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What's Wrong with Eldred? An Essay on Copyright Jurisprudence

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ESSAY

WHAT'S WRONG WITH *ELDRED*? AN ESSAY ON COPYRIGHT JURISPRUDENCE

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With few exceptions, the U.S. Supreme Court has rendered wise copyright decisions consistent with the Copyright Clause. Unfortunately, *Eldred v. Ashcroft*[1] adds to the exceptions. The difference is that the former are positive law, and the latter natural law, decisions.

The basis for characterizing the wisdom of a copyright decision, then, is the basis for the decision, which is that copyright is either a positive law or a natural law concept. There has been much written about positive and natural law, but the difference boils down to this: positive law is statutory law that is the result of deliberations by legislators; natural law is judicial law that is the result of what a judge thinks is right as a matter of reason. An important difference between the two concepts is that positive law is amenable to compromise, while natural law is not. (One does not compromise what is right as a matter of nature.) Consequently, when the interest of various groups must be accommodated, positive law is the only solution. Copyright is in that category, which explains Justice Holmes' position that copyright "could not be recognized or endured for more than a limited time, and therefore, . . . it is one which can hardly be conceived except as a product of a statute . . ."[2]

The positive law basis of American copyright, statutes enacted by Congress pursuant to the power granted in the Copyright Clause, was confirmed by the U.S. Supreme Court in its first copyright case, *Wheaton v. Peters*.[3] In that case, Wheaton's argument for a common law copyright based on natural law implied

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[1] 123 S. Ct. 769, 65 U.S.P.Q.2d (BNA) 1225 (2003).

[2] White-Smith Music Pub. Co. v. Apollo Co., 209 U.S. 1, 19 (1908) (Holmes, J., concurring specially).

[3] 33 U.S. 591 (1834).

that courts shared the copyright power with Congress. The Court rejected the idea, ruling that federal copyright is a matter of positive, not natural, law and left the common law copyright to the states. The states, however, were not in a position to develop natural law rights implicit in the common law copyright because when a work was published, the states lost jurisdiction and federal law took over. While the natural law copyright remained a part of American jurisprudence as a common law copyright, it remained undeveloped and a copyright in name only. It was, in fact, only the right of first publication.

Despite the presence of both a positive law and natural law copyright in American jurisprudence, the Court has usually rendered copyright decisions in accordance with the positive law concept of copyright consistent with Constitution and the public interest. Five cases decided over a hundred year period serve to illustrate the point: *Baker v. Selden*, 1879;[4] *Bobbs-Merrill v. Straus*, 1908;[5] *Sony Corp. of America v. Universal City Studios, Inc.*, 1984;[6] *Feist Publications, Inc. v. Rural Telephone Service Co.*, 1991;[7] and *Fogerty v. Fantasy, Inc.*, 1994.[8]

The test for characterizing a case as a positive law or natural law case is the allocation of rights between the copyright holder and the public. In all of the above cases, the Court rebuffed efforts by copyright holders to have the Court modify American copyright with natural law concepts and thereby increase their rights. In *Baker v. Selden*,[9] the plaintiff sought copyright protection for a system of bookkeeping. The Court ruled that copyright does not protect ideas, and in so doing rejected a backdoor approach to the natural law copyright.

In *Bobbs-Merrill Co. v. Straus*,[10] a test case, the plaintiff claimed that the defendant retailer infringed copyright by selling a book at less than the price required by the copyright notice. The claim of the power to control the resale of a book, of course, was a natural law claim that would have extended the copyright holder's rights beyond the marketplace and, arguably, would have increased them by geometric progression, and the Court rejected it.

In *Sony Corp. of America v. Universal City Studios, Inc.*,[11] another test case, the plaintiff copyright holder sought a ruling that an individual who copied a copyrighted motion picture off-the-air was an infringer. This, too, was a natural law claim intended to subject users to license fees that amounted to use taxes for viewing copyrighted motion pictures at a time other then when they were

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[4] 101 U.S. 99 (1879).
[5] 210 U.S. 339 (1908).
[6] 464 U.S. 417, 220 U.S.P.Q. (BNA) 665 (1984).
[7] 499 U.S. 340, 18 U.S.P.Q.2d (BNA) 1275 (1991).
[8] 510 U.S. 517, 29 U.S.P.Q.2d (BNA) 1881 (1994).
[9] 101 U.S. 99 (1879).
[10] 210 U.S. 339 (1908).
[11] 464 U.S. 417 (1984).

broadcast. The Court rejected it and ruled that individuals have a right to make a copy of a copyrighted work for personal viewing as a matter of fair use.

And in *Feist*,[12] the plaintiff alleged that the copying of names, addresses, and telephone numbers from the white pages of a telephone directory was infringement; the premise was that time, effort and expense in preparing the directory gave him a natural law property right that was protected by copyright, an attempt to water down the basic condition for the positive law copyright: originality. But the directory was a product of the sweat-of-the-brow doctrine, which the Court rejected as a satisfactory condition for copyright. Moreover, the Court ruled that there is a constitutional right to use uncopyrightable materials in a copyrighted work.

In *Fogerty*,[13] the claim was that only copyright holders who prevailed in litigation, not alleged infringers, were entitled to recover attorney's fees under the copyright statute. The Court held that prevailing plaintiffs and defendants must be treated alike in awarding attorneys fees under the Copyright Act. If the Court had held otherwise, it would have added to the copyright holder's arsenal of in terrorem weapons, exemplified by the draconian statutory damages available under the statute.[14] The opinion, however, is as notable for its language reaffirming the positive law basis of copyright as for its holding: " '[t]he limited scope of the copyright holder's statutory monopoly . . . reflects a balance of competing claims upon the public interest . . .' " and " 'copyright law ultimately serves the purpose of enriching the general public through access to creative works.' "[15]

An example of the rare natural law (and unwise) decision is *Buck v. Jewell-LaSalle Realty Co.*,[16] in which the Court held that the hotel receiver (for its guest rooms) of music broadcast on a radio station was liable for performing the music the same as the broadcaster. Therefore, the copyright holder was entitled to royalty payments from both. This was a natural law ruling that enlarged the property rights of the author, and the Court admitted its error sub silentio little more than a generation later by rejecting the rule in such cases as *Fortnightly Corp. v. United Artists Television, Inc.*,[17] *Teleprompter Corp. v. CBS, Inc.*[18] and *Twentieth Century Music Corp. v. Aiken*.[19]

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[12] 499 U.S. 340 (1991).

[13] 510 U.S. 517 (1994).

[14] Arguably, the copyright statute is the only law that enables a plaintiff who has suffered no harm to recover damages from a defendant who has done no wrong.

[15] *Fogerty*, 510 U.S. at 526-27.

[16] 283 U.S. 191 (1931).

[17] 392 U.S. 390 (1968).

[18] 415 U.S. 394 (1974).

[19] 422 U.S. 151 (1975).

The point is that wise copyright decisions tend to be positive law, and constitutional decisions; unwise decisions tend to be natural law, and arguably unconstitutional decisions. But the point is not obvious because a fundamental truth has been ignored. For copyright, positive law provides, and the Constitution requires, a limited proprietary base; natural law, contrary to the Constitution, provides a plenary proprietary base. The ignored truth: The proprietary base of copyright determines the scope of copyright, which is measured by the degree to which the law prefers copyright holders over the rights of users and provides control of access to copyrighted works accordingly. Thus, the term of a copyright determines its proprietary base both horizontally and vertically.

The importance of this point is that the proprietary base of copyright is the measure of the public domain. The shorter the term, the larger the public domain, and the longer the term, the smaller the public domain. This insight makes it almost certain that the Framers gave Congress the power to grant a copyright only for original works, only for a limited time, and only for a specific purpose: to create and protect the public domain. This is why Congress has a constitutional duty to protect, and not to enact copyright statutes that diminish, the public domain. In passing the Copyright Term Extension Act (CTEA), Congress ignored this constitutional duty, and the Court, in upholding the statute, approved Congress' faux pas. That the CTEA diminished the public domain by placing a fence around it is evidence that it is a natural law statute because it benefits only copyright holders, the primary feature of a natural law copyright. Thus, it follows that the Court's ruling upholding the statute was a natural law ruling.

In approving Congress' extension of its copyright power to benefit copyright holders at the expense of the public's "access to creative works," the Court ignored its precedents that the public interest is to be preferred to the author's interest in copyright matters and in doing so, ignored an obvious point. In evaluating the constitutionality of copyright legislation, the Court's task is to determine if Congress complied with the language of the Copyright Clause. The central issue in this determination is whether the language merely states requirements or constitutes conditions. If the answer is requirements, a challenge to a copyright statute as unconstitutional will almost surely fail as *Eldred* did. This is because requirements can be waived in the name of policy. But policy cannot be used to defeat conditions because the conditions are the policy. It follows, then, that in evaluating Congress' policy determinations, the Court is bound by the conditions of the Copyright Clause.

In *Eldred v. Ashcroft*,[20] the Court, wittingly or not, used a clever tactic that enabled it to treat the conditions of the Copyright Clause as requirements. The tactic was to treat its task as derivative, not independent, of congressional actions taken under that Clause. Thus, instead of using the language of the Copyright Clause to evaluate Congress' actions, it used Congress' actions to determine the meaning of the language in the Copyright Clause. For the Court to rule that Congress can extend the copyright term because it has done so many times before gives Congress a license to treat copyright as a natural law right. And, indeed, the anomaly is that the Court sanctioned Congress' use of positive law to implement a natural law copyright concept, that the public domain is not a part of copyright law. The point merits explanation.

Both the positive law and the natural law copyright are author's rights based on the fact of creation, but the two concepts have different origins and thus different consequences. The origin of the positive law copyright was Parliament; the origin of the natural law copyright was a King's Bench decision of 1769, *Millar v. Taylor*.[21] The early copyright was the stationers' copyright, so-called because it was limited to members of the Stationers' Company, the London Company of the booktrade. It was a natural law, proprietary concept that was perpetual and devoid of any public interest,[22] characteristics that made it ideal for its dual role as instrument of censorship and a device of monopoly. The successor to the stationers' copyright, the statutory copyright created by the Statute of Anne[23] in 1710, was more of a regulatory than proprietary concept. The statute was "for the encouragement of learning,"[24] an anti-censorship purpose, and for the first time, it vested the copy of printed books in the author, an anti-monopolistic purpose. The statutory copyright thus changed the early copyright from an instrument of government policy to an instrument for the public interest.

The booksellers, the 18th century copyrightists, did not take kindly to Parliament's effort to regulate their monopoly. To defeat the Parliamentary plan, they turned to the courts seeking a judicial revival of their old copyrights in the form of a perpetual common law copyright for the author based on natural law. Their claim that it was the *author* who was entitled to the natural law copyright was not a matter of charity. The copyrightists intended to have the benefit of the

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[20] 123 S. Ct. 769 (2003).

[21] 98 Eng. Rep. 201 (K.B. 1769).

[22] The stationers' copyright was the creation of tradesmen engaged in the booktrade and memorialized in company ordinances. Thus, evidence that the stationers' copyright was a natural law concept is circumstantial. A persuasive circumstance, in addition to the fact that it was perpetual, was the judges' use of the stationers' copyright as precedent in support of the natural law copyright they created in *Millar v. Taylor*.

[23] 8 Ann., c. 19, § 1 (1710) (Eng.).

[24] *Id.*

perpetual copyright as the author's assignee. Thus, if the author had a perpetual copyright, the author would assign the copyright in perpetuity. (The leverage was the refusal to publish without the assignment.) The ploy worked. In *Millar v. Taylor*,[25] the Court of King's Bench gave the copyrightists what they wanted; it ruled that in addition to the statutory copyright, the author was entitled to a common law copyright based on the natural law that was perpetual.[26] The House of Lords in *Donaldson v. Beckett*,[27] 1774, demonstrated by their actions that they understood the tactic of the copyrightists. They accepted the common law/natural law copyright, but limited it to unpublished works. Once a book was published, it was protected only for the limited term provided by the copyright statute, that is the positive law.

Both the positive law and the natural law copyright are author's rights based on the fact of creation. The difference between them is the term of protection, one having a limited, the other a perpetual, term, but the difference has a major effect on the nature of copyright. The positive law copyright, existing only for a limited term, consists only of rights to which the work is subject; and the natural law copyright, being perpetual, entails ownership of the work.[28] The difference has large practical consequences. A copyright that is only a series of rights to which a work is subject can be used to accommodate the interests of users as a matter of public interest as well as the interests of copyright holders. A copyright that is ownership of the work is less accommodating. Thus, if an author owns a work because he or she created it, several conclusions, all of them contrary to the Copyright Clause, follow. First, copyright protection is automatic (that is, natural) and not subject to any conditions; second, the term of ownership is perpetual, not limited to a term of years; and, third, the author, as owner of the work, is the sole beneficiary of the rights that copyright entails, and the public receives benefits only by the grace of the author, a sophisticated version of the trickle-down theory. Therefore, the public domain, the major contribution the positive law copyright made to learning, is irrelevant in the jurisprudence of the natural law copyright.

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[25] 98 Eng. Rep. 201 (K.B. 1769).

[26] The court did not identify the common law copyright as perpetual, but it did not need to. One of the differences between a legislative statute and a judicial ruling is that legislatures can define the limits of a right they grant; courts are equipped to grant rights, but not to limit them. Thus, the common law copyright, created by courts, was open-ended. The perpetual nature of the common law copyright was recognized in the rule that publication divested the author of the common law copyright. So long as a work remained unpublished, the common law copyright continued without end.

[27] 1 Eng. Rep. 837 (H.L. 1774).

[28] To be fair to the copyrightists, it should be pointed out that at this time the property of copyright was narrower than it is today. It consisted only of the exclusive right to publish. Thus, another was free to abridge or translate a copyrighted book and obtain his or her own copyright.

In light of the history of the Copyright Clause, one must forego the use of logic as part of the reasoning process to support the decision in *Eldred* that approved Congress' suspension of the public domain. The statute granted to copyright holders the power to deny (and thus to charge for) continued public access to copyrighted material, potentially in perpetuity—although in twenty-year increments—and is logically unsupportable. But, of course, there is a difference between logic and reason. The former is based on the intellect and is directed to consistency in the reasoning process; the latter is based on emotion and is directed to a desired result as a matter of self-interest, often obscured by pseudo-logic such as the natural law copyright provides. (Why should a mortal author be entitled to a perpetual copyright?) This difference is an aid to understanding why the Court decided *Eldred* as it did.

That understanding begins with the fact that the Court suffered from two handicaps in considering *Eldred*. One was that it was the first case in which the Court ruled on a challenge to the constitutionality of a copyright statute; the other was the lack of a jurisprudence of the Copyright Clause. The first handicap meant that the Court had no precedent for the reasoning process in making the decision. Courts in the common law system rely heavily on precedent for process as well as result, in part because judges are (necessarily) generalists who must deal with specialized issues and thus rely heavily on precedent. This explains the Court's use of the actions of Congress as precedent to determine the constitutionality of Congress's actions. The second handicap, the lack of a jurisprudence of the Copyright Clause, is more significant.

The purpose of jurisprudence can be said to provide perspective to eliminate prejudice, personal or societal, as a component of analysis. Jurisprudence, then, can be said to be a judge's best friend. To fill this role, however, the subject of the jurisprudence must be relevant to what is to be decided. To the extent the Court relied on jurisprudence in *Eldred*, it relied on the wrong jurisprudence. It relied on the jurisprudence of *copyright*, which limited its consideration to copyright as a positive law or natural law concept. The proper jurisprudence, of course, is the jurisprudence of the Copyright Clause, which makes the positive law/natural law issue moot. The issue is the scope of Congress' power, not the result of the exercise of that power. The fault, however, was not the Court's alone, for American law is substantially devoid of analytical writings, the basis of jurisprudence, on the Copyright Clause. Evidence of the intellectual desert to which the Copyright Clause has been relegated is found in the fact that Congress, in preparation for drafting the bill that became the 1976 Copyright Act, commissioned thirty-five studies on copyright. Not one of the studies dealt with the meaning of the Copyright Clause.

The explanation for this oversight is not clear, but inferences are available. One inference is that members of the copyright industry, the contemporary

copyrightists, had a major influence on the legislative process and did not want a study of the Copyright Clause because it would have made the limitations on Congress' copyright power evident. (The only study devoted to the Copyright Clause was the meaning of the term writings, which was amenable to an expansive reading.) Another inference is that a study of the Copyright Clause might have interfered with the plan to incorporate elements of the natural law copyright into the new statute, for example, the elimination of publication as a condition for copyright. Publication had been a condition for copyright protection since the 1790 Act[29] and had required the formalities of notice, deposit, and registration, which, without publication, were superfluous and thus were also eliminated as conditions. This change, along with the elimination of the two terms for copyright, means that under the 1976 Act, a copyright holder cannot lose the copyright prior to the end of the copyright term, even if the economic value of the work is exhausted (or never existed). Apparently, these changes were deemed necessary for the U.S. to join the Berne Convention, which, because it is based on the natural law copyright, is the Trojan Horse of copyright jurisprudence. The CTEA, for example, was natural law rule hidden in a statute to make it appear to be a positive law rule. Apparently, the goal of the copyrightists is to substitute the Berne Convention for the Copyright Clause as the source of Congress' copyright power.

My argument is that a well developed jurisprudence of the Copyright Clause would have enabled the Court at the least to understand what it was doing in approving the CTEA, and, perhaps, would have led it to a different decision. My concern, however, is more about the process than the result, because a faulty process portends future errors. This is why it is important to develop a jurisprudence of the Copyright Clause. That jurisprudence begins with the premise that the American copyright is a positive law concept and that it is private property vested with a public interest. The major reason the positive law copyright is preferred is that the natural law copyright is private property without the public interest. A concept of copyright that excludes the public interest in favor of the author's ownership of his or her creations (in perpetuity, no less) is logically primitive. To put the point another way, the natural law copyright is intellectually defective.

The defect exists because the natural law copyright is a corruption of natural law. This is because natural law is based on reason independent of self-interest in that it is applicable to all persons at all times in all places. When natural law is used as a cover to protect the right to gain profit by protecting a work for the market forever, it becomes corrupt because it protects the interest of the few at

[29] The condition was first used in the Statute of Anne, which was the model for the 1790 Act.

the expense of the many. The cover used for the natural law copyright, of course, is equity in favor of the author, and it works because natural law is based on equity. The fraud is that the equity is for the publisher, not the author. Consider the following quotes from *Millar v. Taylor*, the case that created the natural law copyright. Lord Mansfield pointed out the reasons for protecting the author before publication:

> [B]ecause it is just, that an author should reap 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.[30]

If the author had these rights before publication, said Lord Mansfield, he should have them after publication. But what he failed to say was that if the author had them after publication, he or she would have assigned them to the publisher in order to get the "pecuniary profits of his own ingenuity and labour."[31] Thus, to quote from the opinion of Justice Willes in *Millar*:

> If the copy of the book belonged to the author, there is no doubt but that he might transfer it to the plaintiff [publisher]. And if the plaintiff, by the transfer, is become the proprietor of the copy, there is as little doubt that the defendant has done him an injury, and violated his right: for which, this action is the proper remedy.[32]

Thus, if the author owned his or her creation in perpetuity, the publisher by assignment would get the right of exclusive publication in perpetuity.

The reason for the booksellers' concern for the author's right is now apparent. But if there is good reason to support the idea that an author's creation of a work entitles him or her to perpetual ownership of that work after having presented it to the world, it is not readily apparent. And, indeed, the House of Lords in *Donaldson* ruled that the publication of a book is a gift to the world, except for the limited rights reserved to the author by statute, that is, the exclusive right to

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[30] 98 Eng. Rep. 201, 252 (K.B. 1769).

[31] *Id.*

[32] *Id.* at 206.

publish for a limited time.[33] While the Lords recognized the common law copyright based on natural law, they limited it to unpublished works, which meant that copyright would require publication.[34] This quid pro quo for legal protection ensured that the copyrighted work would be made available to the public for learning, the purpose of the Statute of Anne that the Framers adopted for the U.S. Constitution. *Donaldson* thus laid the groundwork for the perennial copyright conflict between property rights and political rights that is renewed whenever copyright is extended to new communications technology. The property right is the right of copyright holders to use books for profit, the political right is the right of the people to use books for learning.

The proprietary bias of the common law system causes courts to emphasize property rights over political rights, but the Framers foresaw this danger and sought to guard against it by limiting Congress' copyright power. The limitations take the form of policies underlying the Copyright Clause: the policy of promoting learning, of public access, and protection of the public domain. To one familiar with the historical background of the Copyright Clause, the policies are obvious, but not many, especially lawmakers, are familiar with the background. Thus, it is history that makes apparent that the policy of promoting learning is in fact an anti-censorship policy, that the policy of public access is found in the "exclusive Right,"[35] which was only the exclusive right to publish a book; and that the protection of the public domain was ensured by granting copyright only for original works only for a limited time. The striking aspect of the policies is their interrelationship–publication ensures access that is necessary for learning, but the right of exclusive publication only for a limited time ensures that the public domain is available for the creation of new works. (Consider that under the 1976 Act, William Shakespeare, the greatest playwright in the English language, may well have also been the greatest copyright infringer because so many of his plays were derivative of other works in possible violation of 17 U.S.C. section 106(2).)[36]

Had the Court appreciated the policies of the Copyright Clause, it would have been able to solve a problem in *Eldred* that obviously bothered it. That problem was the effect on the 1976 Act if the Court held the CTEA to be unconstitutional. Paradoxically, the Court created the problem by accepting the actions of Congress as the basis for determining the constitutionality of what Congress did in the CTEA and could have avoided it by recognizing a simple fact: The CTEA was the first time that Congress extended the copyright term independently of legislation dealing with the entire statute, either in the first copyright statute in

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[33] 1 Eng. Rep. 837, 848-49 (H.L. 1774).

[34] *Id.*

[35] U.S. CONST. art. I, § 8, cl. 8.

[36] 17 U.S.C. § 106(2) (2000).

1790[37] or in a general revision of the statute, as in 1831,[38] 1870,[39] 1909,[40] and 1976.[41] That Congress exercised a different power in extending the copyright term in the CTEA and in the general revisions is made clear by a simple fact. In the CTEA, Congress acted in regard to only one condition of the Copyright Clause, the "limited Times"[42] provision; in the general revisions, Congress necessarily acted in regard to all conditions of the clause, including the promotion of learning, the requirement of original works, and public access.

The Court's logical fault was in using the actions of Congress to determine the constitutionality of those actions, apparently accepting the Government's argument that was based on lawyer logic. The argument was both misleading and unfortunate, because apparently it prevented the Court from recognizing the solution to the problem of the constitutionality of the 1976 Act. Measured by the policies of the Copyright Clause, there is little doubt that there are provisions of the 1976 Act that are contrary to the constitutional policies of copyright and, therefore, arguably are unconstitutional. But they are not limited to the extension of the copyright term. The elimination of publication as a condition for copyright,[43] for example, has an adverse impact on the policy of learning, the policy of public access, and the policy of protecting the public domain the same as the extension of the copyright term. But there is a truism that provides the key to the solution: How a statute is interpreted (and thus administered) is more important than what it says.

This is where a jurisprudence of the Copyright Clause would have been helpful. One lesson that the jurisprudence would have provided is that just as Congress is bound by the conditions of the Copyright Clause in enacting copyright statutes, the courts are bound by those same conditions when interpreting the statute. An author, for example, who claimed copyright for a book without making the book accessible to the public by publication within a reasonable time could be held to have forfeited the copyright. The exceptions to the exclusive rights granted in section 106 could be recognized as safe-harbor provisions that do not negate the right of fair use. The right to reproduce a work in a copy could be interpreted to mean the exclusive right to copy for the purpose

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[37] Act of May 31, 1790, 1 Stat. 124 (1790).

[38] Act of Feb. 3, 1831, 4 Stat. 436 (1831).

[39] Act of July 8, 1870, 16 Stat. 198 (1870).

[40] The Copyright Act of 1909, 35 Stat. 1075 (1909).

[41] Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541, *codified at* 17 U.S.C. §§ 101-810 (1976).

[42] U.S. CONST. art. I, § 8, cl. 8.

[43] The elimination of the publication requirement was effectuated by extending copyright to the moment of fixation. *See* L. Ray Patterson, *The DMCA: A Modern Version of the Licensing Act of 1662*, 10 J. INTELL. PROP. L. 33, 38 (2002).

of public distribution, and so forth. The examples could be multiplied, but the point is that the Court could correct any unconstitutional provisions of the copyright statute by giving them a constitutional interpretation.

The objection to the suggested approach will come from the same source that created the problem in the first place: the copyrightists. This brings us back to the traditional copyright conflict between property rights and political rights. The goal is a balance between the two rights, but to provide the desired balance, courts should recognize the unique aspect of copyright decisions. Most judicial decisions affect only the parties to the litigation and precedent provides a rule for similar disputes in the future. But for the most part, the precedent has implications for only a small portion of the population. Only a relatively few people, for example, commit any particular tort and the precedent for imposing liability for that tort has implications for only the few tortfeasors. Copyright decisions are different. They have implications for the entire population because ultimately the issue is always the political right to learn. A ruling that copying materials for classroom use is copyright infringement directly affects all students, past and future, and indirectly all citizens, because education determines the nature of the society in which it exists. All of this means that many copyright decisions are in effect judicial statutes. The truism is one that copyrightists have taken advantage of since the eighteenth century in England when they sought recognition of the common law copyright to override the Statute of Anne. Had the Lords in *Donaldson* ruled that the author has a perpetual common law right based on the natural law, the ruling would have been a judicial statute that negated a Parliamentary statute.

The most disturbing contemporary example of this judicial lawmaking is the copyrightists' use of litigation to override the doctrine of fair use as codified in section 107 of the 1976 Act. Compare the language of the statute with the holdings in *Basic Books, Inc. v. Kinko's Graphic Corp.*,[44] *American Geophysical Union v. Texaco, Inc.*,[45] and *Princeton University Press v. Michigan Document Services, Inc.*[46] The language is that the fair use of a copyrighted work, including use by copying for purposes such as "[c]riticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research is not an infringement of copyright."[47] In each of the three cases the copying was for teaching, scholarship, or research, but each case resulted in a holding of infringement.

The success of the copyrightists in these cases can be explained by their ability to victimize the courts with a jurisprudence of copyright–not the Copyright

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[44] 758 F. Supp. 1522, 18 U.S.P.Q.2d (BNA) 1437 (S.D.N.Y. 1991).

[45] 60 F.3d 913, 35 U.S.P.Q.2d (BNA) 1513 (2d Cir. 1994).

[46] 99 F.3d 1381, 40 U.S.P.Q.2d (BNA) 1641 (6th Cir. 1996).

[47] 17 U.S.C. § 107.

Clause–in support of their claim (by actions rather than words) that copyright is a natural law property right. The copyrightists, of course, begin with a built-in advantage, the proprietary bias of the common law system, a bias that is justified because property rights are the basis of a free society. But the subject of copyright as intellectual is learning materials, which has vastly different implications from land as real property or books as personal property. The fault of the courts is that they do not distinguish the property of copyright from other property. The copyrightists can take credit for this failing, because they have created a jurisprudence of copyright predicated on the premise that copyright is a property in the nature of a fee simple, even though it exists only for a statutorily defined term (which suggests that copyright is more in the nature of an easement than a fee simple). But if one repeats a fiction often enough and long enough, it becomes accepted as fact. This is why copyrightists have managed to infiltrate the 1976 Act with natural law concepts and undermine the positive law copyright, a process than continues apace with Congress' enactment, and the Court's approval, of the CTEA. The tactics they have used to create a jurisprudence of copyright independent of the Copyright Clause can be traced to eighteenth century England when copyrightists used the same tactics to override the Statute of Anne. The use of similar tactics to override the Copyright Clause in the twenty-first century U.S. is understandable because the Statute of Anne is the source of the clause, the language of which is a paraphrase of the title of the English act.

Eldred is the contemporary counterpart to *Millar v. Taylor*,[48] which was the height of the copyrightists' success in England, and one can hope that in a few years the Court will provide a modern counterpart to *Donaldson v. Beckett* that rescued copyright from the natural law abyss created by *Millar*. The precedent that gives hope is *Wheaton v. Peters*, the bedrock case of American copyright law that firmly established (until 1976) the positive law basis for U.S. copyright law. After all, the House of Lords, which reinterpreted the common law copyright based on natural law, provided the Court with a precedent for deciding *Wheaton*. Thus, the Court has its own precedent to use in reinterpreting the natural law components of the CTEA and the 1976 Act. To do so, however, the Court needs a jurisprudence of the Copyright Clause, which the Court is fully capable of developing. The place to start is Article I, section 8, clause 8 of the United States Constitution.

What's wrong with *Eldred*? It's a natural law decision in a positive law world.

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[48] 98 Eng. Rep. 201 (K.B. 1769).