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Copyright, Congress and Technology: The Public Record

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BOOK REVIEW

COPYRIGHT, CONGRESS AND TECHNOLOGY: THE PUBLIC RECORD. Edited by Nicholas Henry. Phoenix, Arizona: The Oryx Press, 1978-79. Pp. 1955. \$95.00.

*Reviewed by L. Ray Patterson**

I. INTRODUCTION

In 1955, the Copyright Office commissioned the first in a series of studies to produce recommendations for a general revision of the copyright statute.¹ In 1976, a new copyright act was finally passed and signed into law, taking effect on January 1, 1978.² This twenty-one year interval resulted in a mass of public documents on the subject of copyright, from which Nicholas Henry has made selections for a five-volume set, *Copyright, Congress and Technology: The Public Record*.³ The record is voluminous, and the fact that the editor had to be selective in his choice of what to include may lessen the value of the work for many persons. It is disappointing, for example, that not all of the Copyright Office studies were included. The work does, however, include the final report of the Commission on New Technological Uses of Copyrighted Words (CONTU), issued in 1978. This document is perhaps most symptomatic of the basic problem in copyright law today—how to accommodate the law of copyright to the development of new technology. It is revealing that rather than delay the needed passage of a new copyright act further, Congress legislated the status quo for copyright in conjunction with computers and authorized CONTU. The charge to the Commission was

to study and compile data on: (1) the reproduction and use of copyrighted works of authorship—(A) in conjunction with automatic systems capable of

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1. Thirty-five studies were prepared. They are reproduced in *THE COPYRIGHT SOCIETY OF THE U.S.A., STUDIES ON COPYRIGHT* (Arthur Fisher Memorial Edition 1963).

2. 17 U.S.C. §§ 101-810 (1976 & Supp. III 1979).

3. *COPYRIGHT, CONGRESS, AND TECHNOLOGY: THE PUBLIC RECORD* (N. Henry ed. 1978-79).

storing, processing, retrieving, and transferring information, and (B) by various forms of machine reproduction, not including reproduction by or at the request of instructors for use in face-to-face teaching activities; and (2) the creation of new works by the application or intervention of such automatic systems or machine reproduction.⁴

This charge raised the most fundamental issue in copyright law: what is the function of copyright? If this simple question could be satisfactorily answered, the problem of the protection to be extended to computer programs and machine-made works, and against photocopying, would be more tractable than it has proved to be. The difficulty with the question, of course, is the assumption that the function of copyright is both known and understood. The copyright clause of the Constitution states that copyright's function is "to promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive right to their . . . Writings. . . ." Thus, if "science" is understood to mean knowledge, the purpose of copyright is to promote knowledge by rewarding authors for their efforts.

The constitutional basis of this purpose gives it something of the force of Holy Writ, but it does not comport with reality. First, copyright is not limited to authors. If the author is an employee for hire, the "author" then is his employer, who may be an individual, a partnership, or a corporation.⁵ Second, the author may assign his copyright and thereby confer all of his rights upon his assignee.⁶ Third, it can hardly be argued that "statuettes, book ends, clocks, lamps, door knockers, candlesticks, inkstands, chandeliers, piggy banks, sundials, salt and pepper shakers, fish bowls, casseroles, and ash trays" contribute in any meaningful way to the promotion of knowledge, though they freely receive the imprimatur of copyright.⁸

The copyright clause notwithstanding, the enactment and interpretation of the various copyright statutes over the years⁹ have

4. Act of Dec. 31, 1974, Pub. L. No. 93-573, § 201, 88 Stat. 1873. See 17 U.S.C. § 117 (Supp. III 1979).

5. U.S. CONST. art. 1, § 8, cl. 8.

6. 17 U.S.C. § 201(b) (Supp. III 1979). See also 17 U.S.C. § 101 (Supp. III 1979) (definition of "work made for hire").

7. 17 U.S.C. § 201(d) (Supp. III 1979). The exception to this statement is the termination right of the author, which cannot be alienated. 17 U.S.C. § 203(a)(5) (Supp. III 1979).

8. *Mazer v. Stein*, 347 U.S. 201, 221 (1954) (Douglas, J., concurring).

9. In addition to individual amendments, there have been four general revisions of the copyright statute, including the 1976 revision. The earlier ones were in 1831, ch. 16, 4 Stat. 436; in 1870, ch. 230, 16 Stat. 198; and in 1909, ch. 320, 35 Stat. 1075.

resulted in the trivialization of copyright. Thus, Betty Boop dolls,¹⁰ for example, come within the protection of the copyright statute, as do telephone directories,¹¹ which contribute little to the culture of our society or the promotion of knowledge. This is not to say that Betty Boop dolls and telephone directories do not deserve the protection of copyright or even that the process of trivialization is necessarily bad. It is to say that copyright law simply has grown.

II. THE GROWTH OF COPYRIGHT AND THE 1976 ACT

The growth of copyright law can be seen in the enlargement of the scope of its subject matter from "books, maps and charts," in the Copyright Act of 1790¹² to "original works of authorship" in the 1976 Act.¹³ The expanded coverage in the 1976 Act, of course, is primarily a product of technology. Yet it is somewhat surprising to note that after the invention of the printing press, which gave rise to copyright, the first change in copyright law to accommodate new technology was the provision made three hundred years later in 1865 for the copyright of photographs and negatives.¹⁴ Since then, however, Congress has been reluctant to accommodate copyright law to new technology, perhaps because it has shared the view of the courts that traditionally have cast a jaundiced eye on copyright as a necessary monopoly to be construed strictly.¹⁵ Thus, in the general revision of the Copyright Act in 1870,¹⁶ Congress attempted to limit the copyright of artistic works to works of fine art. (Justice Holmes summarily dispatched this limitation to the archives of irrelevancy by interpreting the Act to provide protection for a circus poster.¹⁷) Moreover, in 1909, Congress refused to grant copyright for sound recordings, and it was not until 1972 that recordings were granted some form of protection.¹⁸ Even then the copyright protection was limited and these limitations were carried forward in the 1976 Act.¹⁹ Relatedly, although Congress in

10. *Fleischer Studios, Inc. v. Ralph A. Freulich, Inc.*, 73 F.2d 276 (2d Cir. 1934).

11. *Leon v. Pacific Tel. & Tel. Co.*, 91 F.2d 484 (9th Cir. 1937).

12. Ch. 15, § 1, 1 Stat. 124.

13. 17 U.S.C. § 102(a) (Supp. III 1979).

14. Act of Mar. 3, 1865, ch. 126, § 1, 13 Stat. 540.

15. This judicial skepticism was evinced in the first Supreme Court case on copyright, *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834).

16. Ch. 230, § 86, 16 Stat. 198.

17. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

18. Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391.

19. 17 U.S.C. § 114 (Supp. III 1979). The copyright of a sound recording protects against duplication, not imitation.

1912 readily granted copyright protection for motion pictures,²⁰ it never provided copyright protection for radio broadcasts, and until the 1976 Act, the Copyright Office provided protection for television programs only by analogizing them to motion pictures.

The reluctance of Congress to extend copyright protection to the products of new technology can be understood because copyright itself was the product of a particular technology, the printing press. Thus, almost every work given copyright protection over the years could exist in printed form—maps, charts, books, musical compositions, etchings, prints, and dramas. Even photographs and negatives were printed, and motion pictures were, after all, a form of photographs. Sound recordings and the like, however, simply could not be analogized to any kind of printed work.

The 1976 Act thus is a genuinely revolutionary document in extending full copyright protection beyond the realm of printing. I suggest, however, that the 1909 Act was just as revolutionary as the recent legislation, though in a different way and for different reasons. Congress in that act perhaps unwittingly enlarged the scope of the copyright monopoly by making the right to copy one of the exclusive rights of the copyright proprietor. Those exclusive rights in the 1909 Act were "to print, reprint, publish, copy, and vend."²¹ Concerning this new language, the House Report stated: "Subsection (a) of Section 1 adopts without change the phraseology of section 4952 of the Revised Statutes, and this, with the insertion of the word 'copy,' practically adopts the phraseology of the first copyright act Congress ever passed—that of 1790."²² The inclusion of the exclusive right to copy, however, was a significant change in regard to books. Although the right to copy had long been a part of the copyright statute, the right had not applied to books—a point first made by Verner Clapp in a study prepared for the National Advisory Commission on Libraries.²³

The argument that the exclusive right to copy given in the 1909 Act constituted an unwitting expansion of the rights of the copyright proprietor of books rests upon an analysis of the use of the word "copy" in the statutory predecessors of that act. In the 1790 Act, the exclusive rights granted to the copyright proprietor were to print, reprint, publish, and vend the copyrighted work, but

20. Act of Aug. 24, 1912, ch. 356, 37 Stat. 488.

21. Copyright Act of 1909, ch. 320, § 1(a), 35 Stat. 1075.

22. H.R. REP. No. 2222, 60th Cong., 2d Sess. 4 (1909).

23. V. CLAPP, COPYRIGHT—A LIBRARIAN'S VIEW 25-28 (1968).

only maps, charts, and books could be copyrighted.²⁴ The conduct justified by the grant of these rights, however, was distinguished from conduct that constituted infringement. Thus, anyone who "shall print, reprint, publish, or import . . . any copy or copies of such map, chart, book or books" without the consent of the copyright proprietor, or shall sell such work, was guilty of infringement.²⁵

The distinction between the "rights" section and the "infringement" section is important analytically, for it was characteristic of the statutes until the Act of 1909. The amendment of 1802, for example, provided copyright protection for prints, and in its infringement section provided that anyone who "shall engrave, etch or work . . . or in any other manner copy or sell . . . print, reprint, or import for sale" the copyrighted prints was guilty of infringement.²⁶ This use of the verb "copy" was the first in the copyright statutes.

The conduct that constituted an infringement of the copyright of books continued to be printing, publishing, selling, and importing without the authority of the copyright proprietor, while the infringement of the copyright of other kinds of works continued to include copying.²⁷ This distinction was true even in the 1870 revision²⁸ in which all the works subject to copyright and the rights granted in connection with them were assimilated into one section.²⁹ The 1909 Act, however, did not define infringing conduct, and with the addition of the exclusive right to copy, the new statute was interpreted to mean that the exclusive right to copy applied to all works, including books.

The comment in the House Report on the addition of the ex-

24. Ch. 15, § 1, 1 Stat. 124.

25. *Id.* § 2.

26. Ch. 36, § 3, 2 Stat. 171.

27. See §§ 6-7 of the 1831 Revision, ch. 16, 4 Stat. 436.

28. See §§ 99-100 of the 1870 Revision, ch. 230, 16 Stat. 198.

29. Sec. 86. *And be it further enacted*, That any 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, and his executors, administrators, or assigns, shall, upon complying with the provisions of this act, have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same; and in the case of dramatic composition, of publicly performing or representing it, or causing it to be performed or represented by others; and authors may reserve the right to dramatize or to translate their own works. Ch. 230, 16 Stat. 198.

clusive right to copy, implying as it does no substantial change, can best be characterized as disingenuous.³⁰ Prior to the 1909 Act, it seems clear that the copyright proprietor of a book had an exclusive right to copy his work only for commercial purposes. Thus, in his classic treatise in 1879, Eaton Drone wrote that the doctrine of fair use "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.*"³¹ A literal reading of the exclusive right to copy, however, has led to the inexorable conclusion that any copying of a copyrighted work, even by an individual for his own use, may constitute infringement. Even the phraseology of the 1909 Act, however, did not require this result. One of the striking characteristics of all the copyright statutes is the emphasis that they place on the right to sell the work. Thus, a reasonable reading of section 1(a) would have established the right to print and sell, the right to reprint and sell, the right to publish and sell, and the right to copy and sell. The courts did not choose to give the statute this reading, however, perhaps because the defendant in copyright cases was almost always a competitor, not an individual user.

My point is not that the enlargement of the scope of copyright by the inclusion of the exclusive right to copy was good or bad, but that it was unwitting and that it changed the concept of copyright. With the advent of the exclusive right to copy books as a right distinct from the right to print, reprint, or publish them, the concept of copyright ceased to be viewed primarily as a concept of monopoly. Instead, it came to be perceived as a proprietary concept reflecting principles of property. Paradoxically, the change enhanced the monopoly of copyright. It is one thing to prohibit the copying of a book by a competitor, which was consistent with the law prior to 1909; it is another to prohibit copying from a book by an individual user for his own private purposes, which was not consistent with the law prior to 1909. Thus, copyright no longer merely gave control for profit, but gave full control of the copy-

30. Ironically, so far from "retain[ing] without change" the old phraseology, the committees (the House of Representatives and the Senate shared the same report) were introducing a word that was new in the context and that nearly 60 years later has not been construed. Through it the copyright proprietors, without seeking it and apparently quite by accident, acquired at least the semblance of a right of an activity that was to have increasing importance in the new century. V. CLAPP, *supra* note 23, at 27.

31. E. DRONE, *A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS* 386 (1879) (emphasis added).

righted work itself. The fears of monopoly that had accompanied the early history of copyright had faded, and this change in the concept of copyright prepared the way for the 1976 Act. If copyright is a proprietary concept used to protect the profit to be gained from publishing a book, no reason exists not to extend the concept to protect the profit to be gained from all original works of authorship fixed in any tangible medium of expression.

The monopolistic characteristics of copyright, however, were by no means overlooked by the draftsmen of the 1976 Act. Indeed, a substantial portion of the statute deals with limitations on the exclusive rights of the copyright proprietor. One of the continuing problems in copyright law is the balancing of the interests of the copyright proprietor with those of the user of the copyrighted work. This problem has been made unduly complex by the fiction that copyright is an author's right. This notion has resulted in confusion about the function of copyright, which, I suggest, is trade regulation. Thus, if copyright is a right of the author for his own protection, it is difficult to view the function of copyright as a trade regulation device, because an author should have more than just economic rights in works that he creates. As Holmes stated, "Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone."³² Moreover, the notion of copyright as an author's right suggests that copyright policy involves the interest of only two groups: authors and users. There are, however, three groups whose interests must be reconciled: authors, publishers/entrepreneurs, and users.

So long as the publisher is omitted from the equation, the constitutionally mandated function of copyright to promote learning by rewarding authors makes sense. As suggested above, however, this function of copyright does not accord with reality. As history demonstrates, copyright was originally developed by and for publishers, and the author did not become a part of the equation until the concept had matured.³³ The author entered the picture in the English Copyright Act of 1710, known as the Statute of Anne, which was entitled, "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."³⁴ The

32. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903).

33. See L. PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* (1968), for a detailed treatment of the early history of copyright.

34. Statute of Anne, 1709, 8 Anne, c. 19.

American Copyright Act of 1790³⁵ copied this English act.

III. HISTORICAL PERSPECTIVE AND MISCONCEPTIONS

The Statute of Anne is commonly called the first copyright act in Anglo-American history, a half-truth that has obscured the earlier history of copyright. It was the first Parliamentary statute devoted exclusively to copyright, but it was also a successor to other legislation representing a hundred and fifty year history of copyright that includes Star Chamber decrees,³⁶ Ordinances during the Interregnum,³⁷ and the Licensing Act of 1662.³⁸ Without an understanding of this historical background, a proper understanding of the Statute of Anne, if not impossible, is at least highly improbable.

The Anglo-American copyright was originally a product of the Stationers' Company, a London company of the book trade, which had a monopoly of printing and publishing due to a royal charter granted in 1557.³⁹ The primary motivation in the grant of the charter was to make the company an effective instrument of censorship and press control, a motive in which the stationers acquiesced without compunction.⁴⁰ In order to protect their monopoly, the stationers were more than willing to assist the government in seeking out and destroying secret presses to prevent seditious books or pamphlets.

The primary concern of the stationers, of course, was their property, which depended upon the maintenance of good order within the company. Having a monopoly of printing and publishing, their problem was inside rather than outside piracy. The government, on the other hand, was not concerned with the proprietary rights of the stationers and thus permitted them to control their own destiny in this regard. The method by which the stationers maintained their position was the registration of their copies in the company register books, which gave the member who regis-

35. Ch. 15, 1 Stat. 124.

36. The two major decrees were the Star Chamber Decree of 1586 and the Star Chamber Decree of 1637. The two decrees are reproduced in L. PATTERSON, *supra* note 33, at Appendix II.

37. The major ordinances regulating the press during the Interregnum were the Ordinances of 1643 and 1645, and the Act of 1649. See C. FIRTH & R. RAIT, *I ACTS & ORDINANCES OF THE INTERREGNUM* 184-87, 1021-23 (1911); II *id.* 245-54.

38. 13 & 14 Car. 2, c. 33.

39. The Charter is reproduced in I E. ARBER, *A TRANSCRIPT OF THE REGISTERS OF THE COMPANY OF STATIONERS, 1544-1640 A.D.* xxviii (1875).

40. See generally C. BLAGDEN, *THE STATIONERS' COMPANY* (1960).

tered his copy the exclusive right to publish the work.⁴¹ Since registration was limited to members of the company, there was no question of an author's copyright because authors were not members. How a stationer acquired the manuscript that he registered was not a concern of the company. Once acquired, however, the copyright existed in perpetuity and led to an offensive and opprobrious monopoly of the book trade by a few booksellers who maintained control by selling their copyrights only to each other.⁴²

The various statutes of censorship gave the stationers' copyright legal efficacy through provisions that forbade the printing of works contrary to the stationers' copyright as well as without the licenser's imprimatur. The most notable of these acts was the Licensing Act of 1662,⁴³ modeled after the Star Chamber Decree of 1637,⁴⁴ which had expired with the demise of the Star Chamber in 1640.⁴⁵ The Licensing Act itself expired by its own terms periodically, but was renewed several times until 1694 when Parliament refused to renew it. Parliament's objection, however, was not to censorship as much as to the booksellers' monopoly. When their efforts to renew the Licensing Act failed, the monopolists sought to obtain the passage of a copyright act per se, but failed in this effort in both 1703 and 1706.⁴⁶ They finally resorted to urging the passage of a copyright act to protect authors rather than themselves. This stratagem succeeded, resulting in the Statute of Anne.

An analysis of the Statute of Anne, however, shows that the copyright provided was not so much a protection for the author as a trade regulation device. It did enable authors for the first time to secure a statutory copyright for their works, but this effect was only because the statute enabled anyone to acquire a statutory copyright.⁴⁷ The important change was not that authors could now acquire copyright, but that copyright was no longer limited to members of the Stationers' Company—a blow against the monopolists. Indeed, the only right in the statute unique to the author was the privilege of renewing the copyright, if he were living at the end

41. See E. ARBER, *supra* note 39.

42. Gray, *Alexander Donaldson and the Fight for Cheap Books*, 38 JUDICIAL REV. 180 (1926).

43. 13 & 14 Car. 2, c. 33.

44. See note 36 *supra*.

45. 16 Car. 1, c. 10 (1640).

46. See XIV H.C. JOUR. 249, 278, 287 and XV H.C. JOUR. 313.

47. The right to secure copyright was given to the author and his "Assignee or Assigns." Statute of Anne, 1709, 8 Anne, c. 19, § 1.

of the first term, for a second term of fourteen years.⁴⁸ This right is the predecessor of the termination right in the 1976 Act. The limitation of the renewal right to the author was a benefit to him, but it was also antimonopolistic in effect. It meant that the assignee of the author, the bookseller, could not renew the copyright.

The new statute gave consideration to the existing stationers' copyrights by continuing them for twenty-one years.⁴⁹ This provision may explain why the statute also contained an elaborate provision for regulating the prices of books, providing for remedies to be granted by various officials if the price of a book was excessive.⁵⁰ Interestingly, the named officials were substantially the same as those who had been named as licensing authorities in the Licensing Act of 1662 and the Star Chamber Decree of 1637.

Despite its intended function as a trade regulation device, the Statute of Anne actually had little immediate effect on the booksellers' monopoly. This impotence was partly because their old copyrights were continued for twenty-one years and partly because the booksellers simply continued to require that authors assign their copies to them. Eventually, however, the monopolists had to realize that the statutory copyright did not exist in perpetuity as had the old stationers' copyright. In their efforts to perpetuate their monopoly in spite of the limitations of the statutory copyright, the monopolists turned to a frequent refuge for legal scoundrels who find themselves in a statutory bind—judicial interpretation. Once again, the monopolists sought succor with their most sympathetic argument, the rights of the author. The author, they claimed, in addition to the statutory copyright, had a common law copyright in perpetuity by reason of his creation. Not so coincidentally, the author could assign this common law copyright to the bookseller, perpetuity and all. The monopolists' purpose, of course, was to revive the stationers' copyright in the guise of a common law copyright.

The booksellers almost succeeded. Indeed they got the result they wanted in *Millar v. Taylor*⁵¹ in 1768. In that case the Court of King's Bench ruled that the author did have a common law copyright existing in perpetuity—the Statute of Anne notwithstanding—and that he could assign this copyright to a bookseller. Fortunately, the *Millar* case did not prevail, and the last word was left

48. *Id.* § 11.

49. *Id.* § 1.

50. *Id.* § 4.

51. 4 Burr. 2303, 98 Eng. Rep. 201 (1768).

to the House of Lords in *Donaldson v. Beckett*.⁵² An author, said the Lords, did indeed have a common law copyright in his works. This common law right existed only until publication, however, at which point the author must look for protection to the statutory copyright provided by the Statute of Anne. Thus, the stationers' copyright for publishers came to be recognized as an author's copyright through statutes and judicial interpretation without any substantial change in the function of copyright.

The confusion over copyright created by the monopolists in England was transported to this country and promoted by treatise writers intent on establishing a theoretical basis for literary property. George Ticknor Curtis, for example, in *A Treatise on the Law of Copyright*,⁵³ devoted the first twenty-five pages of his book to the "Theory of the Rights of Authors." He argued that the author's rights in his property were based in natural law and existed in perpetuity.⁵⁴ While Drone took a similar view,⁵⁵ the practice, nevertheless, was that copyright had developed and continued to protect the publisher.

The aftermath is still with us in the guise of the fiction that copyright is intended primarily to protect the author. An examination of the customs of the publishing industry in this country would reveal that by far the majority of copyrights are held by publishers. The author is protected only by contract—usually adhesion contracts. Thus, the author in 1981 has no greater protection than John Milton had in 1667 when he assigned the "Copy, or Manuscript of a Poem entitled Paradise Lost, . . . now lately Licensed to be printed" to Samuëll Simmons for five pounds, a sum that was to be increased to a total of seventy pounds if sales of the work warranted it.

IV. CONCLUSION

This early history of copyright would be of little more than antiquarian interest except that it demonstrates the source of the confusion regarding the function of copyright. Although generally viewed as a right of the author, copyright has continued to function as a trade regulation device. Before the advent of computers and copying machines, this point was of relatively little impor-

52. 2 Bro. P.C. 129, 1 Eng. Rep. 837 (1774).

53. G. CURTIS, *A TREATISE ON THE LAW OF COPYRIGHT* (1847).

54. *Id.* at 23.

55. See E. DRONE, *supra* note 31.

tance, but IBM and Xerox have complicated copyright law enormously. Thus, in attempting to isolate the issues, it is helpful to view the law of copyright as statutorily creating unfair competition based on the doctrine of misappropriation. It is both monopolistic and antimonopolistic in that it is a trade regulation concept intended to protect legitimate property rights while preventing the expansion of those rights into an unwarranted monopoly. Indeed, the new copyright act reflects this function in several ways. It prohibits copyright for ideas,⁵⁶ contains compulsory licensing provisions,⁵⁷ and provides for extensive limitations on the exclusive rights of the copyright proprietor⁵⁸—primarily, the doctrine of fair use.⁵⁹

Modern communication technology has far outstripped copyright as an author's right, and the time has come to reassess the concept. The obstacle, of course, is the author, who is recognized as having a special kind of interest in the works that he creates beyond the economic interest associated with property. This interest is recognized in the form of the moral right of the author in civil law countries, particularly France and Germany.⁶⁰ This moral right includes the right of the author to protect the integrity of his work and his reputation in connection with the use of the work and can be characterized as a personal as opposed to a proprietary right.

History is helpful in understanding the rejection of the doctrine of moral right in the common law countries. A major reason is *Millar v. Taylor*,⁶¹ recognizing the author's common law copyright as existing separate and apart from the statutory copyright. Lord Mansfield in that case was in effect giving recognition to the moral rights of the author, and this was, I believe, what he intended the common law copyright to be. He made, however, a major conceptual error. He could not, or would not, distinguish between the personal and the proprietary rights of the author. Consequently, his recognition of the author's common law copyright protected the monopoly of the booksellers. When the issue came before the House of Lords in *Donaldson v. Beckett*,⁶² the re-

56. 17 U.S.C. § 102(b) (Supp. III 1979).

57. 17 U.S.C. §§ 111, 115, 116, 118 (Supp. III 1979).

58. See 17 U.S.C. §§ 107-118 (Supp. III 1979).

59. 17 U.S.C. § 107 (Supp. III 1979).

60. See Strauss, *The Moral Right of the Author* (1959), Study 4 of the Copyright Office Studies, reprinted in THE COPYRIGHT SOCIETY OF THE U.S.A., II STUDIES ON COPYRIGHT 963 (Arthur Fisher Memorial Edition 1963).

61. 4 Burr. 2303, 98 Eng. Rep. 201 (1768).

62. 2 Bro. P.C. 129, 1 Eng. Rep. 837 (1774).

sentment against the booksellers' monopoly prevailed. The Lords recognized that the author had a common law copyright, but only until his work was published.

These two cases explain the confused concept of copyright, for they meant that copyright was to be a concept that encompassed both proprietary and personal rights. The notion that copyright is to protect the author's personal rights has continually served as a rationalization for enlarging the proprietary rights of the copyright proprietor, more to the benefit of the publisher than the author.

The importance of the distinction between proprietary and personal rights in connection with copyright did not become apparent until the development of modern communication technology. For example, copyright for computers, reproduction by photocopying, and copyright for television are problems that involve proprietary rather than personal rights. By definition, the corporate copyright proprietor can have no personal rights. More important perhaps, the 1976 Copyright Act eliminated the common law copyright, and the only protection that the author now has is statutory.⁶³ There is much to be said for the elimination of the dual system of copyright protection in this country, but the change was almost surely made to accommodate copyright to television. Needless to say, technology will undoubtedly continue to shape the law of copyright.

The time has come when it is not only feasible but desirable to make the distinction that Lord Mansfield failed to make in *Millar*—the distinction between a proprietary and a personal copyright. Indeed, the 1909 and 1976 copyright statutes suggest that the law of copyright in this country is taking this direction. The work-made-for-hire doctrine, first codified in the 1909 Act,⁶⁴ under which an employer is deemed the author for copyright purposes, implies a proprietary copyright that should be treated differently from the copyright of an individual author's work. Thus, the term of such a copyright is not the life of the author plus fifty years, but either seventy-five years from publication or one hundred years from creation.⁶⁵ Moreover, the termination right does not apply to works made for hire.⁶⁶ The limited rights available to the copyright of a sound recording suggest that it is a proprietary copyright, and the various compulsory licenses also suggest the trend to

63. 17 U.S.C. § 301 (Supp. III 1979).

64. Copyright Act of 1909, ch. 320, § 26, 35 Stat. 1075.

65. 17 U.S.C. § 302(c) (Supp. III 1979).

66. 17 U.S.C. § 203(a) (Supp. III 1979).

a purely proprietary copyright.

The trend, however, has apparently not been recognized and thus is not counterbalanced by the parallel development of a personal copyright for the individual author. Presumably, this omission is because copyright is deemed to be an author's right in the first place. As suggested above, however, this theory is not consistent with practice. The proprietary copyright is developing at the expense of the author's personal rights.

The recognition of an individual author's personal copyright would have substantial merit in itself. Its principal value, however, would be to provide a sounder perspective for copyright law. It would dispel the fiction that copyright law as it presently functions serves primarily to protect the author. Both legislative and judicial lawmakers would thereby be in a better position to bring the issues more sharply into focus by recognizing the proprietary copyright as a concept of trade regulation for intellectual property, while still providing appropriate protection for the rights of the individual author. The problems of copyright for computers, fair use in photocopying, and copyright for television could then be approached in a much more realistic manner. That in itself would be no small feat.