concept of copyright was based, most likely reflect an intent not to give Congress the power to make a law regulating the press. In one sense, the framers' efforts were too successful. The American experience demonstrates that their design was so subtle that it found fruition in copyright rather than free speech doctrines.

C. *The American Experience*

The American copyright of the nineteenth century did not create free speech problems.[100] No problems arose partly because free speech doctrines remained undeveloped and partly because statutory copyright required publication and, therefore, dissemination of the copyrighted work regardless of its content.[101] Most impor-

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100. The first Congress enacted a copyright statute, 1 Stat. 124, 1st Cong., 2d. Sess., ch. 15, that departed from the wording of the copyright clause by making copyright available to both the author and the author's assigns. One ostensible explanation for this act is that it was based on the Statute of Anne, which did the same thing. A closer analysis of the two acts, however, suggests that the draftsmen of the American statute were conscious of the constitutional limitations on copyright. A comparison of the two titles indicates the differences. The title of the Statute of Anne was "An act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned." The title of the American act was "An Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned." The substitution of "proprietors" in the American act for "the purchasers of copies" in the English act can be explained as follows: The American act, unlike its English counterpart, provided that copyright was available for the author's executors and administrators, as well as his assigns. All these persons would be "proprietors" of the copyright. Thus, it is reasonable to infer that the purpose of the copyright for assigns was to enable the author to obtain the benefit of his exclusive right by assigning that right to a publisher. The American act, unlike the English act, was intended subtly to deny the publisher any independent basis for copyright by reason of owning the manuscript. From the beginning, a distinction existed between the ownership of the work—the physical object—and of the copyright of the work—merely a series of rights to which the work was subject. The statute's legalization of the piracy of foreign works in section 5 indicates that the copyright rights were wholly the product of the statute. Section 5, incidentally, was based on section VII of the Statute of Anne, a provision designed to end control over the importation of books allowed by the Licensing Act.

101. With two minor exceptions, Congress did not enact any content-based copyright, and Congress quickly retreated from its two failed efforts.

> Congress has enacted two statutory copyright restrictions that were arguably content based, but afterwards repealed them. After the language "composition designed or suited for public representation," which was contained in the 1856 version of the Copyright Act, Act of August 18, 1856, 11 Stat. 138, was construed in *Martinette v. Maquire*, 16 Fed.Cas. 920 (C.C.Cal. 1867) (No. 9,173) to mean that the moral content of the work had to be suitable for public consumption . . . Congress deleted the "suited" language from the next version of the Act. *See* Act of July 8, 1870, 16 Stat. 198. A later

tantly, however, the courts respected the implicit free speech constraints in the copyright clause.

If the copyright clause had contained explicit free speech constraints, one reasonably can assume that those constraints would have required publication of a work as a condition for statutory protection; precluded copyright protection for ideas or for public documents, for example, court opinions; and permitted competitive use of a copyrighted work under limited circumstances. Although the copyright clause did not contain such constraints, the foregoing doctrines nonetheless developed in the American copyright experience. All these doctrines were present or promulgated in the nineteenth century as copyright, not free speech, doctrines. In its first copyright case, *Wheaton v. Peters*,[102] the Supreme Court rejected the author's common-law copyright after publication, construed the copyright statute's requirements strictly, held that judicial opinions could not be copyrighted, and implicitly held that ideas were not subject to copyright. The Court made this latter doctrine explicit almost fifty years later in *Baker v. Selden*.[103] Additionally, in *Folsom v. Marsh*[104] Justice Story promulgated the fair use doctrine.[105] These free speech doctrines masqueraded as copyright law: publication ensured public access; the nature of court opinions required public access unfettered by private copyright; subjecting ideas to copyright would make copyright the device of censorship it had been under the Tudors and Stuarts; and the fair use doctrine eliminated the danger that an economic right to publish and sell books might be used as a political right of suppression.

It is not surprising that these rules were viewed as antimonopolistic rather than pro-free speech. Censorship was considered a

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version, Act of June 18, 1874, ch. 301, § 3, 18 Stat. 78, 79, contained language arguably placing content restrictions on the copyrightability of engravings, cuts and prints. (The Act provided that such works were copyrightable only if "connected with the fine arts.") After this language was narrowly construed by the Supreme Court, *see Bleistein v. Donaldson Lithograph Co.*, 188 U.S. 239 (1903), the language was deleted from the 1909 version of the Act, which is controlling in this case, leaving no content-based restrictions in the Act.

Mitchell Bros. Film Co. v. Cinema Adult Theater, 604 F.2d 852, 855 n.4 (5th Cir. 1979).

102. 33 U.S. (8 Pet.) 591 (1834). For an excellent and detailed background of the case, see Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*, 83 MICH. L. REV. 1291 (1985).

103. 101 U.S. 99 (1879).

104. 9 F. Cas. 342, No. 4901 (C.C.D. Mass. 1841).

105. The Supreme Court recently made note of "the First Amendment protections already emhodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use, . . ." *Harper & Row Publishers*, 105 S. Ct. at 2230.

political concern, whereas the American copyright was viewed primarily as an economic concern. As the English experience demonstrated, censorship requires three types of control. It requires control of the process (the printing press), control of the product (licensing of the book), and control of distribution (a publishers' cartel). None of these conditions existed in the United States. Thus, free speech doctrines were not needed.

There was another reason that free speech doctrines did not develop in conjunction with copyright law. During the nineteenth century, American courts, true to the concept of copyright envisioned by the framers of the Constitution, maintained the distinction between the use of the copyright, an economic concern, and the use of the work, a matter of learning. In deed, if not in word, courts consistently used the distinction between the use of the work and the use of the copyright. *Baker v. Selden*,[106] which prevented copyright from extending to ideas, and *Folsom v. Marsh*,[107] which promulgated the fair use doctrine, clearly were predicated on this distinction. Moreover, abridgments, which involved a use of the work, were not considered copyright infringements. In *Stowe v. Thomas*,[108] for example, a court held that the publication of a German translation of *Uncle Tom's Cabin*—a most obvious use of the work—did not infringe the copyright. In a more subtle vein, the courts, contrary to the wording of the copyright statute, which provided the copyright owner with an exclusive right to vend the copyrighted work, created the first sale doctrine.[109] This doctrine provided that the right to vend a copy of the work was exhausted with the first sale of that copy.

The absence of explicit free speech constraints in the copyright clause itself, combined with the lack of judicial need to use free speech doctrines, has allowed the idea that the copyright clause imposes free speech constraints on Congress to remain dormant. The time has come to reassert that idea.[110] The 1976 Copy-

106. 101 U.S. 99 (1879).

107. 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901).

108. 23 F. Cas. 201 (E.D. Pa. 1853) (No. 13,514).

109. *See, e.g.*, Harrison v. Maynard, Merrill & Co., 61 F. 689 (2d Cir. 1894); Independent News Co. v. Williams, 293 F.2d 510 (3d Cir. 1961). The doctrine is codified in the 1976 Act, 17 U.S.C. § 109. *Cf.* 17 U.S.C. § 202 (ownership of copyright is distinct from ownership of material object).

110. Commentators recently have raised the copyright/free speech issue, but not in the terms suggested here. *See* Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 CAL. L. REV. 283 (1979); Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970); Nimmer, *Does Copyright Abridge the*

right Act, in applying copyright to new communications technology, has forfeited the major free speech safeguard implicit in copyright—the requirement of publication. Prior to the 1976 Act, however, the relevance of free speech constraints to copyright had been undermined by three related developments: (1) the growth of the notion that a copyright is private property; (2) the unwitting expansion of copyright in the 1909 Copyright Revision Act; and (3) the corruption of the fair use doctrine, a direct result of the second development.

III. COPYRIGHT AND FAIR USE

A. Overview

Of the three free speech constraints implicit in copyright—publication, no copyright for ideas or governmental works, and fair use—the last is the most important and far reaching. Eliminate the others, and a rational fair use doctrine can protect the rights of free speech. As it currently exists, however, the fair use doctrine is irrational. The most important free speech constraint implicit in copyright, therefore, is the least efficacious.

The tangled web of reasons for this state of affairs leads ultimately to the failure to recognize the free speech limitations in the copyright clause. Courts aware of these limitations would have

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First Amendment Guarantees of Free Speech and Press?, 17 UCLA L. REV. 1180 (1970).

Courts consistently have rejected the free speech defense in copyright infringement actions. *See, e.g.*, Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc., 600 F.2d 1184 (5th Cir. 1979); Roy Export Co. Estab. v. Columbia Broadcasting System, Inc., 672 F.2d 1095 (2d Cir. 1982); Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977); Wainwright Securities, Inc. v. Wall Street Transcript Corp., 558 F.2d 91 (2d Cir. 1977); Walt Disney Productions v. Air Pirates, 581 F.2d 751 (9th Cir. 1978). One district court upheld the free speech defense, Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 445 F. Supp. 875 (S.D. Fla. 1978), but on appeal, the Court of Appeals rejected the free speech defense and affirmed on fair use grounds, 626 F.2d 1171 (5th Cir. 1980).

In general, these cases were sound in rejecting the free speech defense as being the last refuge of an infringing scoundrel. The denigration of the defense caused by its use by blatant infringers, however, should not be allowed to obscure its importance in an appropriate case. Furthermore, courts should not be beguiled by Nimmer's solution that because copyright does not protect ideas, it cannot infringe free speech rights. The Supreme Court has accepted the notion that the idea/expression dichotomy is a sound basis for reconciling copyright and free speech rights. "The Second Circuit noted, correctly, that copyright's idea/expression dichotomy 'strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression.' " *Harper & Row Publishers*, 105 S. Ct. at 2228-29. This approach, however, overlooks the essential problem created by the application of copyright to new technology: the copyright owner's control of access to the expression of the idea.

avoided the confusion over the nature of copyright as proprietary or regulatory in nature; Congress' unwitting expansion of copyright in the 1909 Act would not have occurred; and without this expansion courts would have had no basis to corrupt the fair use doctrine. Consequently, the application of copyright to new communications technology would have been made in light of the threat that copyright poses for free speech rights. These statements, of course, are statements of probabilities, for reason could have faltered anywhere along the way. But if we assume sound reason, the probabilities are high. To demonstrate the point, we focus here in detail on the fair use doctrine, with a brief preliminary explanation of the thesis.

As originally promulgated, the fair use doctrine was a fair "competitive" use doctrine designed to enable a rival author or publisher to use a copyrighted work in preparing another publication. Therefore, the doctrine applied only to competitors, not consumers. When Congress enlarged the copyright owner's rights in the 1909 Copyright Revision Act to encompass the right to copy, as well as the rights to print, reprint, publish, and vend the copyrighted work, it enlarged the copyright owner's domain and brought consumer conduct within the realm of infringement. Before the 1909 Act, the consumer's use of a copyrighted work was merely an ordinary use, neither fair nor unfair, and was irrelevant to copyright infringement actions. Thus, after the 1909 Act, the notion that the judicially created doctrine of fair use would protect the consumer's right of access was illusory because saying that a use may be fair is saying also that it may be unfair. Courts applying the 1909 Act thus reduced the three uses of copyrighted work—unfair use by a competitor (infringement), fair use by a competitor (no infringement), and ordinary use by a consumer (no issue raised)—to two—unfair use and fair use. The chilling effect that the new act had on the constitutional purpose of copyright—the promotion of learning—was subtle, but consequential. The principle the 1909 Act established was the beginning of a termitic infestation of the constitutional right of free speech.

B. The Origin of the Fair Use Doctrine

In 1841 Joseph Story formulated the fair use doctrine in *Folsom v. Marsh*,[111] a case involving two publishers of George Washington biographies. Because an understanding of the original fair

111. 9 F. Cas. 342 (C.C.D. Mass 1841) (No. 4901).

use doctrine requires an awareness of the copyright owner's rights at the time the doctrine was created, it is important to note that the copyright statute involved in *Folsom* was the Revision Act of 1831.[112] The relevant rights in that statute, however, were the same as those in the 1790 Act.[113] Under both acts, the owner of a book's copyright had the right to print, reprint, publish, and vend the copyrighted work.

In *Folsom* the plaintiff's author, Jared Sparks, had published a twelve volume work entitled *The Writings of George Washington.* The defendant's author, the Reverend Charles W. Upham, had published a two volume work entitled *The Life of Washington in the form of an Autobiography.* Upham's work derived 353 of its 866 pages from letters and other documents that had appeared in the 7000 pages of Sparks' work. The court held that Washington's letters were subject to copyright and rejected the defendant's defense that his work was an abridgment, which at that time was not deemed an infringement. The copying in *Folsom*, however, involved printing and publishing by a competitor. The court held that the defendant had infringed the plaintiff's copyright. In reaching this conclusion, the court stated:

> The question, then, is whether this is a justifiable use of the original materials, such as the law recognizes as no infringement of the copyright of the plaintiffs . . . . In short, we must often, in deciding questions of this sort, look to the nature and object of the selections made [by a competitor], the quantity and or value of the materials used [by a competitor], and the degree in which the use [by a competitor] may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.[114]

The editorial addition of the bracketed "by a competitor" language is intended to make the following point: The fair use doctrine, as originally promulgated, was a fair "competitive" use doctrine predicated on a distinction between the use of the work and the use of the copyright. Using the work could be fair, using the copyright could not. The key issue was whether the use of the work had become a use of the copyright. As Eaton Drone stated in his nineteenth century classic on copyright law: "It is a recognized principle that every author, compiler or publisher may make certain uses of a copyrighted work, in the preparation of a rival or other publication."[115] Because a consumer would not use the work

112. Act of February 3, 1831, ch. 16, 4 Stat. 436.
113. *See supra* note 33.
114. 9 F. Cas. at 348.
115. E. DRONE, A TREATISE ON THE LAW OF INTELLECTUAL PRODUCTIONS 386 (1870).

in the preparation of a rival or other publication, the fair use doctrine had no relevance to the consumer's use of the work.

The consumer's absence from the fair use equation was not coincidental. Copyright infringement involved the competitive use of a copyrighted work and was viewed as an act of piracy.[116] A consumer's use of the work, of course, was not an act of piracy unless it became competitive in nature.

To appreciate why the consumer did not fall within the realm of the fair use doctrine, it is helpful to note that the development of the doctrine was closely allied to the doctrine that the abridgment of a copyrighted work was not an infringement. In *Folsom* Story acknowledged that "a fair and bona fide abridgement of an original work, is not a piracy of the copyright of the author."[117] Story and American courts in general, however, did not like the doctrine.[118] In *Gray v. Russell*[119] Story made substantially the same points regarding fair abridgment as he would make two years later in *Folsom*.[120] In *Folsom* Story, notwithstanding his enunciation of the fair use doctrine, held that the defendant's work was a piratical use. Story explained this result near the end of his opinion: "If it had been the case of a fair and bona fide abridgement of the work of the plaintiffs it might have admitted of a very different consideration."[121]

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116. Thus *Folsom* was a "Bill in equity for piracy of the copyright of the writings of Washington." 9 F. Cas. at 343. "In the law of copyright, piracy is the use of literary property in violation of the rights of the owner. The meaning of infringement is the same." E. DRONE, *supra* note 115, at 383.

117. 9 F. Cas. at 345.

118. *See* E. DRONE, *supra* note 115, at 434-35. For example, in a case which turned on the question of ahridgment, Justice M'Lean would have ruled for the author: "But a contrary doctrine has been long established in England, under the statute of Anne, which, in this respect, is similar to our own statute; and in this country the same doctrine has prevailed. I am, therefore, bound by precedent; and I yield to it in this instance, more as a principle of law, than a rule of reason or justice." Story v. Holcomhe, 23 F. Cas. 171, 173 (C.C.D. Ohio 1847) (No. 13,479).

119. 10 F. Cas. 1035 (C.C.D. Mass. 1839) (No. 5728).

120.

> The question, in such a case [abridgment of an original work], must be compounded of various considerations; whether it be a bona fide abridgment, or only an evasion by the omission of some unimportant parts; whether it will, in its present form, prejudice or supersede the original work; whether it will be adapted to the same class of readers; and many other considerations of the same sort, which may enter as elements, in ascertaining, whether there has been piracy or not. Although the doctrine is often laid down in the books, that an abridgment is not a piracy of the original copyright; yet this proposition must be received with many qualifications.

Id. at 1038.

121. 9 F. Cas. at 349.

Given that a bona fide abridgment of a copyrighted work was not considered an infringement, Story could not summarily hold that the defendant's use was piratical. Instead, he did the next best thing by narrowing the principles applicable to abridgment and making those principles applicable to a use of the copyrighted work generally. He repeated in *Folsom* what he had said in *Gray* and, without acknowledging it, reinforced his earlier narrowing of the fair abridgment doctrine. The result of Story's opinion in *Folsom* was to enlarge protection for the copyright owner.

Although providing authors with greater protection against predatory competitive practices is commendable, extending the fair use doctrine to protect the author against a consumer's ordinary use of the work demonstrates that Drone was correct when he wrote: "The judicial history of copyright is fertile in examples showing how false doctrines become firmly rooted in jurisprudence by the practice of blindly following precedents without examining the precedents on which they are based."[122]

C. *The Corruption of the Fair Use Doctrine*

Today, the fair use doctrine is no longer competitive in nature. The doctrine is applied to consumers as well as competitors.[123] A fair use doctrine intended to permit competitors to make reasonable use of a work is quite different from a fair use doctrine that makes a consumer's use of the work for ordinary purposes suspect. The fair use doctrine, therefore, has been separated from its foundations and has become a free floating doctrine of "equitable reason,"[124] with all the confusion that a doctrine of equitable reason entails. The confusion began with the 1909 Copyright Revision Act.[125] The confusion's source was the Act's addition of the right to copy to the copyright owner's exclusive rights, an error that eventually tilted the foundations of copyright law away from its public purpose to the cause of private gain.

Prior to the 1909 Copyright Act, copyright statutes contained

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122. E. DRONE, *supra* note 115, at 434.

123. In Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984), the issue was whether the use of the copyrighted works—videotaping copyrighted motion pictures off-the-air—was a fair use. Justice Blackmun made my point in his dissent: "I am aware of no case in which the reproduction of a copyrighted work for the sole benefit of the user has been held to be fair use." 464 U.S. at 479 (Blackmun, J., dissenting).

124. H.R. REP. No. 94-1476, 94th Cong., 2d Sess. 65, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659.

125. Act of March 4, 1909, ch. 320, 35 Stat. 1075-88; 17 U.S.C. §§ 1-216 (1976).

a specification-of-rights section and a specification-of-infringement section. The latter distinguished the infringement of books from the infringement of other types of works, such as maps, charts, prints, engravings, and statuary.[126] In general, printing a book and copying other kinds of works were infringements.[127] The specification-of-rights section, as distinguished from the specification-of-infringement section, was continued in the 1870 Copyright Revision Act,[128] the second major revision of the copyright law, and assumed considerable importance because of the increased scope of copyright coverage. The relevant section read:

> [A]ny citizen of the United States, or resident therein, who shall be the author, inventor, designer, or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph or negative thereof, or of a painting, drawing, chromo, statue, statuary, and of models or designs intended to be perfected as works of the fine arts . . . shall . . . have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same . . . .[129]

For the first time, the right to copy was associated with books, but the infringement sections of the 1870 Act[130] made clear that the right to copy did not apply to books.[131] Congress, in the 1909 Act, overlooked this point and defined both the copyright owner's rights and the rights "[t]o print, reprint, publish, copy, and vend the copyrighted work . . ."[132] and eliminated the specification-of-infringement section.[133] The rights to print, reprint, publish, copy, and vend were made applicable to all copyrighted works. The Congress was justified in including the right to copy because the statute protected works for which the only appropriate protection was the right to copy. Congress, however, did not recognize the consequences of the statutory change. The Committee Report on the bill

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126. *See* V. CLAPP, COPYRIGHT—A LIBRARIAN'S VIEW 28 (1968).

127. Williams & Wilkins Co. v. United States, 487 F.2d 1345, 1350 (Ct. Cl. 1973), *aff'd per curiam*, 420 U.S. 376 (1975) (Court equally divided).

128. Act of July 8, 1870, ch. 230, 16 Stat. 198-217 (*codified and reenacted* in 1873-74 as §§ 4948-71 of the Revised Statutes).

129. § 86, 16 Stat. at 212.

130. §§ 99 (infringement of books), 100 (infringement of other works), 16 Stat. at 214.

131. The statute . . . makes a distinction between infringement of a book and of cut, engraving, etc. A book is infringed by printing, publishing, importing, selling, or exposing for sale any copy of the book. Section 4964, Rev. St. A chart, print, cut, engraving, etc., is infringed by engraving, etching, working, *copying*, printing, publishing, importing, selling, or exposing for the sale a copy of the chart, cut, etc. Section 4965. Harper v. Shoppell, 26 F. 519, 520 (C.C.S.D. N.Y. 1886).

132. 17 U.S.C. § 1(a) (1976).

133. "If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable . . . ." 17 U.S.C. § 101 (1976).

"stated incorrectly that the draft reproduced without change the phraseology of the Revised statutes, but stated correctly that 'this, with the insertion of the word "copy", practically adopts the phraseology of the first copyright act Congress ever passed—that of 1790.' "[134] This language suggests that Congress did not intend to change significantly the scope of copyright protection. "[C]opyright proprietors, without seeking it and apparently quite by accident, acquired at least the semblance of a right to an activity that was to have increasing importance in the new century."[135] Congress had no reason to apply the right to copy to books already protected adequately by the rights to print, reprint, publish, and vend.

The new right to copy for the first time gave a book's copyright owner a right as to books that a consumer of the work historically could properly exercise,[136] but did not deny the consumer the continued right of exercise. Therefore, the new right created an ostensible dilemma. Courts might be forced to choose between two rights: the copyright owner's right to copy the work and the consumer's right to use the work in a way that involved copying. Yet the dilemma was not recognized, partly because of the courts' proprietary bias. The main reason the dilemma was not recognized, however, was that most copyright infringement actions were brought against competitors who unfairly used the copyright. In such cases, the fair use defense was rejected properly.

If the courts had perceived the dilemma, they could have avoided it easily by recognizing that the right to copy was, in fact, the right to copy and vend. This interpretation, however, was never given to the statute. Moreover, the fair use doctrine as codified in the 1976 Copyright Act[137] suggests that courts are not likely

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134. V. CLAPP, *supra* note 127, at 27 (quoting H.R. REP. 2222, 60th Cong., 2d Sess. 4 (1909)).

135. *Id.*

136. [T]he effect of a copyright is not to prevent any reasonable use of the book which is sold. I go to a book-store, and I buy a book which has been copyrighted. I may use that book for reference, study, reading, lending, copying passages from it at my will. I may not duplicate that book, and thus put in upon the market, for in so doing I would infringe the copyright.

Stover v. Lathrop, 33 F. 348, 349 (C.C.D. Colo. 1888). "[T]he 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 an exclusive right to his conceptions . . . ." Stowe v. Thomas, 23 F. Cas. 201, 207 (C.C.E.D. Pa. 1853) (No. 13,514).

137. *See* 17 U.S.C. § 107 (1976).

Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means

to interpret the statute this way in the future. section 107 of the 1976 Copyright Act lists four factors that courts should consider in determining whether a particular use is fair: (1) the nature of the use; (2) the nature of the work; (3) the amount used; and (4) the economic effect.[138]

The Act defines the nature of the use more specifically as "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes."[139] Three of the four factors listed in section 107—the nature of the work, the amount used, and the economic effect—also are found in *Folsom*.[140] The nature of the use, however, is not.[141] This factor clearly brings the using consumer under the umbrella of fair use and eliminates any basis for distinguishing between the using consumer and the using competitor.

To make the type of use a factor in determining whether a particular use is fair without distinguishing between types of users, as the 1976 Act did, is to treat copyright as property and to give the copyright owner control over the learning function of copy-

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specified by tbat section, for purposes such as criticism, comment, news reporting, teacbing (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) tbe purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

138. *See id.*

139. *Id.* § 107(1).

140. 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901). *See supra* text accompanying notes 111-14.

141. "Section 107 departs materially from the *Folsom* criteria only in the first statutory factor, which is '[t]he purpose of and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.'" Raskind, *A Functional Interpretation of Fair Use*, 31 J. COPYRIGHT SOC. 601, 606 (1984).

Patry says that the factor of "the nature and objects of the selections made" was "as slightly rephrased" adopted in section 107 of the 1976 Act as the first fair use factor. W. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW 24 (1985). This conclusion, however, does not stand up under analysis. The words "nature and objects" refer to the selections taken, not to their use. In other words, they refer to the nature of the work (the second fair use factor in section 107) and not the use of the work. Recall that at that time, the copyright owner had only the rights "to print, reprint, publish and vend" the copyrighted work. In 1841, the use was by definition a commercial use. Note also that two years earlier, in Gray v. Russell, 10 F. Cas. 1035, 1038 (C.C.D. Mass. 1839) (No. 5728), Story made essentially the same points in regard to abridgments; clearly a commercial use.

right, because the failure to make a distinction between users implies that there is no distinction between the use of the work and the use of the copyright. Therefore, although three types of uses may be made of a copyrighted work—an unfair use, a fair use, and an ordinary use—the failure to distinguish between the use of the work and the use of the copyright results in the conclusion that there are only two types of use—unfair and fair. Thus, when the copyright owner's rights were enlarged to include the right to copy, it followed that any copying of a work would be either a fair or unfair use, whether the use was by a competitor or a consumer. Unfair and fair use, however, should apply only to the use of the copyright, not the use of the work. The refusal to accept this conclusion meant that the fair use doctrine would be used to protect the owner's copyright from the consumer by treating the consumer as a competitor, even though the fair use doctrine was intended to limit the copyright monopoly.[142] Courts assumed, apparently without analyzing the problem, that the doctrine of fair use applied to the consumer's as well as the competitor's copying of the work.[143] Thus, fair use now applies to the use of the work for learning purposes as well as the use of the copyright for competitive purposes.

The result of these developments is confusion regarding the scope and nature of fair use.[144] This confusion has been generated

142. The source of the problem, of course, is that copyright as property is a property of joint use that is not consumed with the use. The value of a book's copyright depends upon the number of persons who will purchase the book, and an infinite number can purchase the book. Printing a book does not destroy its value. In fact, it may enhance the book for printing by another. Because a consumer can "copy" a book purchased by another and thereby deprive the copyright owner of a sale, courts deemed it necessary to protect "the monopoly" from the consumer. The application of traditional market principles to a nontraditional property thus tends to defeat the purpose of the law that gives the property existence—the promotion of learning. Copyright's nontraditional nature is the basis of the justification for treating copyright as a regulatory concept.

143. *See, e.g.*, Wihtol v. Crow, 309 F.2d 777 (8th Cir. 1962).

144. Is fair use an infringement of copyright that is excused, or is it not an infringement? The Copyright Act states that "the fair use of a copyrighted work . . . is not an infringement of copyright." 17 U.S.C. § 107. Commentators have provided various definitions of fair use, for example: "a privilege in others than the owner of the copyright, to use the copyrighted material in a reasonable manner without his consent; notwithstanding the monopoly granted to the owner by the copyright." H. BALL, THE LAW OF COPYRIGHT AND LITERARY PROPERTY 260 (1944); and "a use technically forbidden by the law, but allowed as reasonable and customary, on the theory that the author must have forseen it and tacitly consented to it." R. DEWOLF, AN OUTLINE OF COPYRIGHT LAW 143 (1925), *quoted in* Choen, *Fair Use in the Law of Copyright*, 6 COPYRIGHT L. SYMP. (ASCAP) 43, 45 (1955). *See* Marsh, *Fair Use and New Technology: The Appropriate Standards to Apply*, 5 CARD. L. REV. 635, 643 (1984). "A part of the difficulty in comprehending the limits of fair use would appear to lie in the broad and to some extent contradictory manner in which the courts defined the

largely by the ease of photocopying materials and has obscured the point that fair use "has always had to do with the use by a second author of a first author's work."[145] Consequently, fair use analysis traditionally was directed to competitors' actions. "Fair use has not heretofore had to do with the mere reproduction of a work in order to use it for its intrinsic purpose—to make what might be called the 'ordinary' use of it."[146] This statement is sound, but the inference drawn from it is not. The author goes on to say, "[w]hen copies are made for the work's 'ordinary' purpose, ordinary infringement has customarily been triggered."[147]

This statement's fallacy is its assumption that the use of a copyrighted work always involves one of two kinds of uses, fair and unfair. This is simply not so. The points this assumption overlooks are that copyrighted works may be used in any one of three ways—unfairly, fairly, and ordinarily—and that an ordinary use creates no copyright issue.[148] Prior to the 1909 Act, the consumer's use was neither fair nor unfair; it was merely ordinary.[149] The no-

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concept prior to codification in the current Act." M. NIMMER, *supra* note 96, at 13-63 (1986). Nimmer does not attempt to define fair use and treats it as merely a matter of defense in infringement actions. If, as the Copyright Act provides, 17 U.S.C. § 107, fair use is not an infringement, however, fair use has a purpose other than serving as a defense in infringement actions.

145. L. SELTZER, EXEMPTIONS AND FAIR USE IN COPYRIGHT 24 (1968).

146. *Id.*

147. *Id.* If ordinary use had been relevant to the fair use doctrine, Drone surely would have discussed it, because bis bias was clearly in favor of protecting the rights of the author. His test for fair use, therefore, is instructive:

> The general test for determining whether a fair or a piratical use has been made of one work in the preparation of another will be, whether the later one or the part in question is tbe result of independent labor, or is substantially copied from the earlier one . . . . It is true that a subsequent author, keeping within the letter of the law defining fair use, will often avail himself to no small extent of the industry and learning of another, and give to his own book a value which properly belongs elsewhere. In other words, a fair use in law may in ethics amount to plagiarism. But this cannot well be avoided.

E. DRONE, *supra* note 115, at 398-99.

148.

> [T]he effect of a copyright is not to prevent any reasonable use of the book which is sold. I go to a book-store, and I buy a book which has been copyrighted. I may use tbat 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.

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

149. Justice Blackmun's dissent in Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984), is so at odds with this point that it merits comment. Justice Blackmun expressed the view that fair use generally is limited to productive uses by another scholar, in wbich case "the fair use doctrine acts as a form of subsidy." 464 U.S. at 478 (Blackmun, J., dissenting). The view that fair use requires a productive use leads naturally

tion that an individual consumer's ordinary use of a work, as by copying it, constitutes infringement is not just nonsense, it is dangerous nonsense that is wholly contrary to the constitutional purpose of copyright.[150]

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to the conclusion that "when a user reproduces an entire work and uses it for its original purpose, with no added benefit to the public, the doctrine of fair use usually does not apply. There is then no need whatsoever to provide the ordinary user with a fair use subsidy at the author's expense." 464 U.S. at 480 (Blackmun, J., dissenting).

This passage raises three points: First, while fair use may be a subsidy, one can argue just as plausibly that copyright is "a tax on readers for the purpose of giving a bounty to writers." T. MACAULAY, SPEECHES ON COPYRIGHT 25 (C. Gaston ed. 1914). Second, prohibiting a user from reproducing the work for its original purpose gives the work's particular purpose precedence over the general purpose of copyright—the promotion of learning. Third, the pbrase "with no added benefit to the public" ignores that the user is the public. The constitutional purpose of copyright can be fulfilled only through individual users.

It should be noted that the "productive use" requirement of the fair use doctrine almost surely is inherited from the doctrine of fair abridgment. A fair abridgment would entail effort on the part of the second author and thus be a "productive use" of the work. *See* Gray v. Russell, 10 F. Cas. 1035, 1038 (No. 5728) (C.C.D. Mass. 1839); E. DRONE, *supra* note 115, at 158 ("there must be substantial and valuable fruit of authorship on the part of the maker"). Thus, it is logical to infer that when the issue became "fair use" instead of fair abridgment, the productive use requirement continued. The result would have been sound if the fair use doctrine bad remained competitive in nature, but the productive use requirement makes little sense when applied to the consumer. The majority in *Sony* was justified in rejecting the "productive use" requirement for fair use.

The distressing point about this passage, however, is that it implies that copyright is private property vested with no public interest. If this is so, the result that the framers sought to avoid in the copyright and free speech clauses—congressional power over the press—has been achieved, because Congress has, in effect, made the press an author. More importantly, the Court has said that Congress may attach to its grant of copyright whatever conditions and restrictions it sees fit. United Dictionary Co. v. G. & C. Merriam Co., 208 U.S. 260, 264 (1908).

150. The ultimate issue is whether the copyright clause requires that the right of public access to publicly disseminated copyrighted material be respected during the term of the copyright. The Supreme Court has not analyzed this issue very well. In Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984), for example, Justice Stevens, writing for the majority, noted that copyright "is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to all tbe public access to the products of their genius *after the limited period of exclusive control has expired.*" *Id.* at 429. In dissent, Justice Blackmun noted: "Copyright gives the author a right to limit access or even to cut off access to his work." *Id.* at 480 (Blackmun, J., dissenting).

This last statement is astounding when considered in light of the meaning of copyright in 1787—"the sole printing and publishing of a work"—which by its nature insured public access. The fallacy of both Justice Stevens' and Justice Blackmun's statements is tbeir failure to recognize that copyright has both a purpose and a function. The purpose is to promote learning; the function is to protect the author's economic interest. The function, however, must serve the purpose, not vice versa. To say that the copyright owner has a right to the profit and a right to deny public access is to fly in the face of the constitutional scheme of copyright. The purpose of copyright relates to the use of the work; the function of copyright relates to the use of the copyright. In order to protect tbe author against the use of the copyright, it is not necessary to deny the consumer the use of the work.

Congress further confused this issue by focusing on the problem of consumer copying in both section 107 and section 108 of the 1976 Copyright Act, which ensured that ordinary use, and thus the consumer, would remain within the compass of the fair use doctrine.[151] A fair use doctrine that is applied to consumer use of the work—the learning function—inhibits rather than promotes learning. It enlarges the concept of infringement at the expense of the individual consumer's right to copy the work for purposes of learning.[152]

The fact that an individual user is not likely to be subjected to an infringement action for copying one article is irrelevant. The point is that the infringement claim has a reasonable basis and could succeed. The legitimacy of this claim legitimizes the right to use copyright to create, rather than merely protect, the profit to be gained from a work.[153] Thus, because the fair use doctrine has been expanded to encompass the learning function of copyright, it can be and has been used to expand the copyright owner's right to control access to the copyrighted work.[154]

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151. *See* 17 U.S.C. § 108 (1976). Notwithstanding the educational purpose enumerated in its codification of the fair use doctrine, 17 U.S.C. § 107, Congress included in the House Report an Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions, H.R. REP. No. 94-1476, 94th Cong., 2d Sess., 68-70 (1976). This agreement properly can be characterized as restrictive. For an early example of a court's negative reaction to the use of educational materials, see Macmillan Co. v. King, 223 F. 862 (1914) (private economics tutor not protected by fair use in preparing 32 outlines of a work for students required to possess a copy of the work).

152. Thus, if an individual photocopies a copyrighted article, his use of the article can be characterized theoretically as an ordinary use, a fair use, or an unfair use. If copying is per se an exclusive right of the copyright owner, the individual's copying cannot be an ordinary use. Therefore, it must be either a fair or unfair use. This means that the individual user is always subject to a charge of copyright infringement, and the burden of proving no infringement has occurred will be on him.

153. As the Supreme Court noted in *Sony*, "the natural tendency of legal rights to express themselves in absolute terms to the exclusion of all else is particularly pronounced in the history of the constitutionally sanctioned monopolies of the copyright and the patent." Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 432 n.13 (1983).

Puhlications today frequently contain a legend that the work may be copied for fifty cents per page. The following comment from *The Copyright Law Journal* is revealing:

> Readers have expressed interest in the question of permissible photocopying of our newsletter. The short answer is that Section 108 prohibits related or concerted reproduction of multiple copies of the same material. In addition, the legislative history states, as a general principle, that the scope of fair use should be considerably narrower in the case of newsletters than in the case of other periodicals. In response to this situation, therefore, we are now offering a discount to our subscribers on all multiple copies. The rate for each additional subscription is $100.

I THE COPYRIGHT LAW JGURNAL 60 (1984).

154. The defect of the "nature of the use" factor contains its own remedy. The nature of the use should be construed to refer to the use of the copyright, not the work. The refer-

There is a paradox here. In 1841, and up until the 1909 Act, fair use was a minor adjunct to copyright law. Fair use was a fair "competitive" use not by design, but because of copyright's limited scope, which gave the copyright owner no right to control the use of the work once it was published, except against a competitor. The public benefit derived from the fair use doctrine in terms of the promotion of learning was minimal. Once the book was on the library shelf, public access was assured and the public needed no fair use protection. The paradox is that today the copyright owner's right to control access to the work far exceeds what could have been imagined in 1841, and the fair use doctrine is being used to enhance that control even further. The growth of the idea that copyright is a property right vested with little or no public interest is an important factor in this development.

IV. The Growth of the Notion of Copyright as Private Property

The 1909 Copyright Act marked a turning point in American copyright law. Congress passed the Act at the beginning of a new era of technology and, in attempting to accommodate copyright to the new technology of mechanical recordings, devised a compulsory recording license for musical compositions[155] in order to provide copyright protection and to prevent the monopolization of the recording industry. Except for photographs, which were given copyright protection in 1865[156] and which took the form of prints, mechanical sound recordings were the first products of new technology protected by copyright since the printing press gave rise to the need for such protection.

More significantly, however, the 1909 Act abolished the doctrine that abridgments and translations did not constitute copyright infringements.[157] Although many believed that this change righted an injustice to authors, it was directed only to competitive uses of copyrighted works. With the exception of one other change, the 1909 Act maintained the unarticulated distinction between the

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ence in section 107 to the "fair use of a copyrighted work" is no impediment to this interpretation because the use of the copyright entails the use of the work. This interpretation excludes the consumer from the umbrella of fair use and gives the other fair use factors a coherence when applied to a competitor's use of the copyright. A consumer who uses the copyright, of course, ceases to be a consumer and becomes a competitor.

155. 17 U.S.C. § 1(e) (1976).

156. 8 Stat. 540-41.

157. 17 U.S.C. § 1(b) (1976).

use of the copyright and the use of the work. That other change added the right to copy literary works to the exclusive rights of the copyright owner.

Congress' expansion of copyright by this latter change was an unwitting, but almost inevitable result of a continuing course of development set in motion by *Wheaton v. Peters*.[158] "The core of [*Wheaton*'s] doctrine—that copyright is a statutory grant for the benefit of the author, which can be secured only by strict compliance with statutory requirements—remains fundamental to the copyright law of the United States to the present day."[159] *Wheaton*, however, had two faults: its premise was too broad and its holding was too narrow. *Wheaton*'s premise was that the Court was dealing with the "literary property of authors." Its holding was that copyright is a statutory monopoly to be strictly construed.

Wheaton's faults can be traced to *Millar v. Taylor*,[160] which was far more influential on *Wheaton* than was *Donaldson v. Beckett*.[161] Without recognizing the difference between *Millar* and *Wheaton*, M'Lean's majority opinion in *Wheaton* relied heavily on Yeates' dissent in *Millar*, while Thompson's dissenting opinion in *Wheaton* was devoted largely to refuting Yeates' dissent. The difference between the two cases was that in *Millar* the King's Bench dealt with copyright in a technical sense as the right to the sole printing and publishing of a work, whereas in *Wheaton* the Court treated copyright as the author's literary property. Given Mansfield's dictum in *Millar*, which incorporated the author's rights into copyright, M'Lean's characterization of the problem as one of the "author's literary property" is understandable but unfortunate. This characterization foreclosed the theoretical distinction between the work and the copyright of the work.

Wheaton's rigid holding, that copyright is the author's statutory monopoly and should be strictly construed, had two effects. First, the author suffered because of a rigid construction of copyright. Second, Congress inevitably acted to remedy the inequities created by *Wheaton*'s holding by enlarging copyright statutorily.[162]

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158. *See supra* note 102 and accompanying text.

159. Joyce, *supra* note 102, at 1291-92.

160. 4 Burr. 2303, 98 Eng. Rep. 201 (K.B. 1769).

161. 4 Burr. 2407, 98 Eng. Rep. 257, 17 Cobbett's Parl. Hist. Eng. 953 (H.L. 1774).

162. "By many amendments, and by complete revision in 1831, 1870, 1909, and 1976, authors' rights have been expanded to provide protection to any 'original works of authorship fixed in any tangible medium of expression,' including 'motion pictures and other audiovisual works.' 17 U.S.C. § 102(a)." Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 460-61 (Blackmun, J., dissenting). The revisions of the copyright statute were

This constant growth of rights led inevitably to the notion of copyright as property despite its regulatory function.

The premier example of the effect that rigid construction of the copyright statute had on the author is *Stowe v. Thomas*.[163] In *Stowe* the court held a German translation of *Uncle Tom's Cabin* not to be an infringement of copyright.[164] This result was manifestly unjust. It was this type of unjust result that led Congress to enlarge the scope of copyright. The 1909 Act, for example, gave the copyright owner, not the author per se, the right to translate copyrighted works.[165] This development ultimately led, in the 1976 Act,[166] to the right to prepare derivative works generally. More harmful to the author was the loss of copyright for gossamer reasons—the improper notice or lack of notice—which were almost surely the publisher's fault.[167]

If copyright had not been construed to encompass the author's entire rights, a feasible solution based on the distinction between the use of the work and the use of the copyright would have been apparent. Publishing a translation of an author's work would have been a use of the work, but not of the copyright. The publisher could not have complained, and the publication could not have been prevented. The author, however, could have been entitled to royalties.[168] The loss of copyright by lack of notice could have permitted competitive publication, but only if the competitor paid the author royalties during the copyright's statutory term. Ironically,

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Act of Feb. 3, 1831, ch. 16, 4 Stat. 436; Act of July 8, 1870, §§ 85-111, 16 Stat. 212-17; Act of March 4, 1909, 35 Stat. 1075 (formerly codified as 17 U.S.C. §§ 1-216 (1976); Copyright Revision Act of 1976, 90 Stat. 2541, 17 U.S.C. §§ 101-809 (1982). The reference to "authors' rights" exemplifies the ingrained nature of the notion that copyright is an authors' right, even in a case in which the "authors" of the works in issue—motion pictures—were corporations and were "authors" only by grace of the work for hire doctrine, which is a manifest fiction. *See* 17 U.S.C. § 201(b).

163. 23 F. Cas. 201, (E.D. Pa. 1853) (No. 13,514).

164. The holding in *Stowe* was consistent with copyright doctrine at that time. "A man has a right to a copy-right in a translation, upon which he has bestowed his time and labor. To be sure, another man has an equal right to translate the original work, and to publish his translation; but then it must be his own translation by his own skill and labor; and not the mere use and publication of the translation already made by another." Emerson v. Davies, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (No. 4436).

165. 17 U.S.C. § 1(b) (1976).

166. 17 U.S.C. § 106 (1982).

167. *See, e.g.*, Mifflin v. R. H. White Co., 190 U.S. 260 (1903); Holmes v. Hurst, 174 U.S. 82 (1899).

168. "In the nineteenth century American publishers sold countless copies of British works and paid their authors royalties despite the fact that American copyright law did not protect British works." Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 282-83 (1970).

Thompson's dissent in *Wheaton* contains a passage that implies such a solution. Near the end of his dissenting opinion, he wrote: "The term for which the copyright is secured in the case now before the court, has not expired; and according to the admitted and settled doctrine in England, under the Statute of Anne, the common-law remedy exists during that period."[169]

Thompson implied a basis for protecting the author's rights independently from those of the publisher, by distinguishing the use of the work from the use of the copyright. This solution was wholly consistent with the copyright clause because it would have provided protection for the author, but not necessarily for the publisher. *Wheaton*, however, foreclosed this solution by making the publisher the invisible actor in the copyright drama. Because the publisher was an invisible actor and because he was the source of the monopoly problem, he had to be reached through the author.

Because of *Wheaton*, publishers in the United States continued, as in eighteenth century England, to use the author as a foil to enlarge the rights of copyright owners.[170] Expanding copyright to protect the author's property, however, benefited the entrepreneur more than the author. The expansion continued until the entrepreneur was treated, under the guise of the work for hire doctrine, on a par with the author.

The work for hire doctrine was incorporated into the 1909 Copyright Act. Section 26 of the Act provided that "the word 'author' shall include an employer in the case of works made for hire," and section 24 provided that in the case of "any work copyrighted . . . by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal." Congress justified inclusion of the doctrine on the basis of expediency.[171]

Although doubts about the work for hire doctrine's constitu-

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169. *See Wheaton*, 33 U.S. (8 Pet.) at 698 (Thompson, J., dissenting).

170. Indeed, the concern of Wheaton's publisher over Peter's proposal for his *Condensed Reports*, although Wheaton himself was in Denmark, demonstrates the active role of publishers in copyright litigation. *See* Joyce, *supra* note 102, at 1367-70.

171.

> In the case of composite or cyclopaedic works, to which a great many authors contribute for hire and upon which the copyright was originally secured by the proprietor of the work, it was felt that the proprietor of such work should have the exclusive right to apply for the renewal term. In some cases the contributors to such a work might number hundreds and be scattered over the world, and it would be impossible for the proprietor of the work to secure their application in applying for renewal.

H.R. REP. 2222, 60th Cong., 2d Sess. 16 (1909). The report makes no mention of the substantive provision making the change.

tionality were expressed,[172] its constitutionality was never passed upon.[173] The doctrine was carried forward into the 1976 Act,[174] apparently without consideration of its constitutional implications.[175] The late Professor Nimmer, the leading authority on copyright, defended the constitutionality of the work for hire doctrine by saying that "Congress has in effect created an implied assignment of rights from the employee-author to his employer—in the absence of an express agreement to the contrary."[176]

Professor Nimmer, however, recognized that the doctrine is a legal fiction. "The fiction of the employer as author was employed . . . not in order to achieve substantive results that could not have been otherwise achieved, but rather because of the 'convenience and simplicity' of this manner of achieving such results."[177] The method chosen, however, does have substantive results; it effectively makes the entrepreneur an author. The justification for this result is that copyright is property. "The author's property right derived from the Constitutional authority is unquestionably assignable."[178] This statement makes my point: the notion of copyright as property serves as the basis for the continued expansion of copyright to the benefit of the entrepreneur. The point overlooked is that it is not the author's property rights but his regulatory rights that are derived from "the constitutional authority."

Congress, therefore, accomplished by fiction what the framers of the Constitution avoided: a copyright for publishers and entrepreneurs that exists independently of assignment from the author. Prior to the 1909 Act, courts deemed copyright to be a statutory monopoly and therefore regulatory in nature. After the 1909 Act, the monopoly concerns of copyright were subordinated to the notion that copyright was merely property to be protected as any other property right.

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172. *See* Scherr v. Universal Match Corp., 417 F.2d 497, 502 (2d Cir. 1969) (Friendly, J., dissenting).

173. M. NIMMER, *supra* note 96, at 1-39.

174. 17 U.S.C. §§ 201(b), 101 (defining "work made for hire").

175. The study made for Congress in connection with the revision of copyright and the work for hire doctrine does not mention the copyright clause. B. Varmer, Study No. 13, *Works Made for Hire and on Commission*, STUDIES PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 68th Cong., 2d Sess. (1960).

176. M. NIMMER, *supra* note 96, at 1-40.

177. *Id.* at 1-41.

178. *Id.* at 1-38.

V. Copyright Gone Astray: The Cause and the Remedy

American copyright law has gone astray. The 1976 Copyright Act's most striking aspect is the extent to which it uses fictions to circumvent the constitutional limits on Congress' power to grant copyright. The copyright clause of the Constitution empowers Congress to secure only to authors the exclusive right only to their writings, only for limited times, and only to promote learning. The core of copyright doctrine, therefore, consists of three elements: author, writings, and publication. A fourth element, creativity or originality, is included because copyright is available only for new works. The 1976 Copyright Act accommodates all these elements by fictions.

The 1976 Act gives copyright to all works of authorship fixed in any tangible medium of expression,[179] a phrase clearly intended to reach beyond writings. The Act continues to embellish the doctrine that an employer, most often a corporate entity, is the author of an employee's creations.[180] It treats a work televised to millions as performed, not published, and it treats a pamphlet placed on sale, although ignored by potential purchasers, as published.[181] A live television broadcast of an event, whether of a burning building or a football game, entitles the broadcaster to copyright protection.[182] The only authorship or creativity required by the Act is the simultaneous recording of the event as it is broadcast.

American copyright law began to stray beyond the path of constitutionality when the 1909 Copyright Act added the exclusive right to copy to the copyright owner's rights and adopted the work for hire doctrine. One casualty of these changes was the rational fair use doctrine promulgated in *Folsom*, a fair competitive use doctrine whose proper application turned on the distinction between the use of a work and the use of a work's copyright.

The full effect of these changes did not become apparent until copyright was applied to new communications technologies. To understand fully the significance of these changes, one must analyze copyright as a functional rather than doctrinaire legal concept. Functionally speaking, copyright must accommodate the interests of three groups: authors, entrepreneurs, and consumers. Thus, copyright has three different purposes: cultural, economic, and

179. 17 U.S.C. § 102(a) (1982).
180. *Id.* § 201(b); *id.* § 101 (defining "work made for hire").
181. *Id.* § 101 (defining "publication" and "perform").
182. *Id.* § 101 (defining "fixed").

social.[183] These purposes in turn are fulfilled by three functions: the creative, the distributive, and the learning functions. The legal doctrines associated with these functions are ownership, control, and access. The following scheme served as a basis for this analysis:

Person:	Author	Entrepreneur	Consumer
Purpose:	Cultural	Economic	Social
Function:	Creative	Distributive	Learning
Doctrine:	Ownership	Control	Access

If we apply this scheme to printed materials—the paradigm of copyright—we will derive the following results for traditional copyright doctrines: (1) the author contributes to the culture of society by creating works, which he owns; (2) the entrepreneur fulfills the economic purpose of copyright (and thereby rewards the author) by distributing the work, a process that he controls; and (3) the consumer fulfills the social purpose of copyright by using the work for learning, a use that requires uninhibited access to the work.

As long as copyright was limited to printed materials, the creative, distributive, and learning functions of copyright were discrete, yet reciprocal and interdependent in nature, involving a *quid pro quo* at every stage. The author created the work and assigned the copyright to the entrepreneur in return for royalties. The entrepreneur then distributed the work in fixed form for profit, from which he paid royalties to the author. The consumer paid the price of the tangible object in which the work was embodied and received permanent access to the work. Generally, one could say that the author "owned" the work by reason of his creative efforts; the entrepreneur "controlled" the copyright of the work through assignment from the author for purposes of distribution; and the consumer gained uncontrolled access to the work by purchasing a

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In a wider perspective, a number of basic dimensions of the nature and function of copyright may be distinguished. In an overall cultural perspective, the stated purpose of copyright is to encourage intellectual creation by serving as the main means of recompensing the intellectual worker and to protect his moral rights. In an economic sense, copyright can be seen as a method for the regulation of trade and commerce. Copyright thus serves as a mechanism by which the law brings the world of science, art and culture into relation with the world of commerce. In a social sense, copyright is an instrument for the cultural, scientific and technological organization of society. Copyright is thus used as a means to channel and control flows of information in society.
E. PLOWMAN & L. HAMILTON, COPYRIGHT, INTELLECTUAL PROPERTY IN THE INFORMATION AGE 25 (1980).

"copy" of the work.

When the 1909 Act gave the copyright owner the exclusive right to copy, the scheme, as it concerned the entrepreneur and consumer, was skewed. Both the entrepreneur and the consumer now wanted to copy the work, but for different purposes. Because "to copy" is a generic term, however, the significance of this point was not recognized. Instead, some reasoned that if the copyright owner had the exclusive right to copy, the copyright must have been his property. Copyright, therefore, must have been property, not regulation. Consequently, the entrepreneur's right to copy for economic purposes was given preference over the consumer's right to copy for learning purposes. By contrast, Congress' adoption of the work for hire doctrine skewed the copyright scheme as it concerned the author and the entrepreneur. The entrepreneur was given the role of author and, as such, controlled both the creative and distributive functions of copyright.

The cumulative effect of these developments was to give the entrepreneur complete control over tbe three functions of copyright and, therefore, to subordinate copyright's purpose to its function. The victim of these developments was the right of public access. The consequences, however, were more detrimental in theory than in practice. As long as copyright was limited to printed materials, the product and the process of communication remained distinct. Economic concerns limited the right to control distribution. The author still had to write the book, and the entrepreneur still had to distribute it to gain any profit.

The theoretical detriment, however, became a detriment in fact when Congress applied these same principles of copyright to electronic communication in the 1976 Copyright Act. The scenario presaged by the 1909 Act thus emerged full blown from the 1976 Act. The 1909 Act, by creating the work for hire doctrine, destroyed the reciprocity of the creative and distributive functions of copyright. The 1976 Act, by conferring copyright from the moment of fixation and eliminating publication as a condition of copyright, destroyed the reciprocity of the distributive and learning functions of copyright. By applying copyright law to new communications technology, Congress gave the entrepreneur control over all copyright's functions, a result contrary to copyright's constitutional purpose.

Pacific and Southern Co. v. Duncan,[184] an Eleventh Circuit

184. 744 F.2d 1490 (11th Cir.), *cert. denied*, 105 S. Ct. 1867 (1984). Although the

Court of Appeals case of first impression, provides a concrete example of the problem. *Duncan,* which involved the copyright of live television newscasts, held that videotaping newscasts off-the-air and selling videoclips to subjects of the newscasts is not a fair use. The court reached this conclusion despite the facts that the television station systematically erased its videotapes of the newscasts seven days after they were broadcast and did not, by its own admission, suffer economic harm from the questioned practice or customarily register its claim of copyright on the newscasts.[185]

Duncan, because it involved the application of copyright to a "new" technology, provides a good example of how copyright law has been distorted. The copyrighted work, a live television newscast, was performed for public access for ninety minutes. The videotape of the copyrighted work was erased seven days later. Yet a broadcast monitor who taped the newscast off-the-air and sold a two minute videoclip of the newscast to the subject of the clip was denied the fair use defense and held to have infringed the station's copyright. The case thus demonstrates how coalescing copyright's creative and distributive functions in the entrepreneur, on the one hand, and substituting performance for the distributive function, on the other, give the copyright owner complete control of the learning function by giving him control of access to the copyrighted work.

The relief ordered in *Duncan* was a permanent injunction against the defendant's activities. The effect of this injunction was to give the television station protection for its live television newscasts, the videotapes of which were never registered with the Copyright Office, but instead were erased systematically. The television station, contrary to the copyright clause, receives perpetual copyright protection for ephemeral works. This result is a variation of what Professor Paul Goldstein aptly has termed "enterprise monopoly." Professor Goldstein distinguished "enterprise monopoly" from the statutory copyright as follows:

> Enterprise monopolies . . . are built on pyramids of individual copyrights . . . . Statutory copyright's constraint is direct: it empowers its holder to regulate the timing—and, to a large extent, the pricing—of the public's access to the individually copyrighted work. Enterprise constraint is more subtle. Not only does the enterprise have the capacity to regulate the timing and pricing of public access to its inventory of works, it also has a degree of control,

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author was counsel for defendant in this case, the role of advocate for a private litigant has been discarded for the purposes of this Article. Criticism of this case is based on a concern for the law of copyright developed over twenty years of study and teaching in the area.

185. *Id.*; *see also* 572 F. Supp. 1186 (N.D. Ga. 1983).

roughly proportional to the size of its copyright aggregation, over the content and the selection of works which are made available to the public.[186]

Duncan's result varies from Professor Goldstein's "enterprise monopoly" because in *Duncan* the enterprise acquired its monopoly by using one claim of copyright on one small portion of a work to protect all future works in the same class. The court apparently was unimpressed that the subject of the works happened to be news reports, a type of work arguably vested with a public interest involving free speech considerations. The court's disregard for the copyright clause indicates the mesmeric effect that the notion of copyright as property has, at least on courts for whom copyright is an arcane subject. History is repeating itself. "A copyright enterprise, to the extent that it dominates and regulates a market, exercises a private hegemony which, when joined with the Copyright Act's license to operate, places the enterprise in a quasi-governmental position approaching that of the Stationers' Company in the sixteenth and seventeenth centuries."[187] The ghost of *Millar v. Taylor* has arisen in the form of *Duncan* to give legitimacy to the claim of the stationers of the twentieth century that they are entitled to copyright protection in perpetuity.

Despite the two centuries separating the cases, the decisions are a product of similar circumstances—technology, monopoly, and the superficial reasoning that characterizes law derived from the judicial resolution of private disputes. There is, however, one major difference in the two cultures that produced the cases—the premium placed on the freedom of speech. Reason tells us that a body of rules that enables communications conglomerates to control the flow of information and ideas for profit also gives them the power of censorship. Yet reason has little force of itself, for we are all culture bound, limited in the power to rationalize by the ideas we inherit. Thus, because copyright was separated long ago from its role as governmental censor and has evolved from a monopoly to be restrained to a private property to be embraced, the framers' wisdom in formulating the copyright clause is in danger of becoming forfeited, because the framers lived in culture different from ours—free speech was more important than private property and public learning more valuable than private profit.

New technology has revived the great question of literary

186. Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983, 986 (1970).

187. *Id.* at 987. The analogy becomes even more apt when one recognizes that television stations are licensed by the federal government.

property. Courts should not ignore the charter for copyright embodied in the copyright clause. The risk is that judges will be beguiled by the talismanic nature of the word *property*. Already cases suggest that in the computer field, the proprietary concept of copyright reigns supreme.[188] For example, in *Whelan Associates, Inc. v. Jaslow Dental Laboratory, Inc.*[189] the Third Circuit Court of Appeals held that a computer program copyright protects the structures, sequence, and organization of the program. Such a copyright arguably protects ideas, not merely the expression of those ideas, contrary to the mandate of Congress in the Copyright Act. Moreover, in *West Publishing Co. v. Mead Data Central, Inc.*[190] the Eighth Circuit Court of Appeals held that West's copyright protected "West's arrangements of cases in its National Reporter System Publications . . . and . . . that the LEXIS Star Pagination feature infringes West's copyright in the arrangement."[191]

In many of the computer cases, it is clear that the court was impressed with the deceitful and fraudulent conduct of the defendant[192] and that the result was merited as a matter of equity. Courts, however, should not allow rascals to make law for all citizens, both consumers and competitors. Thus, in their zeal to do justice, courts err by treating copyright as property. If copyright is property for the purpose of protecting the copyright owner against piratical competitors, however, it remains property for protecting the copyright owner against nonpiratical consumers. Because new communications technology gives a copyright owner control of access without limitation, characterizing copyright as property eliminates, for all practical purposes, the distinction between the use of the copyright and the use of the work.

The solution to the control of access problem was presaged almost seventy years ago by the Supreme Court in *International News Service v. Associated Press.*[193] In *INS* the Associated Press (AP) sought to enjoin the International News Service (INS) from using AP press dispatches. The news reports were copyrightable,

188. *See, e.g.,* Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240 (3d Cir. 1983), *cert. dismissed,* 464 U.S. 1033 (1984); Williams Elecs., Inc. v. Artic International, Inc., 685 F.2d 870 (3d Cir. 1982); Stern Elecs., Inc. v. Kaufman, 669 F.2d 852 (2d Cir. 1982).

189. 32 Pat. Trademark & Copyright J. (BNA) 384 (1986).

190. 799 F.2d 1219 (8th Cir. 1986).

191. *Id.* at 1220.

192. *See, e.g.,* SAS Institute, Inc., v. S & H Computer Systems, 605 F. Supp. 816 (M.D. Tenn. 1985).

193. 248 U.S. 215 (1918).

but not copyrighted. The case, therefore, can be viewed as a copyright case in the guise of unfair competition. The Court bypassed "the general question of property in news matter at common law, or the application of the copyright act, since it seems to us that the case must turn upon the question of unfair competition in business."[194] The Court then disposed of INS's argument that by distributing its news reports, AP no longer had the right to control their use because the reports, once distributed, became available for use by anyone for any purpose. The Court stated: "The fault in the reasoning lies in applying as a test the right of the complainant as against the public, instead of considering the rights of complainant and defendant, competitors in business, as between themselves."[195]

Because the Court was concerned that INS was endeavoring "to reap where it has not sown,"[196] it characterized the news reports as "*quasi* property for the purposes of their business because they are both selling it as such."[197] By characterizing copyright as quasi-property, the Court, faced with an uncopyrighted work, was really saying that copyright is a regulatory concept because the real subject of copyright is not the work, but the use of the work. In *White-Smith Music Publishing Co. v. Apollo Co.*[198] Justice Holmes made this point as follows:

> The notion of property starts . . . from confirmed possession of a tangible object and consists in the right to exclude others from interference with the more or less free doing with it as one wills. But in copyright property has reached a more abstract expression. The right to exclude is not directed to an object in possession or owned, but is *in vacuo,* so to speak . . . . It is a prohibition of conduct remote from the persons or tangibles of the party having the right.[199]

Like *INS*, modern cases involving copyrights for computer programs have emphasized the defendant's conduct.[200] Unlike *INS*, however, these contemporary rulings have been based on the copyright statute and thus apply to the consumer, as well as the competitor, because the question is deemed to involve property, not quasi-property. If courts would recognize copyright as quasi-

194. *Id.* at 234-35.
195. *Id.* at 239.
196. *Id.*
197. *Id.* at 242.
198. 209 U.S. 1 (1908).
199. *Id.* at 19 (Holmes, J., concurring).
200. *See, e.g.*, SAS Institute, Inc. v. S & H Computer Systems, 605 F. Supp. 816 (M.D. Tenn. 1985).

property, they also would recognize it as being regulatory in nature. Courts, however, appear unwilling to take this step without strong reason for doing so. Consequently, we must return to the copyright clause itself and to the argument that because of free speech concerns that clause limits Congress' power to enact copyright legislation.

The Constitution creates no property rights.[201] Furthermore, Congress, by enacting a copyright statute, does not create any either. The statute merely creates rights and commensurate duties to which a particular type of property—an author's writings—may or may not be subjected at the author's will. If the author chooses to utilize the rights, he also assumes the duties. Foremost among those duties is the duty to provide public access to the work, for without access no learning can occur.

Thus, the time has come to make explicit the doctrine that American courts in the nineteenth century practiced, but did not preach—that a distinction exists between the work and the copyright of a work. This distinction reflects the essence of copyright as a regulatory rather than proprietary concept. As the Supreme Court has noted:

> The immediate effect of our copyright law is to secure a fair return for an "author's" creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good. "The sole interest of the United States and the primary object in conferring the monopoly," this Court has said, "lie in the general benefits derived by the public from the labors of authors."[202]

Courts have ignored the conclusion that flows from this analysis of copyright—that copyright's purpose is primarily to serve the public—by treating copyright as a proprietary concept. Part of the reason for this result is that courts make law for the parties, not the public. Although copyright may be viewed as property between parties who are competitors, it really is quasi-property. Quasi-property rights against competitors, as *INS* makes clear, do not necessarily extend equally to the public. Copyright, in short, regulates the economic use of a work by a competitor, and the proper application of copyright law requires courts to make the distinction between the use of the work and the use of the copyright of the work. The important point to remember is that the use of the work and the use of the copyright are not reflexive. Using the

201. Leis v. Flynt, 439 U.S. 438 (1979).
202. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).

copyright necessarily entails using the work, but using the work does not necessarily entail using the copyright.

The distinction between the use of the work and the use of the copyright is the key to establishing a rational fair use doctrine and protecting free speech rights. The competitor uses the copyright; the consumer uses the work. The copyright owner, by reason of the Copyright Act and the copyright clause, has not only no right to interfere, but a duty not to interfere with the consumer's use of a publicly disseminated work.

The problem posed by characterizing copyright as a proprietary concept reaches beyond free speech concerns. The ultimate question is whether copyright law should be an integrated body of coherent rules serving the interests of three groups—the author, the entrepreneur, and the consumer—or whether it should be a body of disparate rules serving primarily the interest of the entrepreneur. Remember, copyright's three dimensions—the creative, the economic, and the social—are congruent only in gross. Their compatability in delineation and implementation requires compromise. Copyright, in short, must be recognized for what it is: a tripartite legal concept that entails imposing concessions in the form of constraints upon each constituent group that the concept serves. The fundamental problem of copyright law is how to determine the measure of the constraints. The starting point for making this determination must be a sound predicate. Unless courts agree either that copyright is proprietary or that it is regulatory in nature, the confusion of copyright law will continue, because this dual conceptual basis has led to the confused state of copyright law today. The copyright clause and traditional copyright doctrine dictate which concept is chosen.

The 1976 Copyright Act itself is predicated on the regulatory concept of copyright. The Act limits and precisely defines the scope of the rights it confers;[203] it limits the term of the rights it defines; and it places the work into the public domain at the expiration of the copyright term.[204] Although the statute treats copy-

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203. Dowling v. United States, 105 S. Ct. 3127, 3133 (1985) ("the copyright holder's dominion is subjected to precisely defined limits").

204. Consider also the following regulatory aspects of the Copyright Act. The copyright may be lost if the terms of the statute are not complied with, for example, if publication is not accompanied by notice. 17 U.S.C. § 401. Once lost, a copyright cannot be recaptured. The copyrighted work is subject to a fair use. 17 U.S.C. § 107. Some copyrights are more limited than others, for example, the copyright of sound recordings, 17 U.S.C. § 114, and compilations or derivative works, 17 U.S.C. § 103. The first sale of a copy of a copyrighted work exhausts the right of the copyright owner to vend that copy. 17 U.S.C. § 109.

right as regulation, the fate of copyright is not solely in the hands of Congress. Copyright's destiny also is determined by the courts. The courts, as opposed to Congress, view copyright as proprietary in nature and have interpreted the statute accordingly.[205] Interpretation of regulation requires one set of principles; interpretation of property requires another. The courts' application of property principles to regulation creates confusion, because the legislative lawmaker and the judicial lawmaker are serving conflicting purposes. This conflict exists in part because of the differences in the two processes: the legislature serves the public interest by considering its actions' general consequences for all citizens; the court serves the public interest by considering its ruling's particular consequences for the parties before the court. A court's view of copyright, therefore, is constricted by the shape of the controversy before it, and the controversy before it usually is one in which the defendant has acted contrary to the sacred principles of property.

Saying that copyright is regulation is tantamount to recognizing that copyright law is in fact a statutory unfair competition doctrine, a view that has sound historical and, as *INS* demonstrates, contemporary precedent. The belief that a competitor has no right "to reap where he has not sown" is the essence of copyright. Protecting the harvest, however, can extend constitutionally only to the economic rewards provided by the marketplace. Copyright cannot extend constitutionally to the harvest of learning, nor can it be used to tax the consumer for gleaning the fields after the harvest. Copyright can protect only the owner's right to profit as the market provides; it cannot be used to create a profit by creating a new market. Copyright protects the owner against unfair use by competitors, not ordinary use by consumers. That is why the distinction between the use of the copyright and the use of the work is critical. A coherent theory of copyright requires recognition of this distinction, and the copyright clause commands this distinction for

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Certain copyrighted works are subject to a compulsory license, either because of the work's nature (musical compositions, 17 U.S.C. § 115), the form the work takes (records for jukeboxes, 17 U.S.C. § 116), or its use (cable television, 17 U.S.C. § 111, or public broadcasting, 17 U.S.C. § 118). The sale of the tangible object in which the work is embodied does not constitute a sale of the copyright and vice versa. 17 U.S.C. § 202. The work's author has an inalienable right to terminate the assignment of the copyright between thirty-five and forty years after the assignment. 17 U.S.C. § 203. Finally, copyright protects only the expression of the idea, not the idea itself. 17 U.S.C. § 102(b).

205. The Fifth Circuit made this point succinctly: "The first amendment is not a license to trammel on legally recognized rights in intellectual property." Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc., 600 F.2d 1184, 1188 (5th Cir. 1979).

the protection of free speech rights.

VI. Conclusion

If the copyright clause has any meaning, the 1976 Copyright Act comes perilously close to being unconstitutional. The stated constitutional purpose of copyright is to promote learning. To fulfill that purpose, copyright functions to protect the author's right to his writings. Construing the copyright clause in light of the state of copyright law in 1787, which reflected the Statute of Anne and *Donaldson v. Beckett*,[206] one reasonably can infer that the clause limits Congress to providing copyright for works that are not only fixed, but also distributed in order to insure public access. The essence of copyright always has been the right to reproduce the copyrighted work in copies for sale. A constitutional copyright promotes learning.

The 1976 Copyright Act provides statutory copyright from the moment of fixation, but does not require that the work be disseminated to the public as a condition of copyright protection. Because public dissemination is not necessary for copyright, the copyright owner may determine not only whether to disseminate, but on what terms to disseminate the work publicly. The statute, therefore, provides the basis for changing the essence of copyright from the right to reproduce the work in copies for sale to the right to control the public access to the copyrighted work for any reason or no reason. A statutory copyright that gives the copyright owner complete control of public access to the work following its publication has no constitutional basis.

The presumption in favor of the constitutionality of statutes tips the balance in favor of the Copyright Act's constitutionality. The presumption, however, presumes that a statute that reaches or possibly goes beyond the boundaries of constitutionality will be given a constitutional construction. Here lies the danger. As *Duncan*[207] illustrates, constitutionally questionable provisions of the Copyright Act can be given a reasonable construction that sanctions unconstitutional copyrights.

Congress, in providing copyright for live television broadcasts, imposed certain compensatory requirements on the copyright

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206. 4 Burr. 2407, 98 Eng. Rep. 257, 17 Corbett's Parl. Hist. Eng. 953 (H.L. 1774).

207. Pacific & Southern Co. v. Duncan, 744 F.2d 1490 (11th Cir.), *cert. denied*, 105 S. Ct. 1867 (1984).

claimant—fixation of the work[208] and registration as a prerequisite to an infringement action.[209] Yet in *Duncan* the court held that the work did not have to be fixed for any specific duration and, ignoring the registration requirement, ordered a permanent injunction to provide copyright protection for works that had not yet been created and that would be destroyed shortly after they were created and the copyright proprietor had obtained his profit. Had the court interpreted the statute in light of the copyright clause, it would have recognized that fixation is a constitutional requirement that must be treated as something more than a fiction and that the registration requirement's purpose is to compensate for dispensing with the requirement of publication. By ignoring the copyright clause, the court created a judicial copyright of perpetual duration unencumbered by constitutional limitations.

The Eleventh Circuit's fallacy in *Duncan*—that a copyright claimed under the copyright statute is a fortiori constitutional—suggests that courts do not deem the copyright clause relevant to the interpretation of the Copyright Act. The fallacy is supported by the Act's own reliance on legal fictions—fictions regarding authors, writings, creativity, and publication. The presence of these fictions, however, accentuates the need to resort to the copyright clause when interpreting the statute. Thus, the copyright clause, interpreted in light of its historical sources, justifies the notion that copyright is a regulatory rather than proprietary concept; requires the distinction between the use of the copyright and the use of the work; compels the interpretation of the fair use doctrine as a fair competitive use doctrine; and informs us that the clause incorporates free speech values.

Suprisingly, these ideas often are reflected in what courts do, but not in what they say. Two recent Supreme Court decisions on fair use, *Sony Corporation of America v. Universal City Studios*[210] and *Harper & Row Publishers, Inc. v. Nation Enterprises*,[211] demonstrate my point. In *Sony* the copyright's subject matter was the product of new technology, motion pictures broadcast over the public airwaves. The fundamental issue was whether the copyright owner had the right to control individual access to material that had been disseminated publicly only within a short and rigid time frame and thereby to limit public access. The Supreme Court held

208. 17 U.S.C. § 102(a) (1982).
209. *Id.* § 411.
210. 464 U.S. 417 (1984).
211. 105 S. Ct. 2218 (1985).

that the copyright owner did not have this power.[212] Its decision portrays copyright as a regulatory concept, utilizes the distinction between the use of the copyright and the use of the work, treats the fair use doctrine as a fair competitive use doctrine, and implicitly acknowledges that the copyright clause incorporates free speech values. By taping copyrighted programs off-the-air for personal in-home use, the individual makes use of the work, not of the copyright.

Harper & Row[213] involved the right of public access to a book—the paradigm of traditional copyright. Without articulating the point, the Court used the distinction between the use of the copyright and the use of the work. The defendant was a competitor who used the copyright, not the work. It claimed the right to use the copyright under the banner of fair use and free speech. The defendant's argument was hollow, however, because the issue was not the author's duty to provide public access, but his right to provide first public access. No public benefit would have been realized by permitting the competitor to preempt the copyright owner's right to provide this access.[214]

Sony and *Harper & Row* are more sound in their results than in their reasoning. The split decisions in both cases indicate that the results were achieved more by intuition than by an understanding of sound copyright principles. These intuitive decisions have not been enough to guide the lower courts. For example, *Duncan*, which treated copyright as a proprietary concept, ignored the distinction between the use of the copyright and the use of the

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212. 464 U.S. at 442-56.

213. 105 S. Ct. 2218 (1985).

214. The work in *Harper & Row* was unpublished. Prior to the 1976 Copyright Act, therefore, the defendant would not have needed to resort to the fair use doctrine because an unpublished work was not copyrightable. The 1976 Act, however, provided statutory copyright from the moment of fixation. The concept of fair use should relate only to the use of the copyright. Without a copyright, the issue could have been resolved on the basis of the theft of property. Ironically, *Harper & Row* and the 1976 Act hurt the author by providing a basis for applying the fair use doctrine to unpublished works. "Though the right of first publication, like the other rights enumerated in § 106 is expressly made subject to the fair use provisions of § 107, fair use analysis must always be tailored to the individual case." 105 S. Ct. at 2227. The conflation of the common-law copyright with the statutory copyright, similar to *Millar*'s conflation of the author's right and the publishers' rights, therefore, benefits the entrepreneur rather than the author.

A problem here, however, is the retention of the fiction that the public performance of a work does not constitute publication, a doctrine that can be traced to the eighteenth century and predicated on copyright for printed material. Macklin v. Richardson, 2 Amb. 694, 27 Eng. Rep. 451 (1770); *see also* Ferris v. Frohman, 223 U.S. 424, 435 (1912). In an age of electronic communication, the solution is to define public dissemination as publication.

work, rejected the fair competitive use doctrine, and ignored the free speech constraints on Congress' power to enact copyright legislation.

The issues implicated by copyright and fair use mirror those implicated by the free speech clause. Those issues are fundamental in our society and merit better intellectual treatment than they have received. If the pen is mightier than the sword, making the pen a monopoly of entrepreneurs who disseminate ideas threatens the very foundation of our free society. The framers of the Constitution, by incorporating free speech doctrines in the copyright clause, acted with an infinite wisdom that will serve us well if we are wise enough to accept their teaching. Anglo-American copyright's origins in monopoly and censorship contain a lesson that we ignore at our own peril.