

SECURING THE FUTURE OF COPYRIGHT:

A HUMANIST ENDEAVOR

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## SECURING THE FUTURE OF COPYRIGHT: A HUMANIST ENDEAVOR

This afternoon the convention turns its attention to salient contemporary issues in copyright. My purpose is to present an introduction to these discussions with some general observations about the future of copyright. That future is unsettling. Thoughtful scholars have said so before me. 1/

In 1982, the World Intellectual Property Organization commissioned me to prepare the first in a series of studies under the general title "Reflections on the Future Development of Copyright." 2/ In this paper today I hope to restate some of my reflections there and add some other observations.

This audience needs no primer from me to understand that the principal source of strain on copyright is the succession of marvelous new machines for using and enjoying protected works, appearing at a wrenching pace. You know first-hand the problems of reprography, of the control of inputting protected works into electronic information systems, of the rapidly oncoming electronic libraries, and of piracy which in many parts of the world is rampant.

As we approach the 21st century, a vast new array of technological innovations continues to test our understanding of authorship and our will to vindicate its values. Authors' and publishers' rights become difficult to

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1/ Dr. Mihaly Ficsor of Hungary, for example, in his perceptive paper "Disquieting Report from the Maginot Line of Authors," 1982 COPYRIGHT 104; and Stephen Stewart's admirable "International Copyright in the 1980's," the 18th Geiringer Memorial Lecture at New York University in 1980, 28 BULL. COPYRIGHT SOC'Y 351 (1981).

2/ That monograph was published in the October 1983 issue of COPYRIGHT under the title "To Cope with the World Upheaval in Copyright." 1983 COPYRIGHT 289.

enforce as we move away from the print culture and confront a surge of space-age apparatus that enables the broad-based dissemination and simultaneous reception by huge audiences of almost unimaginable quantities of creative works.

In the copyright world there is a prevailing mood of dread that brilliant technologies will overwhelm authorship. There is danger. But the greater danger is that of despairing, and accepting that result as inevitable.

As one surveys the various new technologies, including photocopying, cable television, satellite transmissions, computers, and videotaping, certain common characteristics emerge:

1. A trend toward the increased importance of display and performance for the dissemination of "traditional" works.
2. Widespread consumer ownership of instruments for display and performance.
3. The appearance, along with new technologies, of doubt or ambiguity about the very applicability of copyright control; and, until the doubt is resolved, the unchecked spread of unauthorized uses which are then difficult to bring within legal control (for example, cable and videorecording).

and

4. The practical unenforceability of traditional copyright rights by traditional means against uses which are increasingly private, not readily detectable, and yet enormous in scale.

Copyright in the past -- at least in those countries with highly developed jurisprudence in intellectual property -- adapted and adapted rather well to technological change. Take the experience in the United States. On the electronic side, there were roughly seventy-five years between Samuel Morse's first telegraph message in 1844 and the beginning of commercial radio

broadcasting; thirty years after that, commercial television appeared; fifteen more years until cable television (as something more than a community antenna) was successfully introduced; and now such developments as two-way cable, videotext, and direct broadcast satellites are virtually taken for granted.

Photographs, motion pictures, computer programs, and sound recordings were, of course, inconceivable to the writers of our Constitution in the 18th century, who made specific provision for copyright, or to the first Congress, which in 1790 enacted our first copyright law. Yet they are clearly within the embrace of our law now. With only one exception they were all brought within the law's scope contemporaneously with their first commercial vitality: photographs were added to the statutory list of copyrightable subject matter in 1865, motion pictures in 1912, and computer programs arguably in 1964, probably in 1976, and incontrovertibly in 1980. Only sound recordings waited long, until 1971, before they, too, were protected by the copyright statute.

From those examples alone one sees that technological innovation is not new. But its pace is now unprecedentedly fast, and accelerating. Videotapes, semiconductor chips, data bases, direct broadcast satellites, compact disks, home computers, and other marvels rush upon us.

I will not attempt today to discuss the multitude of problems in accommodating copyright to these new technologies. But there is an important project underway in the Library of Congress which I would like to focus upon, because it embodies so much of the hopeful opportunities and anxious dangers which we sense are rapidly enveloping us.

As you may know, the Copyright Office in 1983 issued a comprehensive report 3/ evaluating that portion of our copyright law which specifically deals with library and archival reproduction and distribution of works. Of course, the central concern of that report was the central problem in 1975: library photocopying. And, while photocopying is still a vigorously, and often bitterly, debated issue, a major portion of our report was given over to the newer technologies, including computerization of library services, electronic publishing, new machine-readable formats for publications, and the like.

We tried to keep in mind the Librarian of Congress' constant reminder that new technologies are not necessarily, not even generally, "displacive." Electronic libraries will not eclipse reprography: at some point a user will print-out a hard copy which, earlier, he or she would have photocopied. But as we prepared the report, we realized as well that analogizing the highly automated, telecommunications-linked libraries of the future (serving a population where home computing and personal reprography will be normal) to the age of the coin-operated photocopier, was fruitless.

Roughly contemporaneously with our photocopying report, the Library of Congress embarked upon an experiment to study and apply optical disk technology to the preservation and organization of collections and to reference services to such collections. This is, as I see it, a paradigm of

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3/ REPORT OF THE REGISTER OF COPYRIGHTS -- LIBRARY REPRODUCTION OF COPYRIGHTED WORKS UNDER 17 U.S.C. 108 (1983).

contemporary legal and political problems in copyright and a testing ground for determining whether we can effectively prepare for the future on some basis other than sacrifice of authors' rights.

The system will include various kinds of works, including print materials, photographs, and cinematic works, stored on optical disk, cataloged, randomly accessible, and incredibly compacted. Display and print-out may be had on site or at remote stations. The disks themselves can be cheaply replicated.

The implications are obvious and staggering. Large parts of the Library's holdings, technologically speaking, can be immediately available by telecommunications links throughout our country and throughout the world, and indeed the "data base" -- that is, much of the Library's vast holdings -- able to be transferred in duplicate optical disks to London, La Paz, Jakarta, or Irkutsk.

Is not the imminence of such a system, whether at the Library of Congress or elsewhere, cause for both optimism and dread? Optimism, because it promises untold efficiencies in providing library services -- by which we mean mostly works of authorship -- in remote corners of the globe, with obvious benefits to impoverished and developing countries. Dread, because if copyright is not provided for -- creatively, thoughtfully, and effectively -- copyright can be devastated. And I suggest that two things will be necessary to contain this revolution: Domestic laws which anticipate this new electronic miracle and an international order with minimal common standards of protection or an international treaty providing them.

Because of technological innovation and its tempo, it is illusory to believe that we can deal with these new technologies, piecemeal and one-by-one. Rather, copyright laws must, if they are to cope, be crafted with declarations of rights broad enough to encompass new technologies of use as they appear, with any limitations specifically enumerated and defined. That indeed was the approach of the comprehensive recodification of our law in the Copyright Act of 1976.

In the revision process which culminated in that Act, my predecessor Abraham Kaminstein counseled against "confining the scope of an author's right on the basis of present technology so that, as the years go by, [the] copyright loses much of its value because of unforeseen technical advances." 4/

Our 1976 Act sought to do so. The act itself provides a framework of broad exclusive rights limited only by express limitations and the fair use doctrine. If copyright laws are to master, or even survive the onslaught of new technologies, they must be framed in broad terms to relate the various rights of which copyright is composed --reproduction, distribution, display, and performance -- so as to comprehend later unanticipated uses and to make this purpose an explicit objective of such laws. Needless to say, such a strategy will work only if it is not undermined by expansive notions of fair use or by private use exemptions.

But what I have said goes to how copyright can adapt and survive. What of the will to have it do so?

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4/ 1965 SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS, at 14.

Ready, cheap, and often free access is a demand increasingly appearing in copyright policy debates and lawsuits. And support for this demand frequently arises both from commercial interests who deem those interests to be affected by payment for use of protected works and also by public or public-supported constituencies understandably concerned with maximum utilization of works of authorship.

Mr. Stewart, in his 1980 Geiringer Lecture, identified a major contemporary challenge to copyright, and explained it so aptly that I quote from his lecture at length:

The next challenge is one which goes to the very root of copyright. It is a doctrine which is not new but which assumed much greater importance in the 1960s and 1970s and will, I fear, gather strength in the 1980s as the economic recession develops. It is known as "consumer politics." Applied to copyright, the doctrine means that the consumer should have the widest possible access to all copyright material at the lowest possible cost and, in many cases, free. Almost everybody in our modern society is a consumer of copyrights in several respects: as a reader of books, newspapers, or other printed copyright material, as a listener to music, as a viewer of television or as a parent of a child at school who should have his school books cheap or free, to name only the most common uses. Thus, put in electoral terms, on most copyright issues the



overwhelming majority of voters are on one side and a comparatively very small number of voters, who are copyright owners, are on the other side of the argument. Furthermore, only a tiny fraction of this small number of copyright owners become millionaires, but it is those few who are constantly in the public eye. No politician, even if he is the opposite of a popularist, could totally ignore this when taking a position on a copyright issue. The counter-argument, as you all know, is that without copyright, the liberty of the subject, including the liberty of speech and the freedom of expression in literature and the arts, would be in danger and ultimately some of the values of western civilization would be at risk. But this counter-argument is not as obvious as the popularist argument of cheap access to copyright works by the general public. Therefore, the copyright argument needs to be put again and again in differing forms and in all countries. Once this is acknowledged, the task of constantly arguing for the maintenance and development of copyright, which may at times appear repetitive, or even tedious, becomes a necessary, even a noble pursuit, humanist in the best sense of the word. 5/

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5/ 28 BULL. COPYRIGHT SOC'Y 351, 369-70 (1981).

How, then, to embark upon this "noble" and "humanist" pursuit?

First, we must never abandon the idea of the author's right. For countries standing in the European tradition, and for those countries which are members of the Berne Convention, its defense will be easier: In those countries, the philosophical basis of copyright is rooted in the idea that an author's work is the extension of his personality; the foundation idea of the author's right as a natural right dominates the jurisprudence; and the Berne Convention, reflecting its European origins, has higher minimal standards from which all debate on copyright issues departs.

Technological change has made copyright issues ever more international in nature. For the past century, authors, governments, and international organizations have struggled with international copyright issues. Many of these, however, were refinements of local issues, such as "How shall the state of A treat the works of a national of the state of B?" Now, however, issues involving international traffic in copyrighted materials inhere directly in technological progress. And in trans-border information flow, and specifically in internationally-operating electronic libraries, those problems will be particularly acute.

But whether in national regimes or international commerce, the case for copyright must be continually made.

Although the principal argument for copyright has always been one of justice, there is another argument no less vital: Copyright is an instrument of freedom. Copyright is intended to support a system, a macrocosm, in which authors and publishers compete for the attention of the public -- independent

of the political will of the majority, the powerful, and above all the government -- no matter how startling, disturbing, or controversial their experience, views, or visions.

Copyright sustains both authors and publishers. More relevantly, copyright supports a system, a milieu, a cultural marketplace which is important in and of itself. If the system's variety is injured, then so too is freedom.

But those grounds -- justice and vitality in fostering diversity and freedom -- are not where the current debate on copyright has moved. The main attack on copyright -- what Stewart characterizes as "consumer politics" -- is that copyright is in opposition to the free flow of information and the public's right to know and use. And here the challenge is greatest, and those who prize copyright and all its benefits must elaborate the arguments and collect the evidence to persuade that

1. <sup>in a variety of</sup> With and because of copyright, works of authorship are available in an abundance and variety never known before and at declining costs.
2. Copyright policy should aim at plenty for consumers, in which plenty there is an opportunity for the excellent to emerge.
3. Curtailment of copyright not only deprives authors of payment, but appropriates the values which the entrepreneur adds in making the author's work available.
4. Limitations on copyright do not necessarily lower costs to the public; they frequently transfer value from copyright owners into the pockets of other commercial interests.
5. Vast benefits in employment and revenues flow from the exploitation of copyrighted works, aside from royalties to authors and profits to publishers.

6. Where profits are momentarily large, they are balanced both by losses from failures and by entry of new authors and entrepreneurs in search of those profits.

and

7. To constrain revenues to copyright will have a debilitating effect, not always immediately visible, but appearing sometimes only over the long run.

Whatever one may think of the comparative merits of economic planning and free markets, or of government as an instrument of wealth redistribution, government should abstain as much as possible from intervention in the copyright world, and willingly forbear from setting or affecting the value or price of works of authorship. Better to trust the consumers' choices in what they will pay to read, see, and hear. Thus, authors and authors' publishers will succeed or fail as the public decides, diversity and freedom will be served, and authors' works will continue to flow to the public in quantity and ever declining costs.

What is needed is a <sup>careful</sup> searching reexamination of how <sup>intense</sup> strong copyright systems <sup>serve</sup> serve the most important needs of all people. That is its purpose. That is its historical and present <sup>achievement</sup> achievement. The results should be a revitalized appreciation of copyright and furthering what Mr. Stewart has called the "noble" and "humanist" endeavor of leading the public to that understanding and appreciation, too.