

ALINA NG

LITERARY PROPERTY

MARCH 1, 2011

Abstract

This Article explores the idea that authors have literary property in their creative works that are separate and distinct from statutory copyright. Three pieces of historical evidence indicate that literary property protected an author's creative rights. First, early publication contracts between Houghton Mifflin & Co. and authors such as John Milton, Oliver Wendell Holmes, Ralph Waldo Emerson, and Nathaniel Hawthorne reveal that authors retained rights over their work after exclusive rights to print were assigned to the publisher. Secondly, the cases that present day scholars and jurists take to have settled the question of literary property - *Donaldson v. Beckett* and *Wheaton v. Peters* - did not in reality adjudicate on the specific question of whether authors had a personal right in their creation but instead dealt with the tangential issues of market monopoly by booksellers and state/federal government control respectively. Finally, New World struggle for cultural independence from European influences coupled with the absence of a publishing industry in the United States when the copyright clause in the Constitution was ratified suggest that literary property protecting the author's creative interests were a priority when rights in literary works were recognized. The question of literary property has immense significance in how scholars, jurists, and policy makers understand and shape copyright laws. When literary property is acknowledged to be separate from statutory

copyright, it will become clear that the entitlements under §106 of the Copyright Act do not entail possessory rights to control social uses of creative works. The role of the author in the copyright system as the primary contributor of literary and artistic resources for social and cultural development will also be more clearly defined with the recognition of literary property, which in turn should encourage authentic expressions that have a positive influence on progress. Recognizing literary property also clarifies society's expectations with respect the use and production of creative works by delimiting an author's rights to protect his creative personality and integrity and the publisher's right to receive payment for the use of the work.

Thesis: *literary property is separate from copyright and recognizing this difference has important consequences for the copyright system*

Table of Contents

| | Page |
|--|------|
| INTRODUCTION | |
| LITERARY PROPERTY AS A LEGAL CONCEPT | |
| DISTINGUISHING LITERARY PROPERTY FROM COPYRIGHT | |
| EFFECT ON THE COPYRIGHT SYSTEM | |
| HOW SHOULD CONGRESS, THE COURTS, AND SOCIETY THINK ABOUT LITERARY PROPERTY? CONGRESS THE COURTS SOCIETY | |
| LITERARY PROPERTY AS A SEPARATE RIGHT IN THE COPYRIGHT SYSTEM | |
| CONCLUSION | |

LITERARY PROPERTY

ALINA NG

MARCH 1, 2011

“copyright, in short, was to become a concept to embrace all the rights to be had in connection with published works, either by author or publisher. As such it was to prevent the recognition of the different interests of the two and thus preclude the development of a satisfactory law to protect the interests of the author as author.”

- Lyman Ray Patterson, Copyright in Historical Perspective p. 151

I. INTRODUCTION

If the copyright system were to be conceptualized to comprise three distinct parties with separate interests in literary and artistic works - authors, publishers, and readers (as a proxy for society as a whole) - it may be observed that authors and publishers of literary and artistic works fulfill very different roles in the copyright system. Essentially, authors create works for their readers that can be used for the purposes of advancing the sciences and the arts while publishers provide a channel that conveys an author's expression as embodied in a work of literature or art to his or her reader. While some authors may create to make profits from the market, many others do not and may create for non-economic reasons, such as to build one's reputation, make contributions to learning and education, or for the sheer pleasure of communicating ideas and

telling stories. Publishers, on the other hand, are traditionally profit-motivated and invest in the publication and dissemination of creative works for the purposes of recovering financial gains from the market. It is surprising, given the distinct interests of both author and publisher, that modern copyright law treat the interests and expectations of both in the same way.¹ But as the law that applies to the production and use of literary and artistic works is statutory-based and augmented by a prolific body of case-law interpreting and applying its specific provisions, jurists and scholars of copyright law have given very little attention to the separate roles authors and publishers play in society, the different expectations that they have, and how these different roles and expectations affect copyright's institutional goal to promote progress of science. Courts have conventionally been deferential to congressional powers where intellectual property laws are concerned and often yield to policy decisions agreed in the legislative process² and as a result, have never attempted to separate the rights and expectations of the author from those of the publisher.

This article proposes that such a separation of rights and a development of specific laws to protect the author's expectations and interests over that which he or she creates is necessary if the copyright system is to fulfill its institutional goal of promoting progress of science for society's benefit. The author plays a specific role in the copyright system that cannot be fulfilled

¹ §106 of the Copyright Act 1976, which provides exclusive rights in creative works, protects the "owner of copyright" and does not distinguish between author and publisher. 17 U.S.C.A. (2001)

² The Supreme Court in *Graham v. John Deere Co. of Kansas City*, for example, stated that "Congress may ... implement the stated purpose of the Framers by selecting the policy which in its judgment best effectuates the constitutional aim" and that it is the duty of the courts "in the administration of the patent system to give effect to the constitutional standard by appropriate application, in each case, of the statutory scheme of the Congress," 383 U.S. 1, 6 (1996). The court in *Eldred v. Ascroft* more recently affirmed their role as the implementer of congressional copyright policies when it stated that "the Copyright Clause empowers Congress to determine the intellectual property regimes that, overall, in that body's judgment, will serve the ends of the Clause [and that] [t]he wisdom of Congress' action ... is not within [the court's] province to second-guess," 537 U.S. 186, 222 (2003).

by other parties in the system, which is to contribute creative works that readers may use to develop individually or as a community through education, research, entertainment, or creative production. As many works embody their author's creative personality, it is important for the copyright system to allow authors to retain some form of property interest in the work to protect their authentic individuality as their works are disseminated and made available to society. The law has, however, been very clear that all rights over literary and artistic works emanate solely from the copyright statute and as a result, there has been very little room for the common law to develop a coherent body of rules that would protect an author's expectation and rights separately from those of the publisher. As Justice McLean in *Wheaton v. Peters* stated, any assertion of rights in creative works must be sustained under acts of congress for congress, by passing the first American copyright act in 1790, created (rather than validated) these rights.³ Following that reasoning, the development of copyright jurisprudence in the United States since then has sidelined any common-law rights that authors may have had in their work as its creator.

The author's rights, if they are to be recognized as separate from rights of publishers, has to be developed independent of the copyright statute, which is founded on an economic rationale that the best way to promote the progress of science is to encourage creativity by providing exclusive rights over uses of the work for a specific duration.⁴ To protect the non-economic interests of the author as the creator of a work, this article argues that there is a need to revisit the

³ *Wheaton v. Peters*, 33 U.S. 591, 661 (1834)

⁴ In *Mazer v. Stein*, the Supreme Court articulated this rationale clearly when it stated that "[t]he economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.' Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered." 347 U.S. 201, 219 (1954)

question of literary property and the author's natural right over that which he or she creates and explore the implications for the recognition and protection of literary property upon the copyright system if such a right is to be recognized to protect the author's creative personality. This article is structured to first discuss literary property as a legal concept, how it is different from statutory copyright, and the effects of making a distinction between literary property and statutory copyright for the legal system. Next the article explores evidence that would support the notion of literary property as an author's right that is separate from statutory copyright and how its recognition will support copyright's institutional goal of promoting progress of science. Finally, the article considers how congress, the courts, and society would deal with the concept of literary property if it was explicitly recognized by the legal system and how the concept could be introduced into the legal system. This article concludes with the suggestion that the concept of literary property should complement statutory copyright to ensure that the expectations of authors and publishers of creative works are adequately protected for the ultimate benefit of society.

LITERARY PROPERTY AS A LEGAL CONCEPT

The notion of literary property is not well defined in the literature and there is very little that has been specifically written about the idea in its context as an author's creative rights in the

work as separate from statutory copyright.⁵ One thing that is known from the historical evidence on author-publisher relations in the developing book trade in late seventeenth century England is that literary property, as the right of the author, was distinct from, and had encompassed, the publisher's copyright as an exclusive right to print the author's manuscript. The earliest known contractual agreement of a transfer of a right to print from the author to the publisher was John Milton's publication contract with Samuel Simmons for *Paradise Lost* dated April 27, 1667.⁶ In the contract, Milton agreed to accept five pounds at the commencement of the contract, five pounds at the end of the first edition (when 1300 copies had been sold off to "particular reading Customers") and five pounds each at the end of the second and third impressions (considered completed when 1300 copies were sold) in return for the manuscript of *Paradise Lost*.⁷ In any event, both Milton and Simmons agreed that these three editions would not run more than 1500 copies. Scholars on eighteenth-century English literature consider the payment of twenty pounds for the manuscript of an epic poem extremely modest by the standards of that time but evidence of an author's due for the sale of a manuscript when Simmons purchased *Paradise Lost* is too scant to conclusively determine that Milton was underpaid for the poem.⁸ While a publisher's unfair treatment of an author might indicate a superior position in the author-publisher relationship that would have allowed a publisher to control the rights to print and sell

⁵ The notions of literary property and authorship have been examined in relation to the commodification of literature and some scholars of law and literary studies have attributed the emergence of literary property and authorship to the commodification of literature with the development of the book market in the eighteenth century. See, for example, MARTHA WOODMANSEE, *THE AUTHOR, ART, AND THE MARKET: REREADING THE HISTORY OF AESTHETICS* 22-33 (Columbia University Press 1994); MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 1 (Harvard University Press 1993); and Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, 10 CARDOZO ARTS & ENT. L. J. 293 (1991-1992)

⁶ Peter Lindenbaum, *Authors and Publishers in the Late Seventeenth Century: New Evidence on their Relations*, THE LIBRARY, s6-17 (3) (1995) p. 250-269

⁷ Peter Lindenbaum, *Milton's Contract*, 10 CARDOZO ARTS & ENT. L. J. 439, 441 (1991-1992)

⁸ *Id.* at 442-443

manuscripts, this did not appear to be the case with Milton's contract and the circumstances surrounding its signing. To the contrary, Milton appeared to have the upper hand in this arrangement as the contract had contained provisions that protected Milton as an owner of specific property rights in the manuscript even after the right to print the work had been assigned to Simmons.

Perhaps the most telling sign that Milton retained some form of literary property in *Paradise Lost* after the rights to print were assigned to Simmons was that one of the clauses in Milton's contract allowed Milton to demand an accounting of sales at reasonable intervals. Should Simmons fail to provide such accounting as demanded, Simmons would be under a duty to pay the five pounds for the whole impression as if it were due then instead of after completing the sales of 1300 copies of the poem.⁹ The inclusion of such a clause into the contract indicates that both Milton and Simmons thought that the author of a manuscript possessed some form of property right in the work even after the right to print the work was assigned to a printer. As a right to demand an accounting of sales was a legal or equitable right that only a co-owner of a property interest or a beneficiary in a trust relationship owned, it seems highly likely that both Milton and Simmons considered the author of a manuscript its property owner with the printer in possession of the manuscript being in the position of a trustee for as long as they owned the more limited right to print the work. Peter Lindenbaum also points to another clause in the contract to suggest that Milton was in possession of some form of property right in the work.¹⁰ The cap on 1500 copies of works that Simmons could print ensured that the printer's profits would not

⁹ *Id.* at 443

¹⁰ *Id.*

exceed the author's due in a disproportionate manner and provides additional evidence to support the claim that the printer possessed a more limited right to print the work that stemmed from the author's more encompassing property right. Lyman Ray Patterson studying the same contract further observes that Milton had agreed that he, as the author, would refrain from interfering from the publication of the work - a clause that Patterson argues would be unnecessary if the assignment of rights in a work to a printer conveyed all legal rights that existed in the work.¹¹

Milton's publication contract for *Paradise Lost* provides a rare and invaluable glimpse into the notion of literary property as an author's right that both authors and publishers acknowledged even before authors were recognized as capable of owning copyright in their work. Until the Statute of Anne was passed in 1710, copyright, as the right to print, publish, and vend literary works, could only be owned by printers and publishers that were members of the Stationers' Company, the trade guild regulating the book publishing business. Ownership of copyright in a book was recorded in the register book of the Stationers' Company by the stationer that was licensed by the Crown to print the book¹² and authors, while on rare occasions owned copyright in their work that were entered into the company's register, were generally excluded

¹¹ LYMAN RAY PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* 74 (Vanderbilt University Press 1968). Patterson also examined two conveyances for James Thomson's poem, *The Seasons*. The first was from Thomson to Millar, a publisher, which contained the specific assignment of the right to print with the benefit of all additions, corrections, and amendments which Thomson may make to the work after the assignment of the copyright. The second conveyance from Millan, a bookseller, to Millar granted the right to lawfully claim all profits from the printing and publishing of the poems. Patterson highlights that both conveyances emphasized the transfer of different rights. The author, Thomson, transferred the copyright together with what Patterson called "the author's creative rights" - the control over the work to make additions, corrections, and amendments notwithstanding the ownership of copyright. The emphasis on profits arising from the printing and publishing of the poems in the second conveyance suggests that copyright was of a more limited nature as the author's right. *Id.* at 75.

¹² Early copyright was intertwined with Crown censorship policies as the government sought to control the publication and distribution of what were considered heretical and seditious materials. The Stationers' Company was the perfect body, and copyright the perfect instrument, to implement these policies through an intricate system of licensing laws. *Id.* at 114-142

from owning the right to print and publish their work. However, Milton's publication contract suggests that authors had a more complex relationship with their publishers than is commonly assumed even before their standing as a legitimate copyright holder was recognized by the Statute of Anne. It is deducible from Milton's contract that the author possessed creative and proprietary rights in the work as its creator, rights which provided the author with ownership and control over the work even after the manuscript was sold to the printer, and which were separate and distinct from the publisher's copyright as a more limited right to print and recover profits from sales of the work.

Milton's publication contract for *Paradise Lost* is not the only historical evidence that is available to suggest that authors had a more encompassing right in the work than copyright. Publication contracts of early American authors after the passing of the first copyright statute of 1790 also allude to an author's proprietary and creative control over the work that the author would retain after sale of the manuscript and assignment of copyright to the publisher. The publication contract between Ralph Waldo Emerson and Houghton, Mifflin and Company, dated March 4, 1868, for the publication of *May-Day and Other Pieces*¹³, for example, contained a clause that granted Houghton, Mifflin and Company "the sole right to publish" the work for the duration of the agreement that appears to be carved out of Emerson's larger proprietary interest. For the consideration of four hundred dollars for the publication of the first two thousand copies of the work and twenty-five cents for additional copies of the work made after the first two thousand copies, Emerson agreed to deposit the stereotype plates for his work with the printers

¹³ Copy on file with author; original contract available at Houghton Library Special Collections, Harvard College Library

and provide written order for the printing of any additional editions of the work that Houghton, Mifflin and Company considered expedient. Emerson had the option of terminating the contract at any time he chose, upon which he was required to purchase all remaining stock of the work in Houghton, Mifflin and Company's possession at their cost. It is notable that even with the Supreme Court's 1834 holding that the author did not have a property right in his manuscript by common law that was separate from the statutory right to print and publish¹⁴, Emerson's contract protected the author's right to control the contents of his manuscript from any form of alteration or modification by requiring the author to provide the stereotype plates of the work to the printer and offer written order to authorize the publication of new additions of the work. The termination clause of the contract further affirms, albeit implicitly, the author's proprietary right in his creative expression by protecting a claim to restitution that only belongs, by law, to a property owner. It would make more business sense for Houghton, Mifflin and Company to seek contractual damages for reliance loss or require Emerson to purchase the remaining stock at market price for breach of contract. However, this was not the agreement between author and publisher in this case and by providing Emerson with the option to terminate the contract at any time he chose with the only penalty the purchase of remaining stock at cost price, Houghton, Mifflin and Company appears to have recognized Emerson's property right in the work itself - a larger proprietary right in the work that encompassed a limited statutory right to print that was assigned in the publication contract between the company and Emerson.¹⁵

¹⁴ Wheaton v. Peters, 33 U.S. 591 (1834)

¹⁵ The publication contracts for Harriet Beecher Stowe, Nathaniel Hawthorne, Henry Thoreau, and Oliver Wendell Holmes show the same implicit recognition of an author's property rights in his work by the publisher (copies on file with author)

As a legal concept, the term literary property often connotes an individual right that grants its owner exclusive ownership over the work. It may be gleaned from copyright cases that there are three distinct but interrelated characteristics connected to the idea of literary property; firstly, it conveys a proprietary right, secondly it protects a creative interest, and thirdly it arises from an author's natural right. Literary property grants the author proprietary rights over the work by recognizing the author's expectation to maintain control over the work even when the work is subjected to the provisions of the copyright act. The Supreme Court in 1985, for example, decided that an author had the right to control the first public appearance of unpublished expressions and that society's expectation to have access to the work was secondary to the right of the author.¹⁶ As the Copyright Act 1976 protected works as soon as they are fixed on a tangible medium of expression¹⁷, the court's decision to deny the defense of fair use while the work has been fixed (putting expression on paper, for example) but remains unpublished protects the author's right to decide whether to publish a work in the first place, and when, where, and in what form the work will be published, which is a common-law right that is outside the explicit rights specified in the copyright act.¹⁸ The right to confidentiality, privacy¹⁹, and creative control of the work are proprietary rights that protect the author's personality and individuality - a right that is, in essence, personal even if it is commercially valuable to author

¹⁶ Harper & Row Publishers, Inc. v, Nation Enterprises, 471 U.S. 539 (1985)

¹⁷ 17 U.S.C.A. §102

¹⁸ The specific rights that the copyright act recognizes upon fixation are the rights to reproduction, distribution, derivatives, and public performance and display. §106

¹⁹ Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (stating "[t]he common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others. Under our system of government, he can never be compelled to express them (except when upon the witness-stand); and even if he has chosen to give them expression, he generally retains the power to fix the limits of the publicity which shall be given them. The existence of this right does not depend upon the particular method of expression adopted. It is immaterial whether it be by word or by signs, in painting, by sculpture, or in music.")

and publisher.²⁰ More importantly, the court's explicit protection of that creative space necessary for the author to develop their ideas during the prepublication stage, where a work is polished for public dissemination, acknowledges the author's personal interest in the work's representation of his personality and individuality to the reading public.²¹ Furthermore, the law protects an author's right to control social uses of unpublished letters that have been made publicly available through libraries on the same principle that "the copyright owner owns the literary property rights, including the right to complain of infringing copying" of the letter's expression.²²

While literary property protects the proprietary interest of authors, the right is more limited in scope in that it appears to only protect the author's creative interests in the work. Generally, commercial interests of authors are protected through statutory copyright law²³ but creative rights of authors do not receive the same degree of protection (at least in the United States) through the copyright statute.²⁴ Literary property, because of its genesis in the author's

²⁰ As the Court explained, "[t]he right of first publication implicates a threshold decision by the author whether and in what form to release his work. First publication is inherently different from other § 106 rights in that only one person can be the first publisher...the commercial value of the right lies primarily in exclusivity." *Harper & Row*, at 2226-2227

²¹ "The period encompassing the work's initiation, its preparation, and its grooming for public dissemination is a crucial one for any literary endeavor. The Copyright Act, which accords the copyright owner the "right to control the first public distribution" of his work...echos the common law's concern that the author or copyright owner retain control throughout this critical stage...The obvious benefit to author and public alike of assuring authors the leisure to develop their ideas free from fear of expropriation outweighs any short-term "news value" to be gained from premature publication of the author's expression." *Id.* at 2227-2228

²² *Salinger v. Random House*, 1 U.S.P.Q. 1673, 1675 (1987)

²³ 17 U.S.C.A. §106

²⁴ Creative rights of authors of works of visual art receive some degree of protection. §106A protects an artist's creative rights in visual arts from plagiarism (the right to claim authorship of the work) (§106A(a)(1)(A)), integrity (the right to prevent the use of the author's name for work that the author did not create) (§106A(a)(1)(B)); and misrepresentation (the right to prevent use of name as the author of a work in the event of a distortion, mutilation, or other modification of the work that would be prejudicial to the author's honor) (§106A(a)(2)). This provision have very strict boundaries and is limited in its application. What amounts to a "work of visual art" is defined narrowly under the copyright act. See §101.

natural right as the creator of the work, protect creative rights, which are an author's personal right to protect his personality as expressed in the work from distortion by others in society. This right serves a very important function by ensuring that the author of the work has the ability to preserve the integrity of his work once the work is made publicly available as the work represents the author's personality and makes a unique contribution to society. Given the author's expression's special contribution to society, Ray Patterson argues that it is only in society's interest to reciprocate by protecting the author's creative interest in the work.²⁵ An author expects two things from making his creative pursuits available to society - payment for the work and preservation of the work's integrity and his personality. As the copyright act facilitates the work's commodification that allow rewards from the market to be garnered, the non-economic interests of authors can be protected by an explicit recognition of literary (or creative) property at common-law. Literary property rights also arises through an author's natural rights in his work and are attributed to the relationship between the creator of a work and the work that is created. The idea that the author owned property in his work because the work embodied the author's personal individuality pre-dated the passing of the earliest copyright statute²⁶ and was not acknowledged because of an existing social convention but as a fundamental human right to own that which he, through his labor, creates.²⁷ John Milton's proclamation that books "contain a

²⁵ Ray Patterson, *supra* note 11 at 70-71

²⁶ The Statute of Anne 1710 was the first copyright statute to be passed in England and had explicitly recognized the right of authors to print, reprint, and publish literary works

²⁷ The most familiar idea that supports the author's natural right in the work is probably John Locke's passage in the Two Treatise of Government that every man has property in his person and when he removes something out of nature to mix it with his own labor, he has property in it. The passage in Locke's Two Treatise of Government states: "Through the earth and all inferior creatures be common to all men, yet every man has a "property" in his own "person." This no body has any right to but himself. The "labor" of his body, and the "work" of his hands, we may say, are properly his. Whatsoever then he removes out of the state of nature hath provided, and left in it, he hath mixed his labor with, and joined to it something that is his own, and thereby makes it his property." JOHN LOCKE, THE SECOND TREATISE ON CIVIL GOVERNMENT 20 (Prometheus 1986)

potency of life in them to be as active as the soul was whose progeny they are” and “preserve as in a vial the purest efficacy and extraction of that living intellect that bred them”²⁸ while protesting censorship of literary works, reveals that the author’s perceives his work to be an extension of his personality or individuality - it is a part of him. Even if the process of literary creation involves a great deal of reinterpretation and reconstruction of existing works, the very act of mixing personal expression with literary resources and ideas from the commons (or nature) creates the literary property right in the work that justifies authorial control over how the work is used, particularly when use of the work misrepresents the author’s intention for creation. Literary property therefore, in summary, is a right that protects the author’s expectations in a way that is separate from that of the publisher, and is proprietary in nature, limited to the protection of creative rights, and exists because of the natural connection between the creator of a work and the work that is created.

DISTINGUISHING LITERARY PROPERTY FROM COPYRIGHT

²⁸ John Milton, *Areopagitica*, in *Paradise Lost* 342 (Gordon Teskey ed.) (W.W. Norton Company 2005)