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An Analysis of the Personal Use Principle under Copyright Law

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by

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CHAPTER 1

INTRODUCTION

Personal use is the use of copyrighted works for private purposes, such as learning or entertainment. Reading a copyrighted book, watching a copyrighted movie or television program, listening to or singing a copyrighted song, and employing a copyrighted computer software are all within the scope of personal use. An issue arises when individual users want to make a copy of the copyrighted works.[1]

New technologies, such as photocopying machines and videotape recorders, make the copying of the copyrighted works become much cheaper and more convenient. Copyright owners think that individual users' occasional copying for private use is harmful to their potential market and they strongly argue for compensation. Does the personal users have the right to reproduce the copyrighted works for private reasons? If the answer is positive, what is the scope of this kind of reproduction?

The confusion about the personal use principle is due to the controversy about the nature of copyright itself. Since the nature of copyright determines the nature and scope of

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[1] *See* L. RAY PATTERSON & STANLEY W. LINDBERG, THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS 193 (1991), hereinafter referred to as PATTERSON & LINDBERG.

the subordinate principles and rules, the uncertainty of it results in the confusion about the personal users' rights. There are two contradictory theories concerning the nature of copyright: one is the natural-law property right theory, the basis of the common-law copyright, and the other is the positive-law theory, the basis of the statutory copyright. Both natural law and positive law influenced the development of copyright.[2]

Under the concept of natural law, the proprietor of a certain object owns complete rights over his or her own property except a few limitations. Because an author creates the work, the assumption is that the work is the author's property. It means that an author has complete property rights on the work because of creation. That is, due to the law of nature and reason, an author has the common-law copyright upon the work.[3]

However, the other viewpoint argues that copyright is a right of the positive law which is granted by legislation for the public welfare. The source of copyright is the statute, which gives authors certain exclusive rights in the work. Copyright is thus a statutory-grant right.

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[2] *See id.* at 109-110; *see also* L. Ray Patterson, *Understanding Fair Use*, 55 LAW & CONTEMP. PROB. 2, 249, at 249 (1992).

[3] Justice Aston, in Millar v. Taylor, explained the meaning of the common law. He said that "The common law, now so called, is founded on the law of nature and reason. Its grounds, maxims and principles are derived from many different fountains,...from natural and moral philosophy, from the civil and canon law, from logic, from the use, custom and conversation among men, collected out of the general disposition, nature and condition of human kind."(footnote omitted) 4 Burr. 2303, 2343; 98 Eng. Rep. 201, 223 (1769).

The choice of the nature of copyright should reflect the purpose of copyright in the Copyright Clause of the U.S. Constitution. The Copyright Clause contains the purpose and basic concepts of copyright, which are the most important guide for copyright legislation. It reads as follows: "The Congress shall have Power...to Promote the Progress of Science..., by securing for limited Times to Authors...the exclusive Right to their respective Writings...."[4]

The promotion of learning[5] is the purpose of copyright. The exclusive right given to authors for limited times is the method used to encourage creations and distributions of the works for the progress of knowledge. The purpose of copyright as promotion of learning is for protecting the public interests, rather than benefiting authors.

One aspect of public interests is citizen's rights to use the copyrighted works, that is, individual users' rights. For promoting learning, the general public needs sufficient ways of access to the copyrighted works and enough rights to use the works. This implies that the Copyright Clause of the Constitution presupposes individual's right of use of the copyrighted works. The personal users' rights are protected directly by the Constitution.

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[4] U.S. CONST. art.I, §8, cl.8.

[5] When the Copyright Clause was legislated in the eighteenth century, "science" meant "knowledge or learning." The purpose of copyright, in modern terms, is to promote the progress of knowledge and learning. *See* PATTERSON & LINDBERG, *supra* note 1, at 48.

The scope of personal users' rights is decided by the nature of copyright. If copyright is a common-law right, it follows that authors' rights on the works are complete property rights, which may be subject to some limitations. Users, basically, have no rights on the copyrighted works except those conferred by the statute. If copyright is a statutory-grant right, authors have the rights given by the statute only. Any other rights upon the works belong to society. Users would have more rights to use the copyrighted works.

The debate about the nature of copyright began at England in the eighteenth century, which was for explaining the 1710 Statute of Anne. Such a controversy was because the stationers(publishers) lost some rights in the Statute of Anne. The history of the stationers' copyright before 1710 was a prelude which resulted in the debate of the nature of copyright. Since these events in England still have influence on modern statutory copyright, the analysis of the personal use principle in this paper will start at an review of the early English copyright history.

The following chapter is an explanation of the purpose of copyright in the Copyright Clause of the American Constitution. The nature of American copyright is the next issue to be analyzed. After clarifying the purpose and nature of copyright, we will focus on the 1976 Copyright Act. That the expansion of the copyright owners' exclusive rights unfortunately endangers the users' right of access to the

copyrighted works is our next topic. Finally, we will have an interpretation of the personal users' rights under current copyright Act.

CHAPTER 2

HISTORICAL DEVELOPMENT OF COPYRIGHT

Copyright in England originated as the stationers' copyright.[6] This development was a response to the advent of the printing press which was introduced into England in 1476. This technology makes books that can be mass reproduced in a quick and convenient way. For protecting published books from piracy, the members of the book trade established some form of property. This kind of property, finally, was to be called copyright.

The important point about the stationers' copyright was not that the stationers originated it, but that they controlled its development for a hundred and fifty years and, furthermore, influenced the subsequent statutory copyright.[7] The reason that the stationers controlled the development of

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[6] Copyright might originate between 1518 and 1542, when the first book was printed and published under the privilege of the government. But, no matter what the precise date copyright originated, it is almost sure that copyright in England originated as the stationers' copyright. *See* LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE [hereinafter PATTERSON, HISTORICAL PERSPECTIVE] 42-43 (1968).

[7] There were two kinds of copyright before the 1710 Statute of Anne: one was the stationers' copyright and the other was the printing patent. Printing patent was a publication right granted by the royal prerogative. This right declined in the latter part of the seventeenth century. The stationers' copyright thus became the model of the statutory copyright. About the details of printing patent, *see generally id.* at 78-113.

copyright for such a long time was partly because of the government's desire for censorship.

Censorship had been one of the government policies even before the advent of the printing press.[8] The arrival of the printing press just transferred the sovereign's attention from authors to printers and publishers. In the 1530's, Henry VIII separated from the Roman Catholic Church, which created a formidable religious and political unrest. Censorship, thus, became the sovereign's systematic business. Copyright at the beginning was an instrument for censorship and a device for booksellers' private interests.

This chapter will start with the stationers' copyright and its relationship to the government press control. The Statute of Anne, which used the stationers' copyright as the model, is the following issue. It was the change from the stationers' copyright to the statutory copyright that caused the debate about the nature of copyright. A review of this controversy in England will give us a more precise understanding about the nature of copyright.

A. The Stationers' Copyright

The beginning of the stationers' copyright was May 4, 1557, when the guild of stationers received a royal charter from Catholic Philip and Mary Tudor to incorporate the Company of

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[8] *See id.* at 23.

Stationers of London.[9] This charter gave the Stationers' Company the right to search out and destroy illegal printed materials and granted the printing rights of most of the books to the stationers. Mary's motive in granting this charter was to use the stationers as an agency for suppressing seditious and heretical books. Although the internal organization of the Brotherhood of Stationers still functioned in the same way,[10] this charter promoted the stationers as the government's partner for censorship. The stationers' copyright, thus, was endorsed by the sovereign.

The stationers' copyright was an exclusive right to print and publish. The purpose of this right was for protecting published books from piracy on the market. There were two important aspects of the stationers' copyright: one was that it was perpetual and the other was that only the members of the Company were qualified to obtain this copyright.[11]

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[9] The guild of stationers was founded in 1403 under the grant of the Mayor and Aldermen of London. *See id.* at 29.

[10] The framework of the Stationers' Company was composed of three main parts. At the top of the Company was the livery. It included a principal officer, the master, the upper warden and under warden, the clerk, and the senior and junior renter wardens. The master, who was assisted by the upper and under warden, had the right to search out and destroy illegal printed materials. The primary job of the clerk was to keep the Company's records. The responsibility of the renter wardens was to collect membership fees once a quarter.

The members below the livery were freemen, the commonalty or yeomanry, apprentices who became free, freemen's sons who inherited the patrimony, persons who transferred from another company, the men who purchased a copy of the book, the beadle, and the brothers.

At the bottom of the Company were the apprentices. *See generally id.* at 28-36.

[11] In fact, authors could obtain copyright sometimes. However, in most cases, the relationship between the stationers and the authors was that the stationers obtained permission from the authors for publishing the works and the authors obtained payment from the stationers. If the authors owned the copyright, the stationer, even though promising to

The procedure for the stationers to obtain copyright was to get a license from the official authorities, then present licensed copy to the Company wardens for permission, then enter the title of the work and the owner's name of this title in the register book of the Company. Before 1637, the entrance was just a custom, not a legal requirement. The Star Chamber Decree of 1637 firmly established that the entrance was a requirement for copyright.[12]

The Stationers' Company was governed by the ordinances drafted by the Company itself and which were approved by the government. An important feature which can help us to understand the nature of the stationers' copyright was about the jurisdiction. The Court of Assistants of the Stationers' Company had the jurisdiction over any members. Any disputes between members or regarding the book trade should be submitted to the Court of Assistants before carried to any other court. This meant that common-law courts took no hand in the development of the stationers' copyright.

Although even without government censorship regulations, copyright would still have been created and developed substantially as it did, the existence of censorship enhanced the stationers' monopoly and their right to control the development of copyright.[13] The stationers' role in press

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publish the work, would not like to promote it. *See id.* at 35-36, 64-77.

[12] About the procedure and form of entrance and whether the entrance was a requirement for copyright, *see generally id.* at 51-64.

[13] The proclamations of censorship prior to the royal charter of 1557 were the proclamation of 1486-87 by Henry VII, the proclamations of

control was as policemen, rather than as judges or arbiters. Since the sovereign had no concern on private property right, the stationers not only had monopoly of printing, but also had the right to freely create and develop copyright according to their own interests.

While the government used copyright as an instrument for press control, the courts or the legislature played no role in the development of copyright. This further explains why authors' right was not developed at that time. To the government, it meant the difficulty for press control. To the stationers, it meant the sharing of rights. Both of them would not like it to be developed.

In 1688, the Glorious Revolution occurred and the religious unrest ceased. Both the government censorship and the stationers' monopoly were detested by the public. Parliament refused to renew the Licensing Act of 1662 in 1694. The stationers lost legal support for their monopolies. They petitioned the Parliament for recovering all their benefits. Parliament rejected censorship regulations. The stationers thus turned to claim authors' rights in order to

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1529, 1530, 1536, 1538, 1544, 1545 and 1546 during Henry VIII's reign, the proclamation by Edward VI in 1551, and the proclamations of 1533 and 1555 by Queen Mary Tudor.

After 1557, Elizabeth I issued the royal charter of 1558 and the Star Chamber Decree of 1566 and 1586. Then, Charles I promulgated the Star Chamber Decree of 1637. In the period of Interregnum, Parliament enacted the ordinances of 1643, 1647, and 1649. The Licensing Act of 1662 was proclaimed during Charles II's reign. It was based on the Star Chamber Decree of 1637 and became the model for the enactment of the Statute of Anne.

About the history of government censorship and press control, *see generally id.* at 20-27, 114-142.

save their old monopolies.[14] The result, then, was the 1710 Statute of Anne.

B. The Statute of Anne

The primary purpose of the Statute of Anne was to restore the order in the book trade after almost sixteen years' pandemonium.[15] The title of the Statute of Anne said that it was "An act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned."[16] In fact, after examining the provisions of the Statute of Anne, it showed that this statute was a trade regulation act to control the stationers' monopoly, rather than an act for protecting the authors' rights.

Section I of the Statute of Anne broke up the stationers' perpetual copyright by limiting the duration of copyright. It gave the books which were already printed a twenty-one-year copyright extension. The books printed after 1710 had a fourteen-year duration.[17] Section XI further provided that if

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[14] For details about the early history of copyright, *see generally id.* at 1-142. *See also* PATTERSON & LINDBERG, *supra* note 1, at 19-23.

[15] The Statute of Anne, in fact, was not the first English copyright act. Before it, there were several royal charters, Star Chamber Decrees, ordinances, and the Licensing Act of 1662. These acts were all censorship regulations. The Statute of Anne was the first English copyright statute legislated by the Parliament without any censorship purpose. *See* PATTERSON, HISTORICAL PERSPECTIVE, *supra* note 6, at 12.

[16] 8 Anne, c. 19.

[17] *Id.* §I.

the author was still alive after the expiration of the first 14 years, he or she could have copyright protection for another 14 years.[18] After the expiration of copyright, books went into the public domain. This is the first time that the concept of the public domain emerged in the copyright history.

Another method to destroy booksellers' monopoly was that everybody had the right to obtain copyright even if he or she was not the member of the Stationers' Company. According to §III, if the clerk of the Stationers' Company refused to register, make entry, or give certificate to the author or proprietor of the copy or copies, the author or proprietor could advertise in the *Gazette*, the legal newspaper, to secure the copyright.[19]

Moreover, §IV required booksellers to maintain the price of the books at a reasonable rate.[20] Section VII permitted the importation and sale of books in foreign language printed beyond the sea.[21]

Since the Statute of Anne allowed authors to transfer their copyright to other persons, the real beneficiaries were still the booksellers.[22] Under the ordinary situation,

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[18] *Id.* §XI.

[19] *Id.* §III.

[20] *Id.* §IV.

[21] *Id.* §VII.

[22] According to the title of the Statute of Anne, purchasers of the copies of printed books could become the copyright owner. 8 Anne, c. 19. This indicated that copyright was transferable. Booksellers still controlled the book trade.

authors must assign their copyright to booksellers in order to be paid, otherwise, their works would not be printed and published. Only the renewal right, codified in §XI, was reserved to the authors.[23] In general, authors were not entitled to copyright until the enactment of the Statute of Anne. The copyright in the Statute of Anne was functioned as a publisher's right.

A comparision of the provisions of the Statute of Anne with the rules of the stationers' copyright shows that the booksellers' rights were severely curtailed. Not only the duration of copyright was limited rather than perpetual, but also anybody could become the copyright owner. The stationers' petition for recovering their old benefit was unavoidably.

After the old copyright expired in 1731, the booksellers' fear about losing the power on the book trade and about the possibility of lessened livelihood pushed them to try other tricks to secure their monopolies. They urged that an author had a common-law copyright, which resulted in the debate about the nature of copyright. The meaning of the Statute of Anne, however, was settled sixty years after its enactment,

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[23] *Id.* §XI.

C. Authors' Common-Law Copyright in England

The main point of the booksellers' argument was that an author had the common-law copyright because he or she creates the work. The intention of the booksellers was to use the author as a chip for getting back their monopolies. If the authors had a complete property right on the work in perpetuity, it meant that the booksellers would have this right by assignment. The purpose of this proposition was to elude the limitations posed by the Statute of Anne.

In fact, copyright in the Statute of Anne operated as a publishers' right because it used the stationers' copyright as the model for its enactment. Before the booksellers argued for authors' rights, authors, in most of the cases, could not even be qualified as the copyright owners. Moreover, common-law courts had no position to help the development of the stationers' copyright. The so-called authors' common-law copyright had never existed until the booksellers claimed it.

The whole process about the booksellers' attempt to save their monopoly was called the "Battle of the Booksellers." This battle lasted for more than forty years.[24] There were many petitions and cases during this period of time. Among them, *Millar v. Taylor*[25] and *Donaldson v. Beckett*[26] were the

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[24] The "Battle of the Booksellers" started in 1734, when the booksellers petitioned the Parliament for a new bill to save their perpetual monopoly. The whole campaign was full of petitions and cases. Not until 1774 did the nature of copyright get an answer in Donaldson v. Beckett. For more details about this situation, *see* PATTERSON, HISTORICAL PERSPECTIVE, *supra* note 6, at 151-79.

[25] 4 Burr. 2303; 98 Eng. Rep. 201 (1769).

most important cases. They decided the nature of English copyright and influenced the choice of the nature of American copyright.

(1). *Millar v. Taylor*

Andrew Millar was a bookseller who owned the copyright of "The Seasons." Millar obtained the printing and publishing permission from the author, James Thomson, in 1729. According to the Statute of Anne, this copyright had expired in 1757. Robert Taylor published and sold copies of "The Seasons" without the license or consent from Millar. In 1767, Millar sued Taylor for copyright infringement before the Court of King's Bench.

The plaintiff alleged that an author had a common-law copyright after publication and this right had not taken away by the Statute of Anne.[27] The defendant strongly disagreed.[28]

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[26] 4 Burr. 2408; 98 Eng. Rep. 257; 1 Eng. Rep. 837 (1774); 17 Cobbett's Parl. Hist. 953 (1813).

[27] The counsel for the plaintiff alleged that "there is a real property remaining in authors, after publication of their works; and...that this right is a common law right, which always has existed, and does still exist, independent of and not taken away by the statute of 8 Ann. c. 19." 4 Burr. at 2304; 98 Eng. Rep. at 202.

[28] The counsel for the defendant absolutely denied that "any such property remained in the author, after the publication of his work; and they treated the pretension of a common law right to it, as mere fancy and imagination, void of any ground or foundation." They argued that "formerly the printer, not the author, was the person who was supposed to have the right,...and accordingly the grants were all made to printers. No right remains in the author, at common law."

They further insisted that "if an original author publishes his work, he sells it to the public; and the purchaser of every book or copy has a right to make what use of it he pleases;....

The issues in this case were: "1st. Whether the copy of a book, or literary composition, belongs to the author, by the common law; 2d. Whether the common law-right of authors to the copies of their own works is taken away by 8 Ann. c. 19."[29]

Four judges delivered their opinions and decided that an author had a common-law right and this right was not taken away by the Statute of Anne in a three-to-one verdict.

Justice Willes, Justice Aston and Lord Mansfield ruled for the plaintiff. The main reason was that the work was created through the author's labour, so it should be the author's property. It was just to apply the concepts of property by occupancy to the author's creation. The author should have the common-law copyright.[30] This right could not be found in custom, but, according to the natural principles, moral justice and fitness, it was just for an author to reap the profits and to protect the integrity and paternity of the work.[31] This copy-right had not taken away by the Statute of Anne.[32]

The Act of Parliament of 8 Ann. c. 19, for the encouragement of learning, vests the copies of printed books in the authors or purchasers of such copies, during the times therein limited. But it is only during that limited time; and under the terms prescribed by the Act. And the utmost extent of the limited time is, in the present case, expired...."
4 Burr. at 2304; 98 Eng. Rep. at 202.

[29] 4 Burr. at 2311; 98 Eng. Rep. at 206.

[30] This opinion was based on Justice Aston's speech. He alleged that "a man may have property in his body, life, fame, labours, and the like; and, in short, in any thing that can be called his." 4 Burr. at 2335-54; 98 Eng. Rep. at 218-29.

[31] Lord Mansfield thought that the source of the common law right was drawn from the argument that "it is just, that an author should reap

A dissenting opinion was rendered by Justice Yates. He asserted that an author had no common-law copyright because the concepts of property by occupancy could not apply to the style and ideas.[33] This common-law right of the author did not exist in custom.[34] The statutory copyright granted by the

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the pecuniary profits of his own ingenuity and labour. It is just, that another should not use his name, without his consent. It is fit that he should judge when to publish, or whether he ever will publish. It is fit he should not only choose the time, but the manner of publication; how many; what volume; what print. It is fit, he should choose to whose care he will trust the accuracy and correctness of the impression; in whose honesty he will confide, not to foist in additions: with other reasonings of the same effect." He thought that this author's common-law right before publication should be applied to author even after he or she published the work. The language of the Statute of Anne had no implications to expel the common-law copyright. 4 Burr. at 2395-2403; 98 Eng. Rep. at 250-55.

[32] Justice Willes' opinion for the plaintiff was that he used the stationers' copyright as the model of the common-law copyright. His supporting evidences were the decrees of the Star-Chamber, Acts of State, and several precedents which were decided based on these previous censorship regulations. 4 Burr. at 2310-2335; 98 Eng. Rep. at 205-218. Justice Yates, in his dissenting opinion, thought that the stationers' copyright was irrelevant to the authors' common-law copyright because "the by-laws of the Stationers' Company protect none but their own members." 4 Burr. at 2377; 98 Eng. Rep. at 241. and because "no author whatever had from them(the by-laws), the least pretension to copy-right." 4 Burr. at 2371; 98 Eng. Rep. at 238.

[33] Justice Yates said that property "is a right by which the very substance of a thing belongs to one person, so that it cannot...become another's....Sentiments are free and open to all; and many people may have the same ideas upon the same subject. In that case, every one of these persons to whom they independently occur, is equally possessed and equally master of all these ideas; and has an equal right to them as his own." 4 Burr. at 2358; 98 Eng. Rep. at 231.

[34] 4 Burr. at 2367-69; 98 Eng. Rep. at 236-37. Justice Yates thought that "to constitute a legal custom, it must have these two qualities: first, a custom must import some general right in a district, and not a few mere private acts of individuals; and, in the next place, such custom must appear to have existed immemorially." But, "the art of printing was not known in this kingdom, till the reign of Ed. 4. therefore these contracts could not be derived from the ancient immemorial law of the land: and, consequently, they could not create a species of property which was unknown to that law." So the common law copyright did not exist in custom.

Statute of Anne was the only right the author had after publication.[35]

The conclusion of *Millar v. Taylor* was that an author had the common-law right after, as well as before, publication. The booksellers still had the monopoly in perpetuity. The purpose of the Statute of Anne for against monopoly was negated under this decision.

(2). *Donaldson v. Beckett*

Millar v. Taylor was not appealed. The decision gave Andrew Millar the perpetual property interests on his copy "The Seasons," but he died in 1768. The executors of Millar's estate auctioned all his copies off in 1769. The syndicate of Thomas Beckett and other fourteen partners obtained the copyright of "The Seasons."

Alexander and John Donaldson thought that the copyright of "The Seasons" was expired under the provisions of the Statute of Anne, so they printed and sold thousands of copies of "The Seasons." In 1772, Beckett and his partners, in accordance with the decision of the *Millar* case, acquired a perpetual injunction from the Court of Chancery to restrain Donaldsons. Donaldsons appealed to the House of Lords.

The issue in *Donaldson v. Beckett* was whether the author had the common-law right of sole printing and publishing the work in perpetuity. The House of Lords directed five

[35] 4 Burr. at 2354-96; 98 Eng. Rep. at 229-50.

questions to the judges of the common-law courts, the Court of King's Bench, Common Pleas and Exchequer for their advisory opinions. These questions were:

1. Whether at common law, an author of any book or literary composition had the sole right of first printing and publishing the same for sale; and might bring an action against any person who printed published and sold the same without his consent?
2. If the author had such right originally, did the law take it away, upon his printing and publishing such book or literary composition; and might any person afterward reprint and sell, for his own benefit, such book or literary composition, against the will of the author?
3. If such action would have lain at common law, is it taken away by the Statute of 8th Ann.? And is an author, by the said statute precluded from every remedy except on the foundation of the said statute and on the terms and conditions prescribed thereby?
4. Whether the author of any literary composition and his assigns, had the sole right of printing and publishing the same in perpetuity, by the common law?

5. Whether this right is any way impeached restrained or taken away by the statute 8th Ann.?[36]

The answers of these five questions were: (1) Yes. (2) No. (3) Yes. (4) Yes. (5) Yes.[37] The first three questions dealt with only the author's right and the last two with the right of the author and his assigns. The fourth question was added for reconsidering the *Millar* case. After hearing the judges' opinions, the lords debated and reversed the grant of the perpetual injunction.[38]

The main reasons to object the common-law copyright were that the author's common-law right had never existed in previous copyright history until the booksellers claimed it[39] and ideas should be free of use once the author released them

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[36] 4 Burr. at 2408; 98 Eng. Rep. at 257-58.

[37] Eleven judges delivered their opinions. Six of them stood against the authors' common-law right, and the other five supported the existence of this right. About the content of the judges' opinions, *see* 17 Cobbett's Parl. Hist. at 971-92.

[38] The lords, by a vote of 22 to 11, reversed the decree of the Court of Chancery for granting the perpetual injunction. *See* 17 Cobbett's Parl. Hist. at 1003.

[39] The statements of Lord Chief Justice De Grey and Lord Camden were good examples of this argument. Lord Chief Justice De Grey said that "The truth is, the idea of a common-law right in perpetuity was not taken up till after that failure in procuring a new statute for an enlargement of the term." 17 Cobbett's Parl. Hist. at 992. Lord Camden supported this opinion and spoke that "The arguments attempted to be maintained on the side of the Respondents, were founded on patents, privileges, Star-chamber decrees, and the bye laws of the Stationers' Company;...the very last places in which I should have dreamt of finding the least trace of the common law of this kingdom..." *Ibid.*

to the public.[40] On the other hand, the supporters of the common-law copyright thought that ideas were the author's property even after publication, so the author should have a perpetual common-law copyright.[41]

The conclusion of *Donaldson v. Beckett* was that an author's common-law right was taken away and supplanted by the Statute of Anne after publication. The common-law copyright meant the exclusive right of first publication only. In fact, even without this decision, the author presumably had the first publication right. Once an author published his or her work, he or she had only the rights granted by the Statute of Anne. But the rights granted by the Statute of Anne were merely the interests derived from publication. An author still has the right to protect the attribution and integrity of his or her work because of

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[40] This point could be explained by the following argument of Lord Camden that "If there be any thing in the world common to all mankind, science and learning are in their nature *publici juris*, and they ought to be as free and general as air or water." 17 Cobbett's Parl. Hist. at 999, and that "Knowledge has no value or use for the solitary owner: to be enjoyed it must be communicated....Glory is the reward of science, and those who deserve it,..." *Id.* at 1000.

[41] Judge Ashurst was one of the proponents for the author's common-law copyright and contended that ideas should be claimed as the author's property. He urged that "Literary property was to be defined and described as well as other matters, and matters which were tangible. Every thing was property that was capable of being known or defined, capable of a separate enjoyment, and of value to the owner. Literary property fell within the terms of this definition. According to the appellants, if a man lends his manuscript to his friend, and his friend prints it, or if he loses it, and the finder prints it, yet an action would lie..., which shewed that there was a property beyond the materials, the paper and print. That a man, by publishing his book, gave the public nothing more than the use of it. A man may give the public a highway through his field, and if there was a mine under that highway, it was nevertheless his property." 17 Cobbett's Parl. Hist. at 976-77.

creation even after publication. This error was because the assumption that the Statute of Anne contained an author's complete interests of the work. For rejecting the author's common-law copyright, it was only need to reject the perpetual common-law copyright, but not necessarily meant that an author lost all the rights upon the work after publication.[42]

However, the holding of *Donaldson v. Beckett* was the only way which could destroy the booksellers' monopoly. After this decision, copyright was an author's right rather than a publisher's right. It was this author's right received into the United States several years later.

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[42] About the opinions and comments of Donaldson v. Beckett, *see generally* PATTERSON & LINDBERG, *supra* note 1, at 36-46. *See also* PATTERSON, HISTORICAL PERSPECTIVE, *supra* note 6, at 172-79.

CHAPTER 3

THE PURPOSE AND POLICIES OF COPYRIGHT

The purpose and policies of copyright are articulated in the U.S. Constitution. There are two Clauses in the Constitution which are related to copyright. One is the Intellectual-Property Clause and the other is the First Amendment.

The Intellectual-Property Clause contains the Patent Clause and the Copyright Clause. It articulates the purpose and policies for both patent and copyright. The content of it is "The Congress shall have 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."[43] According to this language, the purpose of copyright is to promote learning by empowering Congress to give authors the exclusive right to their works.

The First Amendment is for protecting public's rights of free speech and press. It provides that "Congress shall make no law...abridging the freedom of speech, or of the press...."[44] The two rights in the First Amendment ---the

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[43] U.S. CONST. art. I, §8, cl.8.

[44] The First Amendment reads as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

right of free speech and the right of free press--- are known together as "free speech rights."

The free speech rights are the public's rights to disseminate and have access to information. However, the Copyright Clause gives Congress a power to grant authors the exclusive right which is a restraint on users' right of access. In appearance, they conflict with each other, but, in fact, they could complement one another.

In this chapter, we will first explain the purpose, policies and the functional scheme of the Copyright Clause. The free speech in the First Amendment and its relationship to the Copyright Clause are the following issues that we will discuss in the second part of this chapter.

A. The Purpose and Policies of Copyright in the Copyright Clause

The Copyright Clause was enacted by using the title of the Statute of Anne as its model.[45] The main purpose stated in these two documents is the same: to promote the progress of learning. An important difference between them was that the Statute of Anne protected publishers as well as authors, but the Copyright Clause protects authors only.

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[45] Not only the Copyright Clause of the U.S. Constitution imitated the English Statute of Anne, but the various American state statutes and the federal Copyright Act of 1790 also used this statute as a model to legislate their own acts. The English copyright is the lineal ancestor of the American copyright. *See* PATTERSON, HISTORICAL PERSPECTIVE, *supra* note 6, at 3.

There are four policies in the Copyright Clause: the promotion of learning; the preservation of the public domain; the protection of the authors' exclusive rights of publication; and the general public's right of access.[46] A precise understanding of these policies can help to decide the nature of copyright as well as the subordinate principles and rules.

(1). Promotion of the Progress of Learning

The purpose of copyright is to promote the progress of science. Copyright exists for the reason of making the advancement of the welfare of entire society. For achieving this purpose, Congress is empowered to secure to authors the exclusive right for a limited period of time.

The functional scheme the Copyright Clause designed to attain the purpose of promoting knowledge is to use the exclusive right as an inducement to encourage authors' creations and distribution of the works. In theory, more creations and distribution of the works can enrich the culture and make the progress of knowledge. This should be under the premise that the works have the chance to be used by the society. Copyright is construed around the concept of the use of the work.[47]

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[46] *See* PATTERSON & LINDBERG, *supra* note 1, at 47-49, 52.

[47] *Id.* at 191-92.

Since the protection of the authors' exclusive right is just a method to promote learning, it is necessary to establish limitations on the exclusive right for preventing authors' overcontrol on the published works. The limitations are established not only on the scope, but also on the protection time. The extent of the exclusive right given to authors should reach the line that it can protect the works on the market and would not be an obstacle to the progress of science.

Copyright is a deal between the authors and society. Society confers the authors the monopoly to reap the benefit from their own creations. The quid pro quo that authors should offer the society is to allow the general public to use the works. Then the works can make certain contributions to society. The effect of the exclusive right given to authors is to protect the works from piracy, not to prevent the general public's use of the work. Giving the right to users to use the work for personal reasons is a necessary method for promoting learning. This is the personal use principle. The Constitution is just the source that the personal users' rights come from.[48]

(2). Preservation of the Public Domain

Public domain means that ideas, words and knowledge belong to every members of our society. Everyone has the right to use

[48] *Ibid.*

and employ ideas or words without any charge or limitations. These ideas or words can not be owned by certain specific persons.[49]

To protect the public domain, there are three concepts. First, a work should possess a certain degree of originality for obtaining copyright.[50] Copyright is given because of the author's creative combination and organization of the words and ideas. The copyright protection reaches only to the parts which are newly created. The author has no right to claim copyright on the materials already in the public domain. Originality is a required condition for a work to get copyright protection.[51]

Second, once the work is published, the scope of the exclusive right given to authors should be limited. The author should not have the absolutely control right on the work which inevitably constitutes ideas and words from the public domain.

Third, the protection time should be limited. Authors obtain the ideas and knowledge from society to form a new

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[49] *See id.* at 50-51.

[50] The definition of the originality, as developed by the courts, contains two aspects: "independent creation by the author, and a modest quantum of creativity." *See* CRAIG JOYCE et al., COPYRIGHT LAW 55-56 (2d ed. 1991).

[51] Later in the 1976 Copyright Act, originality is codified as a required condition for copyright. Section 102 of the 1976 Act says that copyright protection subsists in "original works of authorship" and does not extend to any "idea, procedure, process, system, method of operation, concept, principle, or discovery." 17 U.S.C. §102 (1994). Furthermore, §103 states that "the copyright in a compilation or derivative work extends only to the material contributed by the author of such work...and does not imply any exclusive right in the preexisting material...." *id.* §103.

work. By inference, it is not reasonable for them to have the exclusive right in perpetuity. After they enjoy the monopoly for a period of time, they should release the works back to society. The result of this kind of process is that all the works will go into the public domain and the culture and knowledge of our society will be promoted.[52]

(3). Protection of the Exclusive Right of Publication

Congress grants authors an exclusive right to their writings. Since the Copyright Clause in the U.S. Constitution used the title of the Statute of Anne as a model, we can find the meaning of this exclusive right by tracing back to the English history.

Throughout the period of the stationers' copyright, the right which the stationers had on their copies was the exclusive right to print and publish.[53] The Statute of Anne inherited this meaning. It vested the copyright only on "printed books."[54]

In 1769, *Millar* v. *Taylor*,[55] which was viewed as an explanation of the Statute of Anne, clarified the content of

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[52] Prof. Chafee raised this theory in 1945. He said that "a dwarf standing on the shoulders of a giant can see farther than the giant himself." The dwarf refers to the author and the giant society. Through this process, knowledge will be promoted. Zecharich Chafee, *Reflections on the Law of Copyright*, 45 COLUM. L. REV. 503, at 511 (1945).

[53] *See supra* text accompanying notes 9-14.

[54] 8 Anne, c. 19.

[55] 4 Burr. 2303; 98 Eng. Rep. 201 (1769).

copy-right. It stated that "the copy of a book...legally used as a technical expression of the author's sole right of printing and publishing that work..."[56] and "...the word 'copy'...has been used for ages, to signify an incorporeal right to the sole printing and publishing of somewhat intellectual, communicated by letters."[57] It is clear that the "exclusive right" meant a sole right of printing and publishing at that time.[58]

Even though *Donaldson* v. *Beckett*[59] overruled *Millar* v. *Taylor* five years later, the meaning of the exclusive right had not been changed. *Donaldson* v. *Beckett* rejected an author's common-law copyright after publication. The author only could have the right granted by the Statute of Anne once the work was published. The exclusive right given by the Statute of Anne was the right to print and publish.

When the Copyright Clause was codified in 1787, there was no other meaning could be found for the author's exclusive right. The content of the "exclusive right" in the U.S. Constitution, at that time, was an exclusive right to "print, publish and vend" the work.[60] The exclusive right in the

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[56] 4 Burr. at 2346; 98 Eng. Rep. at 225.

[57] 4 Burr. at 2396; 98 Eng. Rep. at 251.

[58] Even though the judges in Millar v. Taylor, in fact, treated the copyright as the author's whole property interest of the work, they expressly admitted the meaning of copyright as the sole right of printing and publishing only.

[59] 4 Burr. 2408; 98 Eng. Rep. 257; 1 Eng. Rep. 837 (1774); 17 Cobbett's Parl. Hist. 953 (1813).

[60] The copyright principle developed after 1787 supported this point of view. Under the provisions of the 1790 Act, the copyright owner had the

Copyright Clause is limited on its scope. Authors can only have the exclusive right which the copyright statute gives to them. The other rights belong to the public. The policy in the Constitution is to give a limited-scope exclusive right to authors for the promotion of learning.

(4). The Implied Right of Access

For promoting learning, the general public needs effective and sufficient ways to have the chance to use the works. This is the users' right of access. The Copyright Clause does not explicitly stipulate this right, however, the right of access is necessary for promoting learning. If users can not or have difficulties to use the copyrighted works, how can the knowledge be promoted? The framers of the Constitution had already considered the public's right of access when they legislated the Copyright Clause.

The most powerful method to safeguard the right of access is to make publication a prerequisite for obtaining copyright protection. If every work needs to be published, the right of access to the copyrighted works is guarateed. Otherwise, the right of access would be endangered.[61]

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rights to print, reprint, publish and vend the work. 1 Stat. 124 §2 (1845). A digest, abridgment, or translation of the copyrighted work was not an infringement of copyright because the result of these conducts was a new work and it did not print, reprint, publish or vend the original copyrighted work. *See* PATTERSON & LINDBERG, *supra* note 1, at 60. This inferred that the exclusive right is an exclusive right to print, publish and vend the work. The meaning of the exclusive right was almost the same as that in the Copyright Clause.

[61] *See* PATTERSON & LINDBERG, *supra* note 1, at 52-55.

The group which controls the publication of the works is the publishers rather than the authors. But in the Copyright Clause, the Congress only has the power to secure copyright to authors. The publishers are excluded from copyright protection.

The main reason for the framers of the Constitution to exclude publishers is the concern about preventing booksellers' monopoly. In sixteenth- and seventeenth-century England, it was the booksellers who not only controlled the access to, but also monopolized the price of, the books. An author, ordinarily, must spend a lot of time for just reproducing one work. A publisher, on the other hand, can control the distribution of many works from different authors at the same time. This is why the Copyright Clause excludes the publishers from copyright protection.[62]

However, the functional system of the book trade is that the author assigns copyright to the publisher for publication.[63] Without the publishers, there is no

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[62] *See* L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1, at 13-19 (1987).

[63] Because the authors must assign their copyright to the publishers for publication of the works, an unfortunate influence is the under development of the authors' moral rights. The implication of the Copyright Clause seems to be that the exclusive right constitutes the authors' whole right of the work once the work is published. However, after the authors assign copyright to the publishers, they should still have the right to protect the attribution and integrity of the works. If the subject protected in the Copyright Clause includes the publishers as well as the authors, it may be easier to distinguish the difference between the rights derived from creation (the authors' rights) and the rights derived from publication (the publishers' rights). Authors' moral rights might be developed earlier and better. About the development of the authors' moral rights, *see generally* PATTERSON & LINDBERG, *supra* note 1, at 163-76.

publication. The users get no access to the works. A better legislation is to regulate the publishers' rights rather than exclude or ignore it.[64]

The 1790 Copyright Act, the first federal copyright statute, secured copyright for both the authors and the publishers.[65] All the subsequent Copyright Acts provided copyright protection for the publishers, including the 1976 Act. The best way to promote learning should accommodate the three conflict rights---the authors' rights, the publishers' rights, and the users' rights ---in a balanced level.

In conclusion, the purpose of American copyright is to promote the progress of learning by providing authors exclusive right within a limited period of time under the premise that it will not encroach on the public interests. The public interests are explicitly protected by the First Amendment of the Constitution as free speech rights.

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[64] To establish the rules about the publishers' rights, the most important thing is to clarify the nature of copyright as a statutory-grant right. *See infra* text accompanying notes 83-107. If the copyright owners' exclusive rights are limited, the possibility of the publishers' overcontrol on the book trade is comparatively low. The other way is to use the First Amendment as an aid to restraint of the Congressional power on granting rights to publishers. *See infra* text accompanying notes 66-82.

[65] The title of the 1790 Copyright Act stated that it was "An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned." 1 Stat. 124 (1845).

B. The Free Speech Rights in the First Amendment

Due to the English history of censorship and press control, the purpose of the First Amendment is to prevent any unreasonable control on the flow of information.

Although the First Amendment was adopted in 1790, the development of the free speech concepts were relatively late. Not until recent decades did the Supreme Court develop the free speech rights as the right to hear, speak, read, and print. It is a public's right of access to and dissemination of ideas.[66]

(1). The Relationship between Copyright and the Free Speech Rights

Copyright and the free speech rights are related because both of them deal with the same subject matter--- information. The purpose of the First Amendment is to promote the flow of information by forbidding Congress on making laws to abridge the freedom of speech and of the press. The Copyright Clause, however, gives Congress the power to grant the exclusive proprietary right to authors. The use of the exclusive right may constitute infringement. It seems that the exclusive right is a restraint on the free speech rights.

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[66] That the free speech rights include the right of access is a modern concept which was established by the following cases: Board of Education v. Pico, 457 U.S. 853 (1982) and Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).

In fact, copyright and the free speech rights complement to each other. The free speech rights protect people's freedom of speech and print. The creations and distribution of the works would not be censored. The purpose of copyright for the progress of learning would be promoted. The free speech rights can protect the freedom of copyright.

On the other hand, the granting of copyright to authors is a method to improve the free speech rights. The purpose of giving authors the exclusive right in a limited time is for encouraging their creations and distribution. If there are more works created and distributed, the public would have more opportunities to read and hear. Besides this, at the time the Copyright Clause was codified, the "exclusive right" meant the exclusive printing, publishing and vending right only.[67] Authors do not have the absolute exclusive right to control the works. Although giving copyright to authors sacrifices part of the public interests temporarily, it promotes the flow of information in the long run. Copyright does not abridge the free speech rights, but improves them.

Moreover, the Copyright Clause is a promotion of learning clause. Promotion of learning requires a right of access to the works. The Copyright Clause has free speech values. This point of view can also be verified by the history. The Copyright Clause was enacted from the title of the Statute of Anne. There were four provisions in the Statute of Anne which protected the right of access. Section I limited the terms of

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[67] *See supra* text accompanying notes 53-60.

copyright and created the public domain.[68] Section IV was a price-control provision.[69] Section V required that nine copies of each books should be delivered to the Stationers' Company for the use of the libraries of nine universities.[70] Section VII removed the restrictions on the importation, vending, or selling of books in foreign language printed beyond the seas.[71] The Statute of Anne had free speech values. The Copyright Clause has this free speech values and does not conflict with the First Amendment.[72]

When Congress legislates the copyright acts according to the language of the Copyright Clause, the First Amendment is an aid to prevent Congress from enacting laws which violate the public interests. Congress did it well in the nineteenth century. However, the application of copyright to new technology of communication corrupts the existed balance between copyright and the free speech rights in the twentieth century.

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[68] 8 Anne, c. 19, §I.

[69] *Id.* §IV.

[70] *Id.* §V.

[71] *Id.* §VII.

[72] About the relationship between copyright and the free speech rights, *see* PATTERSON & LINDBERG, *supra* note 1, at 123-28.

(2). The Development of the Free Speech Rights

Before examining the achievement of the free speech rights, it is necessary to clarify the priority between copyright and the free speech rights. Copyright is an exception to the free speech rights. The free speech rights are people's political rights which protect the public interests. Theoretically, public interests are more important than individual's proprietary interests. Furthermore, the proprietary right is one of the people's political rights which need to be recognized and enforced by the government. The priority of the free speech rights is superior to authors' copyright. The authors' proprietary right should be protected under the premise that they will not endanger the public interests.[73]

In the nineteenth century, both legislative and judicial development implemented the right of public access. Congress legislated that publication was a requirement for obtaining copyright.[74] The courts developed three fundamental principles to protect public's right of access. In *Wheaton* v. *Peters*,[75] the Supreme Court decided that an author can only have the rights granted by the statute after publication.

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[73] *See id.* at 131.

[74] In the first copyright act of 1790, section 3 required that the author or proprietor "shall, within two months from the date (of deposit a printed copy of the title of the work) thereof, cause a copy of the...record(of the work) to be published in one or more of the newspapers printed in the United States, for the space of four weeks." 1 Stat. 124 §3 (1845). This publication requirement is eliminated by the 1976 Copyright Act.

[75] 33 U.S. (8 Pet.) 591 (1834).

This statutory-monopoly principle rejected the author's absolute rights on the work and ensured the right of access.[76] The Supreme Court later in *Baker* v. *Selden*[77] established the limited-protection principle which distinguished ideas from expression and protected the users' right of using ideas.[78] The fair use principle was founded by Justice Story in *Folsom* v. *Marsh*.[79] This case made a distinction between a use of the work and a use of the copyright, thus prevented from binding individual's personal use upon the fair use restriction.[80] These principles protect the free speech rights even though they are developed as copyright law.[81]

The free speech became an issue in the twentieth century. There are three development in the twentieth century which endangers the right of access. One is the expansion of the copyright owners' exclusive rights to encompass the right to copy. Another is the elimination of the publication requirement. The codification of the fair use doctrine further endangers the users' right of access.

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[76] *See generally* PATTERSON & LINDBERG, *supra* note 1, at 61-64.

[77] 101 U.S. 99 (1879).

[78] *See generally* PATTERSON & LINDBERG, *supra* note 1, at 60-61.

[79] 9 Fed. Cas. 342 (No. 4901)(C.C.D. Mass. 1841).

[80] *See generally* PATTERSON & LINDBERG, *supra* note 1, at 66-68.

[81] About the American experience of free speech rights, *see* Patterson, *Free Speech and Copyright*, *supra* note 62, at 33-36.

The most important method to save the foundering free speech rights is to have a unified theory about the nature of copyright. For promoting the flow of information, copyright should be regulatory in nature and construed as a statutory-grant right. An effective distinction between the use of the work and the use of copyright is the basis for protecting the users' right of access.[82] The argument about the nature of copyright is the most controversial issue in the copyright history.

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[82] *See* PATTERSON & LINDBERG, *supra* note 1, at 132-33.

CHAPTER 4

THE NATURE OF COPYRIGHT

The Copyright Clause of the U.S. Constitution does not explicitly endorse or reject the author's common-law right.[83] The 1790 Copyright Act, provided no conclusive answer about this issue, either. The nature of copyright remained as undecided at the beginning of American copyright legislation.

The issue of the common-law copyright did not come into focus until 1834 when *Wheaton v. Peters* was brought to the Supreme Court.[84] *Wheaton v. Peters* was viewed as the American counterpart of *Donaldson v. Beckett*. Its holding exempted the application of the common-law copyright from the federal copyright system. Since the common-law copyright was still effective in the state law after the *Wheaton* case, the debate about the nature of copyright had not ceased.

The most unfortunate result of this controversy is the inability to distinguish the use of the work and the use of copyright. The use of the material object in which the work is embodied is a use of the work; the exercise of the exclusive rights of the copyright owners is a use of

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[83] About this issue, *see* Howard B. Abrams, *The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright*, 29 WAYNE L. REV. 1119, at 1174-78 (1983).

[84] 33 U.S. (8 Pet.) 591 (1834).

copyright.[85] This distinction is the basis for deciding the scope of personal use. The failure to distinguish between the use of the work and the use of copyright impedes the distinction between the personal use by a consumer and the fair use by a competitor.[86]

The nature of copyright in the 1976 Copyright Act is a statutory-grant right. This statute, basically, reflects the purpose of copyright as the promotion of learning. Since the copyright owners still act as copyright is their own private property right, a detailed explanation about the nature of copyright is thus necessary and important.

A. *Wheaton v. Peters*

Richard Peters, after succeeded Henry Wheaton as the reporter for the U.S. Supreme Court, announced a circular about publishing the whole series of the decisions argued and adjudged in the Supreme Court from its organization to January term, 1827, which might include the cases already published by Wheaton. Wheaton and his publisher, Robert Donaldson, sent a plea to prevent Peters' plan, but Peters ignored it and published his *Condensed Reports*. The third volume of the *Condensed Reports* contained some cases reported earlier in *Wheaton's Reports*. Wheaton and Donaldson filed a

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[85] *See* PATTERSON & LINDBERG, *supra* note 1, at 120-22.

[86] *Id.* at 197-200.

bill in the Circuit Court in Pennsylvania for seeking an injunction against Peters and his publisher, John Grigg.[87]

Wheaton and Donaldson claimed a copyright in the *Wheaton's Reports* both under the copyright statute and the common law. Peters denied that his *Condensed Reports* was a violation of the complainants' rights. He averred that: first, Wheaton and Donaldson had not performed the requisites of the Copyright Act; second, there was no common-law copyright in the United States; and third, *Wheaton's Reports* was not a work entitled to copyright, either by the statute or by the common law.

Judge Hopkinson of the circuit court first considered the complainants' right under the statute. The evidence provided by the plaintiff was insufficient to prove a valid compliance of the fourth section of the 1790 Copyright Act which required a delivery of a copy of the work to the secretary of state within six months after publication.[88] The question was whether this compliance was indispensable for an author to obtain statutory copyright. According to the decision of *Ewer*

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[87] *See* PATTERSON, HISTORICAL PERSPECTIVE, *supra* note 6, at 203-04.

[88] There were four conditions to be complied with for obtaining copyright protection. Section 3 of the 1790 Act required an author to deposit the title of the book in the clerk's office. 1 Stat. 124-26 §3 (1845). Then, according to §1 of the 1802 Act, it was necessary to insert the copy of the record made by the clerk in the page of the book next to the title. 2 Stat. 171 §1. Section 3 of the 1790 Act further required a public notice in the newspapers within two months after deposit for the space of four weeks. Section 4 of the 1790 Act requested an author to deliver a copy of the work to the secretary of state within six months after publication. 1 Stat. 124-26 §4. The testimony for Wheaton alleged that eighty copies of *Wheaton's Reports* were delivered to the department of state. The court thought that this delivery under the reporter's act did not exonerate Wheaton from depositing a copy of his work required by the 1790 Copyright Act. Wheaton failed to comply with §4 of the 1790 Act. Wheaton v. Peters, 29 Fed. Cas. 862, at 863-65 (No. 17,486) (C.C.E.D. Pa. 1832).

v. Coxe,[89] the circuit court ruled that the statutory provisions was essential, rather than merely directory, to be complied with for an author to obtain his or her title.

About the claim of author's common-law copyright, the court, based on the reasoning of *U.S. v. Worrall*,[90] ruled that there was no common law existed in the U.S. federal government. In the case of state common-law right, the court said that, even though the states followed the English common-law system, there were no states adopted the whole of the common law from England and every states adopted different provisions because of different regional needs. Even in England, the issue about the existence of the common-law copyright had not been settled. Judge Hopkinson concluded that no common-law copyright was set up "in the colonies, in the states, or in the United States,..."[91] He dissolved the injunction and dismissed the bill.[92]

Wheaton appealed to the Supreme Court.[93] The only point unanimously agreed to by the judges of the Supreme Court was that the court's opinions can not become the subject matter of copyright. However, the notes, syllabus, summaries and index about the cases still could be copyrighted.[94] The two

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[89] 8 Fed. Cas. 917 (No. 4,584) (C.C.E.D. Pa. 1824).

[90] 28 Fed. Cas. 774 (No. 16,766) (C.C.D. Pa 1798).

[91] Wheaton v. Peters, 29 Fed. Cas. 862, 872.

[92] Wheaton v. Peters, 29 Fed. Cas. 862 (No. 17,486) (C.C.E.D. Pa. 1832).

[93] Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834).

[94] 33 U.S. (8 Pet.) 591, 698g (Brightly's 3rd ed.).

main issues in this case were: first, does an author have a right at common law after publication? and second, do the conditions required by the statute have to be strictly complied with for securing copyright?

The opinion of the majority, written by Justice McLean, was based on the theory that copyright is a monopoly. The author has no right to hold a perpetual property in the ideas, instruction or entertainment afforded by the book.[95] Under this premise, the majority held that there is no common-law copyright of the U.S. federal system unless the federal legislation explicitly adopt it. Since the federal government is composed of many states which have different local usage, customs and common law, any federal principles have to be clearly embodied. The plaintiff's assertion of common-law right should be determined under the law of Pennsylvania. After discussing *Millar v. Taylor*[96] and

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[95] The following paragraph can express this basic assumption of the majority: "That an author, at common law, has a property in his manuscript, and may obtain redress against any one who deprives him of it, or by improperly obtaining a copy endeavours to realise a profit by its publication, cannot be doubted; but this is a very deferent right from that which asserts a perpetual and exclusive property in the future publication of the work, after the author shall have published it to the world.

The argument that a literary man is as much entitled to the product of his labour as any other member of society, cannot be controverted. And the answer is, that he realises this product by the transfer of his manuscripts, or in the sale of his works, when first published.

A book is valuable on account of the matter it contains, the ideas it communicates, the instruction or entertainment it affords. Does the author hold a perpetual property in these? Is there an implied contract by every purchaser of his book, that he may realise whatever instruction or entertainment which the reading of it shall give, but shall not write out or print its contents." *See* 33 U.S. (8 Pet.) 591, at 657.

[96] 4 Burr. 2303; 98 Eng. Rep. 201 (1769).

Donaldson v. Beckett,[97] the majority thought that the existence of author's common-law right in England was still in doubt. Even if the author's common-law right were shown to exist in England, no one can contend that Pennsylvania adopted all the provisions of English common law. Moreover, long before the issue of author's common-law right was emerged, the colony of Pennsylvania was settled. The common-law copyright had not been recognized in Pennsylvania.

The basic premise of the dissenters was that an author, as a creator, had a natural-law property right on the work. The dissenting opinions, by Justice Thompson and Justice Baldwin, relied on the decision of *Millar v. Taylor* and thought that an author had a common-law copyright. *Donaldson v. Beckett*, based on the Burrow's Reports, did not overrule *Millar v. Taylor*, but affirmed it. The copyright statute was enacted to protect an existing right, but not to create it.

About the second question, the majority held that strict compliance of the statutory requirements was essential to a perfect title. It was not appropriate for the court to determine the requirements were important or not, but the legislature. However, the court was not satisfied with the circuit court's finding about whether Wheaton deposited a copy of his book in the state secretary's office, so it remanded to a jury of the circuit court to decide this fact. The case was reversed.

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[97] 4 Burr. 2408; 98 Eng. Rep. 257; 1 Eng. Rep. 837 (1774); 17 Cobbett's Parl. Hist. 953 (1813).

The requirements of the statute, according to the dissenters, were partly mandatory and partly directory. Requiring a strict compliance was not equitable to Wheaton who enjoyed copyright peacefully for a long time. Even if Wheaton did not completely comply with the statutory conditions, his copyright had not expired. The Congress did not intend to make these requirements indispensable.

Wheaton v. Peters settled the concept of copyright as a statutory-grant monopoly. This result is necessary for promoting the purpose of copyright. Regulating the rights between authors, entrepreneurs and users through legislation is the best way to ensure the promotion of learning.[98] The copyright owners' absolute control on the work will become an obstacle of the progress of learning. Copyright should be a statutory-grant right.

The defect of the *Wheaton* case was that the majority opinion did not speak with determination on the point that the common-law copyright did not exist in England because *Donaldson v. Beckett* rejected it. The reasoning that Pennsylvania did not adopt the English common-law copyright seemed to imply that the common-law copyright was recognized in England.[99] This misinterpretation of *Donaldson v. Beckett* reinforced the confusion about the nature of copyright.

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[98] *See* PATTERSON & LINDBERG, *supra* note 1, at 122.

[99] This misreading of Donaldson v. Beckett was probable because of the over reliance on the *Burrow's Reports*. In fact, the *Burrow's Reports* did not contain the whole process and content of Donaldson v. Beckett. In *Burrow's Reports*, Millar v. Taylor consisted of over one hundred pages and Donaldson v. Beckett only ten pages. Donaldson v. Beckett was just like an appendix of Millar v Taylor. It was easy to be misled on

B. The Nature of American Copyright

Theoretically, *Wheaton v. Peters* had already mandated the nature of American copyright as a statutory-grant right. However, the common-law copyright did not stop its influence on later judicial decisions, which created confusion about the nature of copyright. The reason was partly because of the misconception about the existence of the common-law copyright. Since an author had the common-law right before publication, this caused the assumption that an author just transferred his or her common-law right to a statutory-grant right after publication. Plus the misunderstanding about the existence of the common-law copyright in England, the result was the claim that common law was the theoretical basis of statutory copyright. Copyright had a dual and contradictory theoretical basis and thus the confusion about the nature of copyright was enhanced.

In fact, the common-law copyright had never existed in the Anglo-American copyright history. Copyright originated and continuously functioned as a statutory-grant right. The issue of an author's common-law right was always litigated under the situation that there was a copyright statute. The

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the point that the House of Lords agreed with the decision of Millar v. Taylor and recognized the common-law copyright. A complete report of Donaldson v. Beckett is in *Cobbett's Parliamentary History* which demonstrates that the lords rejected the common-law copyright. *See* PATTERSON & LINDBERG, *supra* note 1, at 37-38. *See also* Abrams, *supra* note 83, at 1183-84.

publication was always a requirement for obtaining copyright. [Not until the 1976 Act, the publication requirement was eliminated.] Copyright was obtained because of publication, but not creation. Creation of a work was a necessary but not sufficient condition for obtaining copyright. The common-law copyright had never existed except the five years between the *Millar* case and the *Donaldson* case. The rejection of the common-law copyright by *Donaldson v. Beckett*[100] and *Wheaton v. Peters*[101] made this right a stillborn concept. After the decision of *Wheaton*, it was the name of the common-law copyright itself which misled that there was another kind of copyright existed other than the statutory copyright. The common-law copyright, nonetheless, was just a name and played no role after a work was published.[102]

This controversy about the nature of copyright impeded the development of the subordinate rules. The most deplorable result may be the difficulty to distinguish the difference between copyright and the work which copyright is subject to. Following the natural-law theory, it is no need to have any distinction between copyright and the work, since all the interests upon the work belong to the author and(or) the copyright owner even after publication. Any use of the copyrighted work, except those conferred by the statute, may

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[100] 97. 4 Burr. 2408; 98 Eng. Rep. 257; 1 Eng. Rep. 837 (1774); 17 Cobbett's Parl. Hist. 953 (1813).

[101] 33 U.S. (8 Pet.) 591 (1834).

[102] *See* PATTERSON & LINDBERG, *supra* note 1, at 118-120.

constitute infringement. However, if complying with the statutory-grant theory, the copyright owner has only the rights granted by the statute. Other rights are free for use by society. A valid distinction between copyright and the work plays an important role in the distinction between the use of copyright and the use of the work.

The 1976 Copyright Act finally determines the nature of copyright by abolishing the common-law copyright. Section 301 makes copyright exclusively a matter of federal law and rejects the application of common law and statutes of any State.[103] Copyright thus is governed by a single sovereign.

Before the 1976 Act, ownership of the work was governed by the state law and ownership of copyright by the federal law. The federal courts had no legal basis to separate copyright and the work, since the rights conferred by ownership of the work was a matter of state law. After the 1976 Act makes copyright solely a matter of federal law, the work is also governed by the federal government. Section 202 then makes a distinction between ownership of a copyright and ownership of any material object.[104]

However, the 1976 Act does not have any provisions to deal with the ownership of the work explicitly. Since an author creates the work, the only logical candidate to own the work is the author. Under the 1976 Act, an author obtains copyright of the work at the moment when he or she has fixed

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[103] 17 U.S.C. §301 (1994).

[104] *Id.* §202.

the ideas in a tangible medium of expression.[105] That is, an author owns both copyright and the work upon creation. Because copyright is distinct from the work, the assignment of copyright does not mean the assignment of the work. Moreover, §203 gives the author a termination right which is inalienable and limited to the author or heirs.[106] Just like a reversionary interest in real property, this termination interest needs a proprietary basis for claiming the right. The proprietary basis of copyright has to be the work. It implies that the author owns the work because he or she has the inalienable termination right. The ownership of the work remains in the author.

The nature of copyright is a statutory-grant right. Copyright owners can only have the rights granted by the statute and other rights belong to the public. This statutory-grant theory requires a valid distinction between copyright and the work. The use of copyright and the use of the work are totally two different things. The distinction between copyright and the work is just the basis for analyzing the users' rights.[107]

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[105] *Id.* §102(a).

[106] *Id.* §203.

[107] There is a great explanation about the nature of copyright in PATTERSON & LINDBERG, *supra* note 1, at 109-22.

CHAPTER 5

THE ENDANGERED RIGHT OF ACCESS

The purpose and nature of copyright are both designed for protecting the users' right of access in order to promote learning. But the development of copyright in the twentieth century tends to expand copyright owners' exclusive rights, which unfortunately endangers the users' right of access.

In the 1909 Copyright Act, Congress expanded the copyright owners' exclusive rights by adding the right to copy in the grant-of-rights section.[108] Later in the 1976 Act, copyright owners were given the right to reproduce the copyrighted works in copies or phonorecords.[109] The assumption derived from this expansion was that the copyright owners had a complete and absolute right to copy a work, which inhibit users' right of access to copy the copyrighted work for personal use.

The elimination of the publication requirement and the codification of the fair use doctrine in the 1976 Act further endangers users' right of access. To accommodate copyright to the new communications technology, the publication requirement is eliminated because this kind of works are

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[108] 17 U.S.C. §1(a) (1909 Act).

[109] 17 U.S.C. §106 (1994).

performed rather than published.[110] The long-term safeguard of the right of access vanished.

The codification of the fair use doctrine enables copyright owners to claim that any use of the copyrighted works should be governed under the fair use restrictions, including personal use.[111] The result is a personal users' tax.

Since the subordinate principles and rules shall be decided according to the policies, the interpretation of these three changes will be based on the purpose and nature of copyright. This chapter will explain the right to copy and the elimination of publication requirement. The personal use and the effect of the codification of the fair use will be discussed in the next chapter.

A. The Right to Copy

The verb "to copy" has two meanings. It means to duplicate an original (for example, with a photocopying machine or a videotape recorder) or to imitate an original by using it as a model (for example, to translate, digest, or abridge a copyrighted work).[112]

This distinction can be clearly explained when we examine copyright in the nineteenth century. Before the 1909 Act,

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[110] *Id.* §102(a).

[111] *Id.* §107.

[112] *See* PATTERSON & LINDBERG, *supra* note 1, at 146-47.

copyright owners had only the right to print, reprint, publish, and vend the work.[113] Another author could not duplicate the copyrighted work for sale, but could freely imitate the work through the way of abridging, digesting, or translating. Individual users had no interests in copying by imitation the copyrighted work, but could duplicate it. Since to buy a book was cheaper and more convenient than to duplicate it, individual users' duplication was thus not an issue. Even if someone spent a lot of time and energy to duplicate a book by hand, it would not affect the market.

The new technology is the reason that makes the right to copy an issue. The photocopying machine and the videotape recorder give users a convenient and cheap method to copy the copyrighted works. Copyright owners claim that their profit is seriously harmed by individual users' copying. The issue now is what is the scope of the copyright owners' reproduction right?

The key point to the scope of the right to copy is whether this right is a dependent or an independent right.[114] If it is a dependent right exercised for vending the work, users will also have the right to copy within a reasonable scope. If it is an independent right with absolute and complete strength, any users' copying of the copyrighted work may constitute infringement.

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[113] 1 Stat. 124 §1 (1790 Act) (1845); 4 Stat. 436 §1 (1831 Revision Act) (1845).

[114] *See* L. Ray Patterson, *Understanding Fair Use*, *supra* note 2, at 260.

(1). In the 1909 Copyright Act

Section 1(a) of the 1909 Copyright Act gave copyright owners the exclusive right to "print, reprint, publish, copy, and vend the copyrighted work."[115] The right to copy was a new right for the copyright owners. The purpose for Congress to add this right was for protecting the art works on the market.

Before the 1909 Act, the proprietor of book, map, or chart had the right to print, reprint, and publish the work. But the right to publish could not provide enough protection for the works of art, the Congress then gave the art works the right to copy the work in order to provide reasonable chance for the art works to obtain profit on the market.[116]

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[115] 17 U.S.C. §1(a) (1909 Act).

[116] The House report on the bill that became the 1909 Act said that the addition of the right to copy was just an adoption of old phraseology, which did not change the phraseology of section 4952 of the Revised Statutes. H.R. Rep. No. 2222, 60th Cong., 2d Sess. 4 (1909).

Section 4952 of the Revised Statutes was as follows:

> "The author, inventor, designer or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph or negative thereof, or of a painting, drawing, chromo, statue, statuary, and of models or designs intended to be perfected as works of the fine arts,...shall...have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same...." 26 Stat. 1106, at 1107 (1891).

The meaning of section 4952 of the Revised Statutes was that one could have the right to print, reprint, and publish a book, map, or chart, to execute and finish models or designs, or to copy an engraving, cut, print, photograph, painting, drawing, chromo, statue, or statuary. The right to copy applied to works of art only.

Sections 4964 and 4965 of the Revised Statutes which distinguished the conduct that infringed a book from that infringing upon other kinds of works supported this interpretation. Section 4964 stated that to print, publish, or import a book without the consent of the copyright

However, the right to copy was granted in the grant-of-rights section. Supposedly, it applied to all kind of works. No matter the right to copy applied to all works or the art works only, the purpose of this right was for protecting the work on the market, just like the purpose of the right to print, reprint, and publish was.

The purpose of the right to print, reprint, and publish was for vending the works since the stationers' copyright. During the era of the stationers' copyright, the printers had the right to print and reprint,[117] and the booksellers had the right to publish. The purpose of these three rights was for vending the books on the market. The right of print, reprint, or import in the Statute of Anne was still for vending the works. The meaning of the right to print, reprint, and publish from the 1790 Act to the 1909 Act kept as the same. This is the market principle which manifests the purpose of copyright as protecting the works for the market. This principle continues to function as one of the major principles of American copyright.[118]

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owner was an infringement. 26 Stat. 1106, at 1109; *see also* The Revised Statutes of the United States, 43d Cong., 1st Sess. 957-60, at 959 (1878). Section 4965 said that to engrave, etch, work, copy, print, publish, or import copyrighted works other than a book without permission from the copyright owner was an infringement. *Ibid.* It implied that to copy a book was not an infringement of copyright. The right to copy was a general right but applied only to the works of art.

[117] The custom of the book trade during the stationers' copyright was to print the first version of the book at the amount of 1,200 copies or less, so it might often require reprinting. This was why the printers had not only the right of print, but also the right of reprint. *See* PATTERSON & LINDBERG, *supra* note 1, at 65.

[118] *Id.* at 64-66.

The scope of the right to copy could not be broader than the scope of the right to print, reprint, and publish. So the purpose of the right to copy was also for vending the works. The exact meaning of the exclusive rights in the 1909 Act, thus, was the right to print and vend, the right to reprint and vend, the right to publish and vend, and the right to copy and vend.

The unfortunate result of adding the right to copy in section 1(a) as a general right was that it gave the copyright owners an excuse to claim that their right to copy was a complete and absolute right. Actually, when the 1909 Act was enacted, the photocopying machine had not invented yet. There was no reason for the Congress to give copyright owners the right to copy to prevent users' copying by photocopying machine at the prephotocopying era. The right to copy in the 1909 Act was a dependent right for vending the works.[119]

(2). In the 1976 Copyright Act

Section 106 of the 1976 Copyright Act gives copyright owners[120] five exclusive rights: (1) to reproduce the

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[119] About the explanation of the meaning of the right to copy in the 1909 Act, *see* Patterson, *Understanding Fair Use*, *supra* note 2, at 258-60. *See also* PATTERSON & LINDBERG, *supra* note 1, at 81-85.

[120] The definition of the "copyright owner" in §101 of the 1976 Act is with respect to "any one of the exclusive rights comprised in a copyright, and refers to the owner of that particular right." 17 U.S.C. §101 (1994).

copyrighted work in copies; (2) to prepare derivative works; (3) to distribute copies of the copyrighted work to the public; (4) to perform it publicly; and (5) to display it publicly.[121]

Among these five rights, the adaptation right, public distribution right, public performance right, and public display right are granted for marketing the work. The issue is whether the reproduction right is granted for marketing the work or for implementing the other four rights.

The right to reproduce in the 1976 Act is a dependent right for implementing the other four rights. To prepare derivative works, the copyright owner must copy the original work by using it as a model, that is, by imitating it. For

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[121] *Id.* §106. In the 1976 Copyright Act, there is no manifest definition about the "exclusive rights," but it has the definitions about other key terminology of section 106 in section 101.

A "derivative work" is "a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a derivative work."

To "perform" a work means "to recite, render, play, dance, or act it,...in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible."

To "display" a work means "to show a copy of it,...in the case of a motion picture or other audiovisual work, to show individual images nonsequentially."

To perform or display a work "publicly" means "(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process[], whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times."

Id. §101.

distributing a work to the public, it is necessary to reproduce the original work in copies by duplication. For the same reason, to exercise the public performance right or the public display right, the copyright owner must duplicate the original work in copies or phonorecords. For example, it is necessary to duplicate a motion picture in copies for repeated and wide public performance, or to duplicate individual images of the motion picture in copies for public display. The right to reproduce functions to implement the right of adaptation, public distribution, public performance, and public display.

The argument that the reproduction right is an independent right does not possess a sound theoretical ground when we explain it in light of the whole grant-of-rights section. In §106, the distribution right, the performance right, and the display right are protected only when the rights are exercised publicly. If an user distributes, performs, or displays a copyrighted work privately, it is not an infringement of copyright. If the reproduction right is an independent right with absolute power, no matter what the reason an user reproduces the copyrighted work, it will constitute an infringement. The copyright owners' exclusive rights would be expanded unreasonably to the extent that an user's reproduction for private distribution, performance, or display constitutes an infringement. The statutory limitations imposed on the exclusive rights would be negated under this kind of wrong interpretation of the right to copy.

The reproduction right is and should be a dependent right when §106 is interpreted as an integrated whole.[122]

There are two kinds of rights in §106. The adaptation right, public distribution right, public performance right, and public display right are subject rights which can be independently exercised for implementing the function of copyright --- marketing the work for profit. The reproduction right is a predicate right which is dependent in nature for implementing the function of the subject rights.

This kind of interpretation reflects the purpose of copyright for promoting learning and the nature of copyright as a statutory-grant right. Since the public interests is superior to the copyright owners' private interests,[123] the scope of exclusive right can not be broader than the extent that the copyright owners have unreasonable monopoly to control the market. The method to prevent copyright owners' monopoly is to keep the works provided on the market with a reasonable price. If the right to copy is an independent right, even though the work is not available with a reasonable price, personal users can not duplicate it. Thus, the copyright owners' monopoly would be enhanced and the purpose of copyright would be inhibited.

The nature of copyright is that copyright is a statutory-grant right. Copyright owners can only have the exclusive

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[122] *See* Patterson, *Understanding Fair Use*, *supra* note 2, at 260-61.

[123] *See supra* text accompanying notes 43-82.

rights granted by the statute.[124] If the right to copy is an independent right with exclusive and absolute power, it would override the public limitation that §106 imposed on the distribution right, performance right, and display right. The right to copy should be a dependent right.

A reasonable conclusion as to the scope of the right to copy is that this right is a dependent right for implementing the subject rights. If an user's copying is for private reasons without exercising any subject rights, it does not constitute an infringement. That is, personal users have the right to reproduce the copyrighted works, since it does not use copyright but only use the work.

B. The Elimination of the Publication Requirement

According to §102(a) of the 1976 Copyright Act, copyright comes into existence while the work is "fixed in any tangible medium of expression."[125] Authors obtain copyright right after the work is created and fixed. The publication requirement as a quid pro quo for copyright protection is eliminated.

This change is for protecting copyright of the new communications technology, especially for television

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[124] *See supra* text accompanying notes 83-107.

[125] 17 U.S.C. §102(a). The content of §102(a) is as follows: "Copyright protection subsists,...in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device...."

broadcast. The marketing method of the communications technology is to transmit the work through public airwaves. The transmission is a kind of performance, which is different from the traditional publication. Publication assures users' access to the works, however, performance threats the right of access.

Print materials require publication in order to obtain profit even though publication is not a requirement for copyright protection. Publication makes print materials at least be available on the library shelves. It ensures not only the contemporary accessibility to the copyrighted works but also the future availability for the public domain.[126]

However, the performance of a work does not guarantee the subsequent availability of the works. After a work is performed, it may not be published on the market, may not be available on the library shelf, and may be erased after the performance. Copyright owners obtain copyright protection and a profit through the initial performance, and still control the further accessibility to the works.[127]

This kind of protection for the electronic copyright is detrimental to the constitutional purpose as the promotion of learning. Learning requires access to the works. Distribution of the works ensures the access. The best way to promote learning is to encourage the distribution but not only

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[126] *See* PATTERSON & LINDBERG, *supra* note 1, at 100.

[127] *Ibid.*

encourage the creation of works.[128] The purpose of the creation requirement is to prevent the works in the public domain been under copyright monopoly repeatedly. The excessive protection which gives the copyright owners of the electronic media the right to control the access to the copyrighted works inhibit learning.

Television programs not only provide entertainment but also shape public opinion. Its role on modern life is significant. To broadcast in a rigid period of time without future availability derogates the public interests. An explicit rule to protect public's right of access is necessary. The Supreme Court protects individual users' right to copy the motion pictures broadcast on television by videotape recorders for private use in *Sony Corp. of America v. Universal City Studios, Inc.* (the Betamax case).[129] A further protection of the right of access by imposing the duty on copyright owners to provide subsequent availability of the works after performance is also vitally important for the promotion of learning. Copyright is a statutory-grant

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[128] *Id.* at 49-50; *see also* Patterson, *Free Speech, Copyright, and Fair Use*, *supra* note 62, at 6-8.

[129] 480 F. Supp. 429 (C.D. Cal. 1979), *rev'd*, 659 F.2d 963 (9th Cir. 1981), *rev'd*, 104 S. Ct. 774 (1984). The Supreme Court held that "manufacturers of home videotape recorders demonstrated a significant likelihood that substantial numbers of copyright holders who licensed their works for broadcast on free television would not object to having their broadcasts time shifted by private viewers and owners of copyrights on television programs failed to demonstrate that time shifting would cause any likelihood of nonminimal harm to the potential market for, or the value of, their copyrighted works and therefore home videotape recorder was capable of substantial noninfringing uses; thus, manufacturers' sale of such equipment to general public did not constitute contributory infringement of respondents' copyrights." 104 S. Ct. 774, at 774.

right for promoting the public interests, but rather a proprietary right for protecting copyright owners' private interests.

CHAPTER 6

THE PERSONAL USE PRINCIPLE

There is no specific statutory rules about the personal users' rights in the 1976 Act. The lack of statutory rules for personal use is probably because personal use had not become an issue until the emergence of new technologies. The source of personal users' rights is the Copyright Clause of the Constitution.[130] The purpose of copyright in the Copyright Clause is to promote learning. The assumption follows that more use of the work makes greater promotion of learning. Thus, protection of citizen's right to use the work is necessary for attaining the constitutional purpose. The individual users' rights are protected by the Constitution.

The controversy about the personal users' rights is the individual's right to copy the copyrighted works for private reasons. The design of the 1976 Act makes this controversy more complex. Section 106 is the rule about the copyright owners' exclusive rights.[131] Following §106, sections 107 through 120 are limitations on exclusive rights.[132] This kind of design results in the assumption that the copyright

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[130] U.S. CONST. art.I, §8, cl.8.

[131] 17 U.S.C. §106 (1994).

[132] *Id.* §§107-120.

owners' exclusive rights have absolute strength subject to limitations only. Under this proposition, personal use is one of the exception of the copyright owners' exclusive rights, rather than a right from the Constitution.[133]

According to our analysis of the nature of copyright as a statutory-grant right, copyright owners can have the right granted by the statute only.[134] They can just have the rights granted in section 106. Their right to reproduce is a dependent right.[135] Personal users have the right to copy the copyrighted works.

The reason that really blurs the personal users' rights in the 1976 Act is the codification of the fair use doctrine. Section 107 says that the fair use of a copyrighted work is not an infringement of copyright. There are four non-exclusive criteria in this section to decide an use is fair or foul.[136] Since there is no independent rules about personal users' rights, the assumption is that every use should apply to those criteria to determine its legitimacy, including personal use.

In fact, personal use is different from fair use. There are two different kind of users' rights: one is the fair use of a copyright by an author, and another is the personal use of a work by an individual. Personal use does not need to be

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[133] *See* PATTERSON & LINDBERG, *supra* note 1, at 193-94.

[134] *See supra* text accompanying notes 83-107.

[135] *See supra* text accompanying notes 112-124.

[136] 17 U.S.C. §107 (1994).

governed by the fair use criteria. Its scope of use should be broader than the scope of fair use.[137]

A. Fair Use

Fair use originated as a fair-competitive-use doctrine by *Folsom v. Marsh*.[138] The codification of it in the 1976 Copyright Act does not change its nature as a fair competitive use. Fair use is designed for protecting competitive users' right to use copyright of the copyrighted works.

(1). The Origin of Fair Use

The fair use doctrine was created by Justice Story in the nineteenth century to supersede the fair abridgment doctrine. Under the 1790 Copyright Act, a second author had the right to freely abridge another author's work. The second author's work was viewed as a new work without infringing the first author's copyright.[139]

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[137] *See* PATTERSON & LINDBERG, *supra* note 1, at 193.

[138] 9 Fed. Cas. 342 (No. 4901)(C.C.D. Mass. 1841).

[139] The exclusive rights granted in the 1790 Copyright Act were the "sole right and liberty of printing, reprinting, publishing and vending..." 1 Stat. 124-26 (1845). Because copyright is a statutory-grant right, the copyright owner only had the right to print, reprint, publish and vend the work. A second author's condensation of the materials of the original work did not constitute a piracy of copyright, since it did not employ the right of printing, reprinting, publishing and vending.

In 1841, *Folsom v. Marsh* was submitted to the Circuit Court of Massachusetts in front of Justice Story.[140] The relevant issue here was whether the defendant's abridgment of the plaintiff's work was just. In this case, the defendant derived 353 of the 866 pages from the plaintiff's twelve-volume biography of George Washington in writing his own two-volume biography of the first president.[141] Justice Story overruled defendant's defense of fair abridgment and imposed three criteria to judge whether a use of the copyrighted work is fair or not:

> The question, then, is, whether this is a justifiable use of the original materials,...In short, we must often, in deciding questions of this sort, 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.[142]

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[140] When *Folsom v. Marsh* was submitted to the Circuit Court, the involved Copyright Act was the Revision Act of 1831. 4 Stat. 436 (1845). Copyright owners' exclusive rights of the Revision Act of 1831 were the same as those rights in the 1790 Act. *Id.* §1.

[141] The points made by the defendants were as follows:
"I. The papers of George Washington are no subjects of copyright....
II. Mr. Sparks (the plaintiff) is not the owner of these papers, but they belong to the United States, and may be published by any one.
III. An author has a right to quote, select, extract or abridge from another, in the composition of a work essentially new." 9 Fed. Cas. at 344.

[142] 9 Fed. Cas. at 348.

The result of this case is the creation of the fair use doctrine which enhanced copyright owners' monopoly. The litigants in *Folsom v. Marsh* were both authors, which showed the fact that fair use was created for balancing competitive authors' rights. The fair use doctrine was promulgated to give a second author the right to use another author's copyright. It was a fair-competitive-use doctrine.

(2). The Codification of the Fair Use Doctrine

The fair use doctrine served as a judicial rule to balance the competitive authors' rights until the 1976 Copyright Act. The dramatic change of the copyright concepts in the 1976 Act creates a necessity for the codification of fair use. Both the exemption of the common-law copyright which manifests that the statute is the only source of copyright and the protection of the electronic copyright which expands copyright owners' monopoly results in the codification of the fair use doctrine to prevent copyright become an obstacle for learning.

Section 107 of the 1976 Act articulates the fair use doctrine, which reads as follows:

> Section 107. Limitations on exclusive rights: Fair use
> 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.[143]

The defect of §107 is that it fails to distinguish copyright and the work. The "use of a copyrighted work" seems to imply that the use of a work is the same as the use of copyright. It further implies that the work is the copyright owners' property. Under this premise, there seems to possess no basis to distinguish the competitors' use of copyright and the consumers' use of the work.

Actually, the preamble of §107 includes examples of personal use as well as fair use. Among the six examples

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[143] 17 U.S.C. §107. About a detailed explanation of the four criteria in §107, *see generally* PATTERSON & LINDBERG, *supra* note 1, at 200-07.

which is not an infringement of copyright, scholarship and research is within the scope of personal use. However, to articulate personal use together with fair use provides copyright owners an excuse to claim that personal use must be applied to the fair use criteria in §107.

The codification of fair use in §107 of the 1976 Act almost negates its nature as a fair competitive use. Under the Copyright Clause, Congress is empowered to grant authors the exclusive right to publish, that is, Congress can legislate rules to protect the works against competitors' unfair use only. It is unconstitutional to give copyright owners the right to control consumers' use of the copyrighted works. The codification of fair use does not change its nature as a fair-competitive-use doctrine. Fair use is for protecting competitors' right of use of the copyright.[144]

B. Personal Use

Personal use is the use of the copyrighted works for one's own private reasons, which includes the copying of the works. The threat to the personal users' rights in the 1976 Act is the codification of the fair use doctrine. Copyright owners, thus, claim that personal use should be governed by the fair use of §107. The issue is whether personal use should apply to the fair use restraints.

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[144] *See* PATTERSON & LINDBERG, *supra* note 1, at 102-06.

The first thing we need to recall here is that fair use was created and still functions to protect the use of the copyright. The use of copyright entails the use of the work, but the use of the work does not necessarily entail the use of copyright. Just like the transfer of ownership of the work does not of itself convey the copyright of that work, and vice versa.[145] This justifies the wording of §107 that the "fair use of a copyrighted work" is not an infringement. Since a fair use of the copyright also entails the use of the work, the "copyrighted work" in §107 means the "fair use of copyright of the copyrighted work." Congress can only have the power to limit the use of copyright, but is not empowered to limit the use of the work. Thus, section 107 governs just the use of copyright.

The use of the copyrighted works by individual users employs the work only and does not employ the copyright. Just like we reveal previously, the reproduction right of the copyright owners is a dependent right and individual users have the right to copy the copyrighted works.[146] The duplication of the copyrighted works by personal users does not further employ copyright owners' adaptation right, public distribution right, public performance right, or public display right. That is, individual users does not employ the copyright of the copyrighted works. Only when a use employs the copyright is it necessary to judge whether this use is

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[145] 17 U.S.C. §202.

[146] *See supra* text accompanying notes 112-124.

fair or not. The constitutional purpose of copyright is to protect the copyright owners' rights against competitors, but not to inhibit individual's use for learning. Basically, all the personal use is intrinsically fair. Personal use is the use of the work which does not need to apply to the fair use restraints.[147]

In the 1976 Act, there are some rules which utilize the personal use. Section 107 itself protects the use of the copyrighted works for scholarship and research.[148] Further in subsection (d) and (e) of section 108, a library or archives has the right to reproduce a copy of the copyrighted work under the patron's request.[149] Since library or archives can reproduce the copyrighted works as an agent, a further inference of §108 is that the patron himself or herself has the same right to reproduce a copy of the copyrighted works for his or her own file.

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[147] *See* PATTERSON & LINDBERG, *supra* note 1, at 197-200.

[148] 17 U.S.C. §107.

[149] *Id.* §108. Section 108 (d) provides that a library or archives, under the request of the user, can reproduce a copy of "no more than one article or other contribution to a copyrighted collection or periodical issue, or to a copy or phonorecord of a small part of any other copyrighted work,..." Section 108 (e) permits a library or archives to reproduce for the user the entire work, or a substantial part of it if "the copyrighted work cannot be obtained at a fair price,..."

C. Personal Use Criteria

Since personal use is not inside the boundary of fair use, its copying of the copyrighted works is not subject to lengthy restrictions. Personal users can make a single copy of the copyrighted works for their own private files, but this copy can not serve as a functional substitute to avoid the purchase of the work which is now available on the market with a reasonable price.[150]

Another point is that personal users' right to copy is less applicable to the works which is created for functional purpose rather than for dissemination of knowledge. The computer program and the architectural plan are two examples. The purpose of the copying of this kind of work is almost undoubtedly for making the functional use of it. The value of the original work would be diminished by this kind of use. Under the constitutional scheme, the purpose to protect personal users' rights is to promote learning, but not to avoid the purchase of the works. If the use of the copyrighted work falls outside the scope of personal use, it should resort to fair use to decide whether this use is fair or not.[151]

An issue about the computer program in recent years is that the copyright owners tend to make their own self-regulations on restricting the use of the works by users.

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[150] *See* PATTERSON & LINDBERG, *supra* note 1, at 194.

[151] *See id.* at 194-95.

They distribute computer programs with shrink-wrapped licenses, which restrict users' right to use the works even to the extent that violate the statutory rules. The main point of their proclamation is to prohibit users' right to copy the computer programs. Because the copying of the computer programs, in most of the cases, will require the copying of the entire works, the copyright owners thus ask for special protection. This protection is to deny users' right to copy, which is protected by section 107 of the 1976 Act. While the users can not unreasonably harm the copyright owners' right by copying the entire work, the copyright owners also have no basis to negate users' right to copy if the work is not available on the market with a fair price. The point to balance these two conflict rights is to have a reasonable price of the works.[152]

Personal use is the use of the work for private reasons. It does not need to apply to the fair use restraints. The copying by personal users is not subject to length restrictions, but it can not be made for public distribution or as a functional substitute for the copyrighted work which is currently available on the market with a reasonable price.

However, the copyright owners tend to treat personal use as one of the fair use branches. The most dangerous proposition of the copyright owners is to impose a users' tax on individual's copying of the works. This inevitably endangers personal users' right of access to the copyrighted

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[152] *Id.* at 218-22.

works which is protected by the Constitution for the promotion of learning.

D. Personal Users' Tax

Personal users' tax is a fee charged at every time when the copyrighted work is copied by individual users. The earliest example of the users' tax is the tax imposed on the public performance of musical compositions charged by the American Society of Composers, Authors, and Publishers. The users' tax in this instance can be justified, since it is charged for public performance which is a kind of competitive use.[153] However, the charge of the personal users' tax is without legal sanction.

According to our analysis of the purpose and policies of copyright, the personal users' tax obstacles users' right of access if personal users have to pay tax at every time they use the copyrighted works. It inhibits learning. Copyright owners not only can profit from the primary market by selling works, but also can obtain extra benefit from the secondary market by imposing license fees on individual users.[154] The statutory right for the copyright owners to control the use of copyright extends unreasonably to control the use of the

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[153] *Id.* at 129.

[154] About copyright owners' rights on the primary market and the secondary market, *see generally id.* at 186-90.

work. The nature of copyright as a statutory-grant right is also nullified by the imposition of the personal users' tax.

The 1976 Copyright Act explicitly protects individual users' right to copy the copyrighted works. In section 107, scholars and researchers are acknowledged to have the right to reproduce the copyrighted works in copies or phonorecords within the fair scope.[155] The further inference from §107 is that if the fair users have the right to copy the copyrighted works, the personal users who just use the work ought to have the same right. Section 108 (d) and (e) permit librarians' copying of the copyrighted works for personal users.[156] The personal users' tax is both unconstitutional and without statutory sanction.

Copyright owners claim that individual users will make copy of the copyrighted works to substitute the purchase of them. If the reality is really like so, the reason is almost because of the monopolistic price of the copyrighted works. Copying a work requires expense of time, money, and energy, and means the loss of quality. The best way is to make the works more attractive on both the price and quality.

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[155] 17 U.S.C. §107.

[156] *Id.* §108 (d) & (e). The Supreme Court's decision in Williams & Wilkins Co. v. United States further confirms the users' right to reproduce the copyrighted works for research. 420 U.S. 376 (1975). The issue in this case was whether the photocopying of copyrighted articles in medical journals by government medical research institute and its library on an individual request constituted as an fair use. The Court of Claims held that this kind of copying which was limited to a single copy of a single article and to articles of less than 50 pages was a fair use. 487 F.2d. 1345 (1973). The Supreme Court affirmed it in an equally divided decision.

Copyright is for protecting the works on the market, but not to guarantee profit. A reasonable price of the work provided by the copyright owners and a reasonable right of the users to use the works are the way to balance the two conflict interests---the copyright owners' interest for profit and the users' interest for learning.[157]

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[157] About the discussion of the personal users' tax, *see* PATTERSON & LINDBERG, *supra* note 1, at 157-59; *see also* Patterson, *Understanding Fair Use*, at 262,263.

CHAPTER 7

CONCLUSION

Personal use is just a small part of copyright. The purpose of it, like any other copyright principles and rules, is for promoting the purpose of learning. Because personal use had not become an issue until the emergence of new technologies, it has not gained much attentions.

The focal point of the personal users' right is the right of access. The new technologies give personal users the convenience to use and copy the copyrighted works. Just because the ease to copy, copyright owners thus ask for excessive rights which endanger users' right of access. The scattered power of individual users is, of course, not powerful enough to fight with the organized power of entrepreneurs.

Both Congress and the courts must contribute to protect the personal users' rights. Congress is better to legislate statutory rules to protect personal users' rights. The courts, when decide specific copyright issues, should consider copyright as an integrated whole and make their decisions to reflect copyright policies and principles. The continuous enhancement of the copyright owners' exclusive rights is detrimental to the users' rights.

There are three major interests in copyright: the authors' moral rights,[158] the publishers' marketing rights,[159] and the users' learning rights.[160] The tendency of American copyright to emphasize the economic aspect results in the overdeveloped publishers' rights and the underdeveloped authors' rights and users' rights. Copyright is a comprise between the public interests and the private interests. All the three rights must accommodate to each other to accomplish the purpose of copyright as the promotion of learning.

The future path of personal users' rights should not only accommodate to the publishers' rights, but also have the legal responsibility to respect the authors' moral rights. Only when these three rights are balanced in a proper way can learning be promoted. The value of learning is just the reason why copyright is so important in our life.[161]

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[158] About details of the authors' moral rights, *see generally* PATTERSON & LINDBERG, *supra* note 1, at 163-76.

[159] About the publishers' rights, *see generally id.* at 177-90.

[160] About the discussion of the users' rights, *see generally id.* at 191-222.

[161] *See id.* at 225-41; *see also* Patterson, *Understanding Fair Use*, at 266.

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