NATURAL COPYRIGHT V. POSITIVE COPYRIGHT

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History of Copyright:

Although copyright law is a type social arrangement, it primarily governs the processes of creation and invention rather than providing entitlements of proprietary legal right to be bestowed upon authors. The development of the printing press created a new industry, the printing and selling of books and alongside it enabled the public to challenge the political and religious authority of the British Monarch through writing books. Crown became interested in using censorship to suppress challenges to its authority. In 1557, Queen Mary enlisted the economic interests of printers and booksellers in the pursuit of her political goals. By Letters Patent, the Queen granted exclusive rights of printing to the members of the Stationers' Company and in return the Stationers' Company acted as the enforcers of the Crown's censorship to seize and destroy unauthorized presses and books.

After 1640, the political atmosphere dramatically changed in Britain and the Stationers' Company struggled to protect their power over the licensing and printing of books. However, the Stationers managed to maintain their position as the government's official printing press by petitioning licensing acts. Nevertheless, in 1694, the House of Commons refused to renew the Licensing Act of 1662 and that resulted in lapse of censorship.

The Statute of Anne[2] secured for authors the exclusive right to print their works. Among other things, the Statute granted authors copyright terms of up to twenty-eight years for newly published works. In the hindsight, the Statute actually protected the interests of the booksellers by extending the exclusive rights to the assigns of authors as well although the Parliament enacted the Statute as a response to the booksellers'

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[2] Statute of Anne, 1710, 8 Ann., c. 19 (Eng.)

undesirable monopoly in the book selling business. The Parliament explicitly adopted the public interest as a touchstone for the Statute, entitling it "An Act for the Encouragement of Learning." The statute had the utilitarian principle at its core and it contained provisions for controlling the price paid for books that was the economic focus of the Statute.

In **Millar v. Taylor**[3], Millar was the publisher of James Thomson's poem "The Seasons" and enjoyed the protection of the Statute of Anne for a full term. After protection term expired, the defendant Taylor began publishing the poem himself but Miller filled a lawsuit claiming natural rights, which flowed from the author's labor. Taylor argued that since copyright was an intangible intellectual right, not capable of possession and therefore could not be recognized under principles of natural law and the exclusive rights owned by Millar existed only to the extent provided by the Statute of Anne. The court decided three to one in favor of Millar. The majority recognized the author's labor of creation and the plaintiff's ownership of copyright under the law of occupancy. Even they believed that the problems of possession could be overcome. It established a natural law theory of copyright alongside the economic approach taken by the Statute of Anne. Copyright now existed not only because of economic necessity, but also due to the natural justice inherent in vindicating the author's labor through the natural law of possession.

In **Donaldson v. Beckett**[4] Five years later, the House of Lords overruled Millar in this case and it eliminated natural law from copyright theory. Donaldson's reversal therefore corrected the Millar court's error and left copyright standing solely as a matter of economically inspired statutory law. Indeed, Donaldson has been construed as conclusive proof that natural law has no place in copyright jurisprudence but later

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[3] 98 Eng. Rep. 201 (K.B. 1769)

[4] 1 Eng. Rep. 837 (H.L. 1774)

events show that Donaldson did not conclusively eliminate natural law from Anglo-American copyright thinking. Even if the House of Lords specifically intended to destroy natural law as a basis for copyright, the Donaldson decision did not convince England's rebellious offspring, the Americans. Instead of reading Donaldson as the end of natural law in copyright, early American thinkers justified copyright under both natural law and economic principles.

In **Wheaton v. Peters**[5]**, The** study of natural law's influence in modern copyright starts. In Wheaton, the United States Supreme Court confronted a dispute between its official reporter, Richard Peters, and his predecessor, Henry Wheaton. The dispute centered around Peters' publishing a series of "Condensed Reports" which contained a number of decisions previously reported by Wheaton. Wheaton claimed that Peters' condensed reports violated Wheaton's statutory and common law copyright. Court Rejected such claim. The Court first distinguished common law copyright from an author's natural right to property in his manuscript. The former involved a perpetual right to control future publication of a work, while the latter consisted of a mere right to control his work until its first publication. According to the Court, the common law could only recognize Wheaton's right of first publication because the broader claim might lead to an overly expansive author's monopoly. In Wheaton Court did acknowledge one exception to this framework that under common law, authors continued to retain rights in unpublished manuscripts because unpublished works remained outside of the purview of the Copyright Act.

A superficial look at modern cases would seem to indicate that copyright has evolved under this reading of Wheaton. Many legislative and judicial statements display a clear

[5] 33 U.S. 591 (1834)

economic orientation towards copyright. Even though economics became the ostensibly sole basis of copyright, modern copyright somehow evolved along lines similar to those suggested by the natural law. This can be seen most clearly by outlining the basic copyright doctrines of originality and the idea/expression dichotomy and then comparing them to the natural law of property through labor and possession. As we shall see, modern American copyright appears to vindicate an author's right to property in the fruits of her labor, but subject to the limits of what can be feasibly possessed.

The Creation of American Copyright:

In the eighteenth century, the Framers of the U.S. Constitution included a similar provision in the Copyright Clause of the U.S. Constitution, giving Congress the 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."[6] The purposes of both the Statute of Anne and the Copyright Clause are similar: the creation and dissemination of knowledge. The Copyright Clause seeks to achieve this goal by granting a limited monopoly to individual authors such that an incentive exists for the authors to realize their full creative potential, without denying the public the benefit of these creative activities.

Reflecting a utilitarian, rather than a natural-law, impulse, the language of the Copyright Clause was borrowed directly from the Statute of Anne. Beyond this expressly utilitarian rationale, the Clause advances no notion of the inviolability of intellectual property rights and explicitly limits copyright and patent protection to a finite duration. Thus, the Copyright Clause carefully eschews any embrace of a natural-law or labor theory of intellectual property.

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[6] See U.S. Const. art. 1, § 8, cl. 8

The federal copyright scheme Congress adopted only conferred protection upon publication, or when a work was first made available to the public. The instrumental quid pro quo was, therefore, explicit: in return for publishing work and disseminating it to the public, a writer would receive a limited monopoly for exclusive exploitation of the publication. Additionally, by making the benefits of copyright protection available only to American citizens and residents, Congress eschewed a natural-law vision of copyright as an inherent property right.

In **Sony Corp. v. Universal City Studios, Inc**.[7] the Court succinctly summarizing the purpose and underlying policy rationales of the Copyright Clause by discussing the Copyright Clause, early cases, and the legislative history of early copyright statutes in the United States. According to the Court, the monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.

Furthermore, the Court in Sony highlighted the need to strike a balance between granting exclusive rights to authors and encouraging public dissemination of creative works-goals that are at once complementary and contradictory and discussing a number of cases that articulate the purpose of copyright law. The limited scope of the copyright holder's statutory monopoly reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of works. The immediate effect of the 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

[7] 464 U.S. 417, 428-34 (1984)

general public good. The sole interest of the United States and the primary object in conferring the monopoly, Court has said in **Twentieth Century Music Corp. v. Aiken**[8] benefit lie in the general benefits derived by the public from the labors of authors. Blackmun, J. dissenting in Sony, 464 U.S. at 479 observed that the fair use doctrine must strike a balance between the dual risks created by the copyright system: on the one hand, that depriving authors of their monopoly will reduce their incentive to create, and, on the other, that granting authors a complete monopoly will reduce the creative ability of others. Even within the durational limitations required by the Constitution, the scope of copyright protection has never been absolute. Courts have invoked numerous prudential doctrines that limit the rights of a copyright holder.

Origin of Fair use:

Fair use doctrine has been hailed as a powerful check on the limited monopoly that a copyright grants. Fair use, we are told, protects public access to the building blocks of creation and advances research and criticism. Far from protecting the public domain, the fair use doctrine has played a central role in the triumph of a natural law vision of copyright that privileges the inherent property interests of authors in the fruits of their labor over the utilitarian goal of progress in the arts. Thus, the fair use doctrine has actually enabled the expansion of the copyright monopoly well beyond its original bounds and has undermined the goals of the copyright system as envisioned by the Framers of the Constitution. The fair use test betrayed this understanding by embracing a natural-law, rather than utilitarian, vision of copyright. This vision fetishized the sole dominion of authors over their creative works beyond all other concerns, including an alleged infringing use's potential contribution to progress in the arts.

[8] 422 U.S. 151, 156 (1975)

The doctrine of fair use limits the scope of the copyright monopoly in furtherance of its utilitarian objective. Pierre N. Leval Judge, United States District Court for the Southern District of New York in his famous article "Toward A Fair Use Standard" argued that "Fair use should not be considered a bizarre, occasionally tolerated departure from the grand conception of the copyright monopoly. To the contrary, it is a necessary part of the overall design. Although no simple definition of fair use can be fashioned, and inevitably disagreement will arise over individual applications, recognition of the function of fair use as integral to copyright's objectives leads to a coherent and useful set of principles. Briefly stated, the use must be of a character that serves the copyright objective of stimulating productive thought and public instruction without excessively diminishing the incentives for creativity. One must assess each of the issues that arise in considering a fair use defense in the light of the governing purpose of copyright law."[9]

English courts recognized the fair use doctrine, which is considered as the most significant limitation on a copyright owner's exclusive rights during the copyright's term. Under the Statute of Anne, English courts held that some secondary uses of copyrighted works could be considered "fair abridgements.[10]

In **Folsom v. Marsh**[11] decision marks the origin of the fair use test. Although the decision did not elaborated about the term "fair use," but is celebrated by many observers as a triumphant victory for the public domain. Facts of the case can be summarized as follow: plaintiff' had 12-volume compilation of Washington's writings containing rare letters and other material written by George Washington and the defendants had taken material from it to create a biography of Washington in his own words. In reaching his decision in favor of the plaintiffs and upholding the lower court's

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[9] Pierre N. Leval, *Toward A Fair Use Standard* 103 Harv. L. Rev. 1105 (1990)

[10] William F. Patry, Copyright Law and Practice 6-17 (1994).

[11] 9 F. Cas. 342, 345 (C.C.D. Mass. 1841) (No. 4901)

injunction barring publication of the work, Justice Story surveyed the case law and deduced the following mode of analysis: "look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work."[12] Judges used these criteria to decide fair use cases until Congress codified many elements of Justice Story's test into § 107 of the Copyright Act in 1976.

Fair use and Natural copyright:

U.S. copyright law has treated private, personal-use copying as a de facto non infringing use since at least the 1970s, tolerating and facilitating the introduction of an impressive array of private copying technologies. The first and most prominent of the goals is social utility. While exclusive copyright provides authors with an economic incentive to create new works, the fair use privilege permits reasonable copying of those works in the interests of generating still more new works. In this respect, Anglo-American copyright jurisprudence envisions a kind of creative ecosystem in which rights, privileges, and incentives coexist and works beget works. The doctrine of fair use has a twofold function in our society.

Many observers celebrate Falcom decision as a triumphant victory for the public domain. Quite to the contrary, Folsom represents a fundamental betrayal of 200 years of copyright law and a re-embrace of the monopolistic, natural-rights based vision of copyright rejected by the Constitution, the Framers, and the jurisprudence of the time. For this reason, at least one scholar has hailed Folsom as the worst intellectual property decision ever. Unfortunately, it is also the most cited case in copyright law and the foundation of modern copyright jurisprudence.

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[12] Ibid

As L. Ray Patterson[13] notes, two prevalent myths surround the Folsom decision. First, commentators claim that Folsom created fair use. Instead, it merely redefined what constituted infringement. Secondly, Folsom is viewed as having diminished the rights of copyright holders. Rather, Patterson argues that "the case enlarged those rights beyond what arguably Congress could do in light of the limitations on its copyright power and, indeed, fair use today continues to be an engine for expanding the copyright monopoly." Far from creating fair use and carving a hole into the copyright monopoly, Justice Story's decision in Folsom transformed copyright law and expanded its monopoly. As Patterson argues, Story accomplished this coup by categorizing copyright as a subset of property law grounded in natural rights instead of a subset of public domain law characterized by a limited statutory monopoly.

Story's bent is clear from the outset of the opinion, when he immediately emphasized that the work has been accomplished at great expense and labor, and after great intellectual efforts, and the very patient and comprehensive researches, both at home and abroad and thus, the court clearly emphasized the plaintiff's property right stemming from the creation of the work rather than the value of the defendant's use to society. However, the admitted value of the defendant's work had little bearing on his analysis or decision. Rather, Story likened the act of borrowing to an act of stealing which is a clear violation of property rights. Story's property-based analysis became more pronounced further along in the decision. Adopting strong natural-rights language, Story maintained that "the entirety of the copyright is the property of the author; and it is no defense, that another person has appropriated a part, and not the whole, of any property." With these words, Story explicitly expanded copyright protection to prevent filching of parts of a work, rather than the slavish duplication of an entire work.

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[13] L. Ray Patterson *"What's wrong with Eldred? An essay on copyright jurisprudence"* 10 J. Intell. Prop. L. 345 (2003)

In numerous respects, Story's opinion represents a striking reversal of prior copyright jurisprudence. In other words, the burden of persuasion lay with the copyright holder to demonstrate that the work was infringing and not transformative. Under Folsom and its progeny, once the copyright holder made a prima facie showing that the alleged infringer borrowed the protected work, the burden then shifted to the alleged infringer to demonstrate that his use was excusable. Folsom v. Marsh marked a basic reversal in copyright jurisprudence through its reinterpretation of the infringement test. In fact, instead of limiting the scope of the copyright monopoly, the fair use test expanded the property rights of copyright holders, thereby frustrating copyright's utilitarian goals.

The fair use doctrine has played a central role in the move towards a natural-law based protection of copyright. As the preceding analysis of Folsom revealed, fair use is a resoundingly natural-rights based doctrine that subverts the utilitarian logic of copyright protection under the United States Constitution. Ray Patterson notes: "If copyright is a statutory monopoly, fair use should be viewed as a limitation on the monopoly in the public interest, which means that it is an affirmative right, not excused infringement. The paradox is that while U.S. copyright is a statutory monopoly copyright, fair use is treated as a natural law right to protect that monopoly. As an examination of relevant jurisprudence reveals, a multitude of transformative uses that advance progress in the arts cannot survive the modern fair use test"[14].

[14] Ibid

Section 107 of the 1976 Copyright Act[15] :

The legislative history of the Act makes clear that Congress merely intended to codify the common law doctrine of fair use that courts already employed. The Supreme Court has interpreted the fair use provision of the 1976 Copyright Act several times since its enactment. In the Court's first look at the fair use doctrine following the passage of the 1976 Act, however, it quickly departed from the common law understanding of fair use. In **Sony Corp. of America v. Universal City Studies, Inc.**[16] the Court wrote that "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of copyright." The Sony Court cited no authority for this statement, and its approach lasted only another decade, until **Campbell v. Acuff-Rose Music, Inc.**[17] In fact, the Sony Court acknowledged, in other parts of its decision, that the common law fair use doctrine explicitly rejected any "rigid, bright-line approach to fair use." The Court's announcement of a commercial

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[15] 17 U.S.C. § 107- Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (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) The 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.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

[16] 464 U.S. 417, 428-34 (1984)

[17] 510 U.S. 569, 584 (1994)

presumption is even more curious because it cited the Conference Report from the 1976 Act, which pointed out that the commercial character of the work is "not conclusive," but rather one factor to be "weighed along with other[s] in fair use decisions."

In its 1994 decision **Campbell v. Acuff-Rose Music**[18], the Supreme Court clarified how courts should examine section 107 fair use defenses. More specifically, Campbell examined whether the band 2 Live Crew's rap parody of Roy Orbison's Oh, Pretty Woman was a fair use. In its decision, which will be spelled out in greater detail throughout this article, the Court reviewed the history of fair use, and discussed extensively both Sony and Harper & Row. Despite the Campbell Court's intent to clarify how courts should examine a claim of fair use, lower courts continue to struggle with questions of fair use. Especially troublesome is the fact that, more than a decade after Campbell, some courts persist in applying the commercial presumption from Sony and in giving the fourth factor more weight than the others , despite Campbell's rejection of both of these practices.

The dominant role of fair use in the protection of authors' natural rights is best illustrated by the Supreme Court's declaration in recent years that the fourth factor of the fair use test, "the effect of the use upon the potential market for or value of the copyrighted work," is the most important. Despite the judicial authority cited for this proposition, Congress' explicit guidance, in 1976 that the fair use factors be balanced makes this assertion somewhat curious. Presumably, if Congress had intended to make one factor in the fair use test more important than any other, it would have said so. Nevertheless, the Court has deemed that the economic harm caused by a potentially infringing use of a copyrighted work is paramount in ascertaining whether use of a copyrighted work is fair. However, such a reading of fair use, especially under the

[18] 510 U.S. 569, 584 (1994)

expansive notions of market harm espoused by modern courts, is anathema to the utilitarian origins of copyright.

Suggestions:

In the Article, "The public's right to fair use: amending section 107 to avoid the "fared use" fallacy", Wendy J. Gordon, Daniel Bahls of Boston University School of Law suggest that the fair use provision, section 107, be amended to read as follows:

§ 107. The right of fair use Notwithstanding other provisions of this title, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means [words omitted here], for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is a right and 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) The 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.

The fact that a work is unpublished or that a license is available for the contested use shall not itself bar a finding of fair use if such finding is made upon consideration of all

relevant factors. The primary suggestion appears in the last sentence of the proposed section 107. Author suggests that Congress should make emphatically clear that the availability of licensing does not foreclose the possibility of fair use.

Situation in India:

India has a much broader fair dealing exception in section 52(1) of its copyright code. Section 52(1) (a) exempts "a fair dealing with a literary, dramatic, musical or artistic work for the purposes of (i) research or private study; (ii) criticism or review, whether of that work or of any other work." Section 52(1) (b) extends this exemption to news reporting of current events. Unlike section 107 of the United States Copyright Act of 1976, section 52 of the Indian act does not include factors for courts to consider when determining whether the use was "fair dealing." The similarity between the American and Indian doctrines may be the result of the countries' common colonial ancestor: the United Kingdom.

Conclusion

All told, this examination of fair use in a historical context reveals that, far from championing the right of the public to access creative works, the fair use doctrine has played a key role in the expansion of the copyright monopoly. As a consequence, a need for rethinking the modern test for infringement and for re-evaluating the viability of the fair use defense. Quite simply, the fair use doctrine has transformed federal copyright from a utilitarian system of compensation to a system of monopoly. Copyright has turned into an unqualified private right. This change raises questions not only about copyright's past I.e. Q. how did we get to this point?, but also about copyright's future Q.where do we go from here?