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Sept. 28, 2007

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Copyright in Historical Perspective By Lyman Ray Patterson

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1

Overview

"WHAT IS its history—its judicial history? It is wrapt in obscurity and uncertainty." Common-law copyright was the subject of inquiry. The question, asked in the landmark case of American copyright law, *Wheaton v. Peters*, was posed by Circuit Judge Joseph Hopkinson in the lower court opinion.¹ The obscurity and uncertainty of which he spoke extended back into sixteenth-century English history. It was manifest in the first major English decision on copyright, *Millar v. Taylor*,² in 1769, sixty years after the enactment of the Statute of Anne, the English copyright act of 1709.³

The Statute of Anne, a successor to sixteenth- and seventeenth-century legislation in England, served as a model both for the early American states' copyright acts and for their successor, this country's first federal copyright act in 1790.⁴ Construing the federal act in 1834, the U.S. Supreme Court in the *Wheaton* case followed the second major English decision on copyright, *Donaldson v. Beckett*.⁵

Summary



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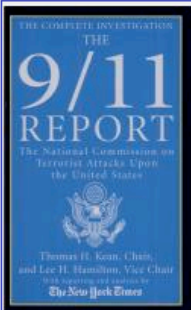
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A treatise on the law of copyright in books, dramatic and musical compositions, letters and other... By Ticknor Curtis

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LAW OF COPYRIGHT.


INTRODUCTION.

THEORY OF THE RIGHTS OF AUTHORS.

BEFORE we enter upon the field of municipal jurisprudence, it may be well to pass through the more enlarged region of natural law.¹ Literary Property has always asserted claims to a foundation in the principles of general right; and the nature and extent of those claims constitute an important subject of inquiry, whenever the interests of this property

¹ It is somewhat embarrassing, as all students of the Law of Nature know, to use terms accurately descriptive of that code which deals rights of man in the natural state, but also the *status* of mankind after those rights have been to some extent modified by the conditions of

Summary



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a letter the Secretary of the Navy wrote on the 24th of January wherein he, the Secretary of War, states, in effect, that all materiel for the air warning service would be there, meaning Hawaii, not later than June 1941. Did you know of that letter?
Colonel MARSTON. I did not know of that letter at the time that

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Colonel MARSTON. I was aware that there was delay in the discussion of the aircraft warning stations, due to a difference of opinion over the technical features of the installations, which, being new, was not fully developed. As I stated before, there was some difference of

Page 1639

is that a thirty-minute warning, which is all that can be expected from a pick-up from the radar plot, is not sufficient to deploy the garrison unless it is in at least the Class 2 Alert, as was given at that time.
106. General GRUNERT. Have you anything that you want to offer

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Respondent also agreed that should he ever resume or indulge in

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in form or substance. (May 25, 1931.)
094. **Newspaper Publisher—Malt Sirup.**—The corporate publisher of a daily newspaper of large circulation on the Pacific coast has signed a stipulation with the Federal Trade Commission whereby it

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stipulation between the advertiser and the Federal Trade Commission, if the case should be settled by stipulation and a revision of the advertising claims of this vendor made to bring his representations within

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◆ Changes in Copyright Scope

- 1790 Act: rights to “print, reprint, publish, and vend.”
 - Trade regulation – printing of entire books for profit.
- 1976 Act: rights to copy, distribute, display, and transform.
 - Reproduction Right – right to multiply copies (material objects from which work may be perceived).
 - Distribution Right – right to disseminate copies (by sale, gift, rental, etc.).
 - Public Display Right – right to show an image in isolation.
 - Public Performance Right – right to show images in sequence (movie theater, TV, etc.).
 - Derivative Work Right – right to translate elements of work into new medium, format, or sequel.

Google Book Search

◆ Changes in Copyright Duration

- 1790 Act: existing and future works get 14 years, plus renewal.
- 1976 Act: life of the author plus 50 years; start at creation
 - Published works with existing copyrights got 75 years
 - Corporate, and anonymous works got 75 - 100 years.
- 1998 Act: life of the author plus 70 years for existing and future works with individual authors
 - Corporate and anonymous works: 95 - 120 years.
 - Constitutional because it promotes incentives, equity, and consistency (internationally). *Eldred v. Ashcroft* (2003).

◆ Result: more pressure on fair use doctrine to provide a viable “public domain.”

Fair Use

◆ *Harper & Row v. Nation* (1985)

- (1) The purpose and character of the use:
 - ◆ Fair use is disfavored for commercial and exploitive uses.
 - ◆ News reporting may be commercial, depending on intent.
- (2) The nature of the copyrighted work:
 - ◆ Fair use is disfavored for unpublished and fictional works.
- (3) The amount and substantiality of the portion used:
 - ◆ Fair use is disfavored when entire work, or its “heart,” is used.
- (4) The effect on the potential market for the work:
 - ◆ Fair use is disfavored when lost revenue has been shown.
- First Amendment and the public interest in news does not change fair use analysis.
 - ◆ Ability to take ideas and make fair uses satisfies First Amendment.

Why Google Book Search (Libraries) May Be a Fair Use

- ◆ Its use may be transformative in purpose.
 - Improving access to information on the Internet:
 - ◆ Kelly v. Arriba Soft (9th Cir. 2003) (copying images for search engine)
 - Creating an index of copyrighted works:
 - ◆ New York Times Co. v. Roxbury Data Interface, Inc. (D.N.J. 1977) (copying New York Times Index to help researchers easily find articles in The New York Times)
 - Engaging in comparative advertising and preparing catalogues of works for consumers:
 - ◆ Sony Computer Entm't Am., Inc. v. Bleem, LLC (9th Cir. 2000) (copying screenshots of Sony Playstation games as comparative advertising)
 - ◆ Ty, Inc. v. Publications Int'l Ltd. (7th Cir. 2002) (copying Beanie Babies for catalog)

Why Google Book Search (Libraries) May Be a Fair Use

- ✦ Most works involved are factual and published.
 - Google is not displaying illustrations or lengthy expressive passages from library books.
 - Works of a factual character are not within the core of copyright law’s protective coverage:
 - ◆ *Campbell v. Acuff-Rose Music, Inc.* (1994).
 - Works that have been “published extensively” and are “publicly known” are harmed less by copying:
 - ◆ *Bill Graham Archives v. Dorling Kindersley Ltd.* (S.D.N.Y., 2005), *aff’d*, (2d Cir. 2006).

Why Google Book Search (Libraries) May Be a Fair Use

- ✦ Google is only displaying snippets of a few lines or less.
 - Copying of a work in its entirety does not defeat fair use where it is reduced in size for the ultimate use.
 - ◆ Kelly v. Arriba Soft (9th Cir. 2003) (copying images for display in “thumbnail” versions in search engine)
 - ◆ Bill Graham Archives v. Dorling Kindersley Ltd., (2d Cir. 2006) (copying Grateful Dead posters for display at reduced size in illustrated history of the group)
 - Where “ultimate use” is limited, copying of entire work does not favor plaintiff very strongly.
 - ◆ Sega Enters. v. Accolade, Inc., (9th Cir. 1992) (copying Sega Genesis games to make and sell compatible games).

Why Google Book Search (Libraries) May Be a Fair Use

- ✦ Google will help, not harm, sales of library books made searchable with snippet previews.
 - Penn State Press saw its sales triple after inclusion on Google Book Search.
 - Amazon.com found that sales of searchable books were up 10% in a short period compared to non-searchable ones.
 - The National Academy of Sciences Press and MIT have found that posting full text of books to the Web increases sales of those books by up to three times.
 - Book revenues are trending sharply upward from \$29 billion in 2004 to an estimated \$40 billion by 2010.
 - Book sales doubled between 1992 and 2004, despite the Web, P2P file-sharing of up to 7,000 books, TV, video games, etc.

Why Google Book Search (Libraries) May Be a Fair Use

- ◆ There is no potential market for the display of library book snippets in response to searches.
 - Copyright notices do not entail digitization rights, nor is there a deed system for copyrights with names/addresses.
 - The Copyright Clearance Center licenses the photocopying of full pages, not snippets.
 - Amazon.com may license book search, but displays full pages and only of books that are in-print.
 - Courts have rejected the circular argument that fair use should not exist whenever defendant could pay.
 - ◆ Bill Graham Archives v. Dorling Kindersley Ltd., (2d Cir. 2006) (fact that defendant did not pay licensing fee did not favor plaintiff because then “fourth fair use factor would always favor the copyright holder”)
 - ◆ Williams & Wilkins Co. v. U.S. (Ct. Cl. 1973) (photocopying: “loss of presumed royalty income [is] a standard which necessarily assumes that plaintiff has a right to issue licenses”), aff’d by 4-4 vote (1975)

Why Google Book Search (Libraries) May *Not* Be a Fair Use

- ◆ Commercial purpose?
 - Google stands to make millions and beat MSFT and Yahoo! in search engine battle for share of U.S. advertising market.
 - Earned \$3 billion profit in 2006, on \$10 billion in revenue.
- ◆ Fictional and poetic works?
 - Highly creative core of copyright – entire poems?
- ◆ Databases of full digital copies of entire libraries?
 - Will libraries buy fewer copies? Will there be a breach?
- ◆ Harm to market for publishers' e-book backlists?
 - HarperCollins plan to introduce searchable versions of the books in its catalogue and backlist.

Transformative Use Trumps Other Factors

- ✦ Most transformative uses in our society are carried out for profit and by commercial sales.
 - Kelly v. Arriba Soft (9th Cir. 2003); Bill Graham Archives v. Dorling Kindersley Ltd., (2d Cir. 2006).
- ✦ Creative nature of work is less relevant when use is for a transformative purpose.
 - Bill Graham Archives (2d Cir. 2006)
- ✦ Copying entire work does not defeat fair use where use is transformative.
 - Bill Graham Archives (2d Cir. 2006); Arriba Soft (9th Cir. 2003); Ty, Inc. v. Publications Int'l (7th Cir. 2002)
- ✦ Copyright owners may not preempt fair use markets merely by offering licenses.
 - Bill Graham Archives v. DK Ltd., (2d Cir. 2006).

The End!