

**THE DEMONOLOGY
OF COPYRIGHT**

By Barbara A. Ringer

R.R. Bowker Memorial Lecture

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IN CHOOSING TO GIVE THIS LECTURE the rather enigmatic title of "The Demonology of Copyright," I do not mean to suggest either that copyright itself is a form of devil-worship or, conversely, that copyright offers a form of salvation from the powers of darkness. Like any other law, copyright is a pragmatic response to certain felt needs of society and, like any other law, must change in scope and direction as these needs change. But changing any law is never an easy matter, and the case of copyright is made much more difficult by the religious fervor and theological arguments thrown at each other by the contending parties. The personal anger, the emotion, the presentation of viewpoints in stark black-and-white terms, are quite different in degree and character from what one might find in disputes over, say, admiralty or insurance law.

It is easy to make fun of the kind of confrontation I am talking about, where the mere mention of a word like "monopoly" or "property" will cause chairs to be pushed back from tables, faces to redden, breathing to shorten and bitter words to be exchanged. This naturally prolongs discussions and makes compromise more difficult to achieve, assuming it is compromise you want. But I for one have seen this sort of exchange too often not to take it seriously; and to ask whether there is something special about copyright that provokes these strong and diametrically opposed expressions of feeling.

Justice Story once called copyright "the metaphysics of the law," and I think most people sense the truth of this aphorism without really knowing what it means. If metaphysics is the study of human genera-

tion, regeneration — of the relation of man to his natural and supernatural environment and to the past and future of his species — then copyright as a legal system can indeed be linked closely to this study. In a religious sense, it is man's creative acts that bring him closest to the godhead, and it is precisely these acts that copyright is concerned with.

Perhaps one of the problems with copyright is that some people have elevated it to a sanctified or divine plane, and that authors have been looked on as saints or angels, if not demi-gods. Before you laugh, think about how you or people you know regard the contributions of Shakespeare and Tolstoy, Beethoven and Toscanini, to your own life and psyche.

But if people feel really strongly about gods and angels there will be a tendency to assume the existence of demons and witches, and to worship evil and combat heresy with equal vigor. Perhaps it is an extreme example, but you will find precisely what I am talking about in the writings of Ezra Pound, where the creative act of authorship is exalted and any attempt to limit or exploit it is deplored as usury, Pound's ultimate devil. At the other extreme, there are plenty of legal philosophers and politicians who attack incremental changes in copyright protection and, in some cases, attack as evil, the very existence of a copyright law.

My purpose here is to analyze this dialectic in terms of the changes the copyright laws of the world are now undergoing, and to determine whether the charges and counter-charges of the pro- and anti-copyright forces can help us in adapting to these changes. Before doing so I should do what Professor Ben Kaplan did in his 1966 Carpentier lectures, collected under the title *An Unhurried View of Copyright*: to admit the personal bias I bring to the subject. Professor Kaplan acknowledged candidly that he had "introduced throughout a calculated low-protectionist bias which I associate with a concern for easy public access to, and use and improvement of products of the mind." My bias is just

the opposite: I believe it is society's duty to go as far as it can possibly go in nurturing the atmosphere in which authors and other creative artists can flourish. I agree that the copyright law should encourage widespread dissemination of works of the mind. But it seems to me that, in the long pull, it is more important for a particular generation to produce a handful of great creative works than to shower its schoolchildren with unauthorized photocopies or to hold the cost of a juke-box play down to a dime, if that is what it is these days.

The Origins of Copyright

It is interesting, though of debatable significance, that copyright as we know it originated in England during the 16th and 17th centuries. This was a period of great religious ferment and political unrest during which witchcraft and devil worship were at their height, and repressive measures against all forms of heresy were widespread. The pro-copyright theologians argue that copyright as a natural property right of the author emerged from the mists of the common law and took definite form as the result of the invention of the printing press and the increase in potential and actual piracy after 1450. They dismiss the historical ties between copyright and the Crown's grants of printing monopolies, its efforts to suppress heretical or seditious writing, and to exercise censorship control over all publications. This line of argument tends to infuriate the anti-copyright scholars who point out that the first copyright statute in history, the Statute of Anne of 1710, was a direct outgrowth of an elaborate series of monopoly grants, Star Chamber decrees, licensing acts, and a system involving mandatory registration of titles with the Stationer's Company. This system operated as a means of exercising control over freedom of the press, generating revenues for the Crown, and giving certain printers monopoly protection as against unlicensed printers. The author was the forgotten figure in this drama, which was played out during the 16th and 17th centuries in England, France, and other Western Euro-

pean countries where the invention of moveable type and its increasing use collided with the desire of the governments to suppress dissident writing. The beneficiaries of these primitive copyrights were the publishers who agreed to buy monopolies in exchange for freedom of the press. Authors were paid off in lump sums, usually quite low.

Now it is true in general that under this system copyright was equated with heresy. But is this any basis for damning copyright as a tool of autocratic power, political or economic, and for linking copyright with efforts to suppress freedom of the press and freedom of speech? This question is a much more lively one than you might think.

Many of you will remember Admiral Rickover's efforts in the early 1960's to prevent the unauthorized publication by Public Affairs Press of several of his speeches on education and atomic energy. At the heart of the dispute was the question of whether the author's efforts to control publication and assert economic rights in his writings amounted to interference with the public's right of free access. Justice Stanley Reed, who by that time had retired from the Supreme Court but was sitting on the Circuit Court of Appeals by designation, wrote the opinion of the Court upholding the Admiral's right to secure copyright, and later described the case as the most fascinating in his entire career on the bench. The Supreme Court ducked the issue, but the defendant felt strongly enough to write a book on the question, publishing it under the title *Constraint by Copyright*. It certainly belongs in anyone's library of copyright demonology.

The theme of copyright and its possible repressive effect on matters of urgent public concern or curiosity runs through a whole series of front-page events over the last decade or so: Martin Luther King's "I have a Dream" speech, Senator Dodd's files, Oswald's diaries, interviews given by Howard Hughes and the Beatles, Hemingway's personal conversations, the dis-

pute over Manchester's book on Kennedy's assassination, and other affairs, some frivolous and others deadly serious. The question rose to the surface in the Pentagon Papers affair, dramatizing the close relationship between systems of security classification and copyright, and the various recent assertions of executive privilege and ownership over Presidential tapes and documents all have direct copyright implications.

The most recent *cause célèbre* in copyright is the infringement suit brought by CBS against Vanderbilt University concerning its archive of video tapes of nightly network news broadcasts. The case, which has its complications as well as its fascinations, has not yet been argued; judging from the briefs I have seen there appears to be a deliberate effort to provoke a confrontation over the extent to which copyright should be allowed to control the fixation and later dissemination of matters of current interest and historical value. Vanderbilt seems much less interested in defending the case on the basis of fair use than on the ground that copyright registration over material such as national news broadcasts should be sharply limited or eliminated altogether. A major argument in the University's briefs rests on the analogy between the efforts of CBS to license the videotaping of its newscasts and to control the conditions under which the tapes are disseminated, and the efforts of the Tudor and Stuart monarchies, and their successors, to control the press through monopolies and licensing.

Somebody who had read the Vanderbilt brief called and asked me whether it was true that copyright really started as a censorship device aimed at suppressing dissident writing and limiting the public to information favorable to the regime. I said that the facts were right but that they should be looked at in a broader historical context. Although a few extreme demonologists might argue otherwise, it is plain to see that English copyright in 1974 is as fundamentally different from English copyright in 1600 as the powers of Elizabeth II are from those of Elizabeth I.

In the first place, to look only at English constitutional history for a moment, it is important to recognize that the Statute of Anne of 1710, the first copyright statute anywhere and the Mother of us all, was enacted precisely because the whole autocratic censorship/monopoly/licensing apparatus had broken down completely. As a result of the bloodless revolution taking place in the English constitutional system, basic individual freedoms, notably freedom of speech and freedom of the press, were becoming established under common law principles. The Statute of Anne marked the end of autocracy in English copyright and established a set of democratic principles: recognition of the individual author as the ultimate beneficiary and fountainhead of protection and a guarantee of legal protection against unauthorized use for limited times, without any elements of prior restraint of censorship by government or its agents. The great English copyright cases of the 18th century, in construing the law as it had been changed by the Statute of Anne, established three fundamental principles; looked at with late 20th century eyes, these principles can be considered a revolutionary "declaration of human rights" for authors:

First, under English common law, the individual author has absolute and perpetual rights in his works. As long as he chooses to leave his work unpublished, the law has an unqualified obligation to protect him against unauthorized publication or other use;

Second, this common law right is not destroyed by publication. The very purpose of authorship is to reach the minds of others through publication, and it is the law's duty to continue to protect an author's work even after he has voluntarily released its contents to the public and thus lost any power to control it physically;

Third, if the law offers protection to the work by means of a copyright statute, common law protection ends and is superseded by protection under the specific terms and conditions written down in the statute. In other words, if

the government chooses to offer protection to published works under specified terms and conditions, the author is guaranteed protection, but only on the terms and conditions laid down in the statute.

If, as I believe, the Statute of Anne was a product of the bloodless revolution that established democracy in England, the copyright laws of the United States were an even more immediate result of the American Revolution. The new country was seized with nationalistic fervor, and copyright, as a means of promoting native authorship, was identified as a leading article in the creed of influential nationalists such as Noah Webster. Under the Articles of Confederation twelve of the thirteen original states adopted copyright statutes based on the Statute of Anne. But it soon became apparent that separate systems of legal protection, even if adopted and enforced in all of the states, could not be effective to protect intangible property capable of flowing across state borders as easily as books and other publications. Thus, the power of Congress at the Federal level, to "promote the progress of science and useful arts by securing to authors and inventors the exclusive rights to their respective writings and discoveries," was guaranteed directly and explicitly in the first Article of the Constitution.

Listen to Madison's words on this guarantee in the *Federalist Papers*: do they suggest any direct or indirect purpose to use copyright protection for purposes of repression or censorship?

The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of 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.

It is striking that the second and third copyright statutes in the world — those of the United States of America and of France — were adopted immediately

following the revolutions in those countries that overthrew autocratic government and were based on ideals of personal liberty and individual freedom. The Rights of Man in both cases certainly included the Rights of the Author, and the French word for copyright, "le droit d'auteur," reflects this philosophical approach literally. The American statute of 1790 followed the Statute of Anne and broke little new ground, but the French statute of 1793 was based on the philosophical recognition of copyright as a natural right of the author and of the author as a creative individual rather than merely as a property owner. Among other revolutionary changes, the French statute established a term of copyright based on the life of the author. An hypothesis well worth exploring is that the copyright statutes adopted one after the other in Europe during the 19th century were the direct product of the Age of Revolution and the political upheavals in each of those countries.

To summarize this point, I don't agree with the charge that copyright originated as a marriage between tyranny and greed, arranged by the devil. Regardless of its origins, however, the concept of copyright changed radically as a result of the revolutionary political movements of the late 18th and 19th centuries, and the first copyright statutes were based on a rejection of autocratic repression and monopoly control and upon a new recognition of individual liberty and the human rights of authors. But nothing ever stays the same, and the main thing all this teaches me is that copyright does have the capacity to do good or evil, promote or suppress individual freedom of expression, depending upon how it is implemented.

Monopoly versus Property

Over the years, I have listened with increasing impatience to hundreds of debates as to whether copyright is monopoly or property. Certainly no single issue divides the pro-copyright and anti-copyright forces more sharply, and the arguments are invariably put forward in stark either/or terms, as if something that is

a monopoly could not possibly also be property, or vice versa. This is an extreme example of what has been called "the tyranny of labels," and its results have been both time-consuming and pernicious.

I have seen too many cases where a judge or lawmaker, coming upon copyright for the first time and looking for guidance on a particular issue, assumes either that he is dealing with a monopoly in which protection should be granted grudgingly and to the bare extent necessary or, conversely, that property rights are involved and that any limitations must be fully justified. Monopoly, property, and personal rights are merely terms describing certain legal concepts; copyright has some of the characteristics of all three of these concepts, but not others. Copyright is, as a legal concept, unique and can be defined only in terms of its own special characteristics.

Be that as it may, the demonologists who have attacked copyright as a "monopoly" (sometimes also referred to as a "tax") have had a considerable influence upon the development of the law throughout the world, and cannot be dismissed as doctrinaire theorists. The greatest of them, the British historian Thomas Babington Macaulay, made a speech on the subject in Parliament in 1841, which probably has more influence today than when it was delivered:

Copyright is monopoly, and produces all the effects which the general voice of mankind attributes to monopoly. The effect of monopoly generally is to make articles scarce, to make them dear, and to make them bad. It is good that authors should be remunerated; and the least exceptionable way of remunerating them is by a monopoly. Yet monopoly is an evil. For the sake of the good we must submit to the evil; but the evil ought not to last a day longer than is necessary for the purpose of securing the good.

Lord Macaulay refused to consider copyright as a form of property. He pointed out that, if the arguments for extending the copyright term were carried

to their logical conclusion, the result would be a perpetual copyright, with the benefits going to monopolists rather than the author or his immediate family. His pithy if hopelessly simplistic conclusion: "The principle of copyright is this. It is a tax on readers for the purpose of giving a bounty to writers."

Macaulay's words and sentiments live on 130 years later, notably in one of the most provocative articles on copyright published in recent years: "The Uneasy Case for Copyright" by Professor Stephen Breyer, published in the *Harvard Law Review* in 1970. Despite the title he chose, Breyer's argument cannot really be considered a "case for copyright," uneasy or otherwise. Like Macaulay from whom he quotes liberally, Breyer strongly opposes any augmentation in the term or scope of the present 65-year-old U.S. copyright law.

Breyer stops short, just barely, of advocating outright abolition of the copyright law, but puts forward an argument that the results of abolition would not be disastrous and might be beneficial, especially when it comes to textbooks. He acknowledges the cost advantage that a pirate would have over the originating publisher, but argues that, even so, the latter could stay in business through his advantage of "lead time" (being on the market first) and possible "retaliation" (bringing out "punitive editions" priced below the pirate's cost and thus driving him out of business). He suggests the possibility that buyers of textbooks might, despite anti-trust problems, be able to organize in ways that, either directly or with government support, would enable them to contract with a publisher in advance of publication to ensure both a reasonable price and a reasonable profit.

For me, the most significant possibility explored in Professor Breyer's article is that, at least in respect to textbooks, government subsidy be substituted entirely for copyright to insure adequate revenue to both publishers and authors. He recognizes two obvious dangers: that the government will subsidize only what it wants to see published, and that it will censor what it subsi-

dizes. Yet, on balance, he seems to prefer this approach to the evils of what he regards as the copyright monopoly. While mostly disagreeing with his conclusions, I admire Professor Breyer's courage and skill in saying what he thinks, but I must say that at this point he scared me.

Professor Ben Kaplan's famous and controversial book preceded and in some ways anticipated Breyer's article. It consists of three lectures published under the title *An Unhurried View of Copyright* and, despite its level tone and expansive view, many proponents of copyright found it an anathema and many anti-copyright demonologists welcomed it as scripture.

One of Kaplan's main points is contained in his second lecture, dealing with plagiarism, and it seems a pity that it has been obscured in the controversy over the book as a whole. His argument is that, before copyright was systematized in statutory form, authors were free to recast works into different forms and to draw freely on elements of plot, characterization, setting and theme from other writers. He felt that this freedom resulted in a flourishing of literature such as that found during the Elizabethan Age in England. By broadening the scope of copyright protection to inhibit or prohibit the kind of untrammelled adaptations, dramatizations, translations, and abridgments that were formerly normal procedure in all artistic pursuits, Kaplan considered that the courts and legislatures have dampened creativity and narrowed the scope of original works available to the public. Some of this makes good sense to me, and I think it is just as indefensible to ignore reasonable warnings about the inhibiting effects of expanding the scope or term of copyright too far as it is to claim that every expansion is automatically against the public interest.

At the other extreme from the anti-monopoly arguments of the professors is the anti-copyright philosophy sometimes expressed on behalf of authors: that an author's work is property generically like any other but qualitatively much more valuable, and that in simple

justice society should protect it without any limitations whatever in term or scope. Under this theory, copyright statutes containing limitations on protection are positive detriments to the author's interests, and if all the copyright statutes were repealed, society would find a way to provide authors with fuller, more effective protection.

Admittedly, there has been a recent resurgence of copyright protection under state common law principles, thanks to the phenomenon of record piracy and the failure of the federal law to deal with it effectively until the problem was out of hand. Nevertheless, experience has proved more than once that local laws are ineffective to deal with problems on a national or international scale. In any case, I doubt whether most copyright owners would agree to run the risk of relying on the vagaries of 50 state copyright laws, even if they existed. They would prefer to do everything they can to seek stronger protection under the existing federal system, but this is an endeavor that is proving increasingly difficult.

The Impact of Technology and International Developments

In 1945, twenty-nine years ago, Zechariah Chafee, Jr. wrote what is probably the best single work on copyright law ever published in English. The opening paragraph of his article entitled "Reflections on the Law of Copyright," published in two parts in the *Columbia Law Review*, was both perceptive and foresighted:

Copyright is the Cinderella of the law. Her rich older sisters, Franchises and Patents, long crowded her into the chimney-corner. Suddenly the Fairy Godmother, Invention, endowed her with mechanical and electrical devices as magical as the pumpkin coach and the mice footmen. Now she whirls through the mad mazes of a glamorous ball.

Although Chafee mentioned specifically, as examples of these magical devices, only motion pictures and radio, he was perfectly aware that new pumpkin coaches and mice footmen were waiting to be summoned.

He lived to see some, but not all, of the mad-mazes technology had in store for copyright: television and its step-child cable TV, audio tape recording, video tape recording, photocomposition and electronic typesetting, automatic storage and retrieval devices, satellites, and our present Prince Charming, photocopying. Reprography seems to me the most serious immediate problem in copyright law, but I have come to feel that satellites represent the most important development in human history since the printing press.

What has happened in the 29 years since Chafee wrote his article is so staggering that words are literally inadequate to describe it. The copyright law that was Cinderella in 1945 has aged considerably, but seems still to be dancing in a mad ball. The changes in communications have produced whole new generations of pressure groups, making statutory reform much more difficult, but the courts have become reluctant to extend the old 1909 Act to cover things Teddy Roosevelt never dreamed of. New services, such as cable systems, photocopy machines, and computers, have emerged without clear-cut copyright guidelines, and people have come to rely on them in their businesses and their very lives. These services cannot be cut off, but somehow the copyright law must find a way to insure that the interests of authors and copyright owners are protected at the same time. Increasingly, the answer being suggested to this problem nationally and internationally involves systems of compulsory licensing: free access with payment of reasonable compensation on some sort of blanket or bulk basis.

In recent years the entire structure of international copyright has been shaken by two new and unexpected factors: the challenge of the developing countries, which have demanded and gotten concessions in their international copyright obligations consistent with their economic and educational problems, and the adherence of the Soviet Union to the Universal Copyright Convention, which has introduced a whole new system and concept of copyright law into the international scheme.

Demonology flourishes where there is uncertainty and a need for simple explanations for complex situations, and the new developments in international copyright have brought the demonologists out in force all over the world. The onslaught of the new technology, combined with the introduction into the international copyright system of countries with different needs and with conflicting economic and political concepts, leaves the future of copyright very much in question.

Copyright's Ultimate Goals

In his 1945 article, Chafee suggested six ideals to which a copyright statute should aspire: 1) complete coverage; 2) unified protection, enabling the author to control all the channels through which the work reaches the public; 3) international protection, with no discrimination against foreign authors; 4) protection that does not go substantially beyond the purposes it seeks to serve; 5) protection that is not so broad as to stifle independent creation by others; and 6) legal rules that are convenient to handle.

These goals are still worthy and unattained today; the failure of the 1909 Act to meet them is much more serious in 1974 than in 1945. The current revision bill, while a considerable improvement over the present law in many respects, would be far from a complete fulfillment of Chafee's six objectives.

There is a seventh goal, which Chafee could not have been as aware of in 1945 as he would be today, and which in fact may be the most important copyright goal of all. It can be stated very simply: a substantial increase in the rights of the author, considered not as a copyright owner but as a separate creative individual. It involves a recognition that committees don't create works and corporations don't create works, and machines don't create works. If, for the sake of convenience of companies or societies or governments, the copyright law forces individual authors back into a collective strait-jacket or makes them into human writing machines, it will indeed have become a tool of the devil.

I think I know a little of why copyright engenders such sensitivity and emotion, such aggressiveness and defensiveness, such extremes of position. It is because at its root there is one beneficiary of protection and one only, and that is the independent author who, as we have seen in the cataclysmic events in our own country of the past 18 months, can change the course of history.

If the copyright law is to continue to function on the side of light against darkness, good against evil, truth against newspeak, it must broaden its base and its goals. Freedom of speech and freedom of the press are meaningless unless authors are able to create independently from control by anyone, and to find a way to put their works before the public. Economic advantage and the shibboleth of "convenience" distort the copyright law into a weapon against authors. Anyone who cares about freedom and authorship must insure that, in the process of improving the efficiency of our law, we do not throw it all the way back to its repressive origins in the Middle Ages.

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