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L. Ray Patterson

University of Georgia School of Law



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FOLSOM V. MARSH AND ITS LEGACY

L. Ray Patterson*

I. INTRODUCTION

The fair use doctrine has become so important in American copyright law that it is somewhat surprising to learn that the case credited with creating it, *Folsom v. Marsh*,¹ was so poorly reasoned that it may be entitled to first place in the category of bad copyright decisions. The case was a bill in equity for copyright piracy, the style of which comes from plaintiff, Folsom, Wells and Thurston, printers and publishers, and defendants, Marsh, Capen and Lyon, booksellers.²

If one of the characteristics of a bad legal decision is that it gives rise to a myth as to what the court in fact ruled, *Folsom* is at the top of the list. The myth is twofold. The first myth is that *Folsom* created fair use, when in fact it merely redefined infringement. The second myth is that *Folsom* diminished, and therefore fair use diminishes, the rights of the copyright owner. In fact, the case enlarged those rights beyond what arguably Congress could do in light of the limitations on its copyright power³ and, indeed, fair use today continues to be an engine for expanding the copyright monopoly.

This is a large charge in light of the modern culture to the contrary, but analysis bears it out, and one begins the analysis with *Folsom*. The major factor in understanding *Folsom* is the scope of copyright when the case was decided, because whether fair use enlarged or diminished the rights of the copyright owner depends upon what those rights were before the fair use doctrine developed.

In 1840, the rights of copyright were available only for a book as it was published; another author could abridge or translate the book without infringing the copyright. Story, aware of both

* Pope Brock Professor of Law, University of Georgia School of Law.

¹ 9 F. Cas. 342, (C.C.D. Mass. 1841) (No. 4, 901).

² *Id.*

³ U.S. CONST. art. I, § 8, cl. 8.

doctrines, acknowledged the abridgment doctrine in *Folsom*, and held that the defendant's work was not an abridgment. He then proceeded to redefine infringement, which in his hands became any copying, duplicative or imitative, in whole or in part of the copyrighted work. This redefinition of infringement enlarged the copyright monopoly and became the basis for what was to become fair use.

There would be, of course, an anomaly in being concerned with a poorly reasoned judicial decision over a hundred years old, except that its impact continues today in unsuspected ways. Prior to *Folsom*, copyright could best be understood as a subset of public domain law in the form of a limited statutory monopoly;⁴ *Folsom* laid the groundwork for transforming copyright into a subset of property law as a natural law right.⁵ Since the law of which copyright is a subset is the source of copyright rules, the choice has important consequences. Whether copyright is a statutory monopoly or a proprietary right is significant for both copyright owners and users of copyrighted material. The former concept provides greater, the latter less, leeway for use by others, and this issue has assumed a new importance in light of communications technology by reason of which copyright holders may be able to control all access to copyrighted material, for example, in a computer database. Before proceeding with the nature of copyright, however, it will be useful to discuss the *Folsom* decision itself since it is better known for its supposed holding than its content.

II. THE FACTS IN *FOLSOM*

The author's work alleged to have been infringed was Jared Sparks' twelve-volume work, *The Writings of George Washington, being his correspondence, addresses, messages, and other papers, official and private, selected and published from the original manuscripts, with a life of the author, notes, and illustrations*.⁶ The infringing work was the Rev. Charles Upham's two-volume

⁴ *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834).

⁵ The best example of this is the development of the sweat-of-the-brow doctrine, a natural law concept, that the U.S. Supreme Court held to be unconstitutional in *Feist Publications, Inc. v. Rural Tel. Co., Inc.*, 499 U.S. 340, 18 U.S.P.Q.2d (BNA) 1275 (1991).

⁶ *Folsom v. Marsh*, 9 F. Cas. 342, 343 (C.C.D. Mass. 1841) (No. 4, 901).

work entitled *The Life of Washington in the Form of An Autobiography, the narrative being to a great extent conducted by himself, in extracts and selections from his own writings, with portraits and other engravings.*⁷

Sparks' work consisted of 6,763 pages,⁸ Upham's work of 866 pages,⁹ 353 of which were copied verbatim from Sparks' work.¹⁰ Of these 353 pages, 34 had appeared in various other publications, 319 had never appeared in print.¹¹ Of the 319 pages, 64 pages were official documents and 255 pages were private.¹² Thus, omitting the official documents, Upham copied 255 of 6,763 pages, approximately 3.8 percent. (Upham did not copy the Sparks' biography of Washington, the first of the twelve volumes, and the only original writing of the twelve volumes.)

The defendants argued three points,¹³ the most important of which was that the papers were public in nature, and, therefore, not private property; that Sparks was not the owner of these papers, which belonged to the United States, and could be published by anyone; and an author has a right to quote, select, extract or abridge another work in the composition of a work essentially new.

III. THE REASONING IN *FOLSOM*

Story's most interesting comment occurs at the beginning of the opinion where he bemoaned the difficulty of deciding the case with

⁷ *Id.*

⁸ *Id.* at 344.

⁹ *Id.*

¹⁰ *Id.* at 343 (Note that on p. 344, the court gives the total number of copied pages to be 388).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

I. The papers of George Washington are not subjects of copyright.

1. They are manuscripts of a deceased person, not injured by publication of them.
2. They are not literary, and, therefore, are not literary property.
3. They are public in nature, and, therefore, not private property.
4. They were meant by the author for public use.

II. Mr. Sparks 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 another in the composition of a work essentially new.

his famous comment that “[p]atents and copyrights approach, nearer than any other class of cases belonging to forensic discussions, to what may be called the metaphysics of the law, where the distinctions are, or at least may be, very subtile and refined, and, sometimes, almost evanescent.”¹⁴

This comment was either a confession of ignorance or the expression of a desire to change the law, and given Story’s eminence, we can assume he had a commensurate ego and that it was the latter. His comment that the question of piracy often depends “upon a nice balance of the comparative use made in one of the materials of the other”¹⁵ is not wholly consistent with the fact that one could translate or abridge a copyrighted work without infringing it and indicates that his motive was to change the legal definition of infringement or piracy, as he called it. For he then used the logically dubious example of a reviewer who “may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism.”¹⁶ But if he “cites the most important parts of the work, with a view, not to criticise but to supersede the use of the original work, and substitute the review for it, such a use will be deemed in law a piracy.”¹⁷ The reviewer example is logically inapt, but apparently Story found it in English precedent and it was more useful for its inference than reliable for its logic: If a reviewer is limited in the use of the work for review, others are even more limited in the use of the work for other purposes.

Story then moved to the question of abridgment, conceding that “it has been decided that a fair and bona fide abridgment of an original work, is not a piracy of the copyright of the author.”¹⁸ He concluded that defendant’s work was not an abridgment, but his reasoning was unpersuasive. First, he said that Upham’s work

is formed upon a plan different from that of Mr. Sparks, and in which Washington is made mainly to tell the story of his own life, by inserting therein his

¹⁴ *Id.* at 344.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 344-45.

¹⁸ *Id.* at 345.

letters and his messages, and other written documents, with such connecting lines in the narrative, as may illustrate and explain the times and circumstances, and occasions of writing them.¹⁹

This conclusion, of course, requires a very narrow meaning of abridgment, a means of limiting—as a step to eradicating—the doctrine, which apparently was honored more in the breach than the observance.²⁰ If one can abridge an entire work, it would seem that the use of less than the entire work to create a new one that entailed intellectual effort would qualify.

Moreover, the fact that one third of the infringing defendant's two volumes was "identical with the passages in Mr. Sparks's work,"²¹ was consistent with abridgment, but its relevance to infringement was analytically remote. The amount of the material defendant takes from plaintiff's work determines infringement as a matter of law, but the amount that benefits defendant determines unjust enrichment as a matter of equity. We can assume, then, that Story viewed infringement as unjust enrichment—a doctrine of equity that was the subject of his *Commentaries*—and felt that a defendant was not entitled to a free ride in using another's copyrighted material.²²

Story then addressed the defendants' objections, dealing first with the objection that the materials "were designed by the author

¹⁹ *Id.*

²⁰ See EATON S. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES (DRONE ON COPYRIGHT) 437 (Rothman Reprints Inc. 1972) (1879) (The leading 18th century copyright Treatise defining fair use as the right of one author to use the works of another author in creating his or her own work).

²¹ 9 F. Cas. at 345.

²² Story's view is made clear in the following passage from his *Commentaries*. "In cases of the invasion of a copy-right by using the same materials in another work, of which a large proportion is original, it constitutes no objection, that an injunction will in effect stop the sale and circulation of the work which so infringes upon the copyright. If the parts, which are original cannot be separated from those, which are not original, without destroying the use and value of the original matter, he, who has made the improper use of that which did not belong to him, must suffer the consequences of so doing." II JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA § 942 at 131 (12th ed. 1877). This, of course, is pure natural law reasoning.

for public use, and not for copyright, or private property."²³ To this defense, Story said that "President Washington deemed them his own private property, and bequeathed them to his nephew, the late Mr. Justice Washington. . . ." ²⁴ How President Washington's self-serving actions could be determinative of the legal status of his papers is not clear, but we have here a personal ulterior motive that was congruent with the jurisprudential motive of enlarging the author's rights. Chief Justice Marshall and Sparks acquired the interest of Bushrod Washington, and "the publication of these writings was undertaken by Mr. Sparks, as editor, for their joint benefit;" from which it followed that "[t]he publication of the defendants, . . . to some extent, must be injurious to the rights of property of the representatives and assignees of President Washington."²⁵

This was a curious argument in view of the fact that "congress have actually purchased these very letters and manuscripts, at a great price, for the benefit of the nation, from their owner and possessor under the will of Mr. Justice Washington, as private and most valuable property."²⁶ Thus using as evidence the conduct of the former President's legatee, Story concluded that the former President did not intend the papers exclusively for public use and held that the author of private letters and papers "has a property therein, and that the copyright thereof exclusively belongs to him."²⁷ But at that time the author of private letters could have no copyright until he or she published them and complied with the provisions of the copyright statute. The author of unpublished works had only a common law copyright.²⁸

Story thus disregarded the distinction between the common law copyright and the statutory copyright, the former being only the exclusive right of first publication, the latter the right of continued and exclusive publication. The relevance of this point is that the common law copyright is a natural law right that is cut off by publication. By ignoring the distinction, Story was able to construe

²³ 9 F. Cas. at 345.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 346.

²⁸ *Donaldson v. Becket*, 4 Burr. 2408, 98 Eng. Rep. 257 (K.B. 1774).

section 9 of the 1831 Copyright Act, with some semblance of reason, to support his position "that the author of any letter or letters (and his representatives) . . . possess the sole and exclusive copyright therein."²⁹ Section 9 provided a remedy against a person who published a manuscript without the author's consent. Story said that it "gives by implication to the author, or legal proprietor of any manuscript whatever, the sole right to print and publish the same, and expressly authorizes the courts of equity of the United States to grant injunctions to restrain the publication thereof, by any person or persons, without his consent."³⁰

The key words are "by implication," which indicate some sleight-of-hand reasoning. While the subject of section 9 was "any manuscript whatever," the term manuscript must have meant a composition written for publication rather than any document that might be written by hand, which in 1840, presumably, included all documents. But Story's reference to "the sole right to print and publish" implies protection for continued publication.

What Story chose to ignore was that logically the section protected only the author's right of first publication of his or her manuscript, for the author's right of continued publication was the function of statutory copyright. If another published a manuscript without permission, the author could get an injunction to stop the publication. But if the author himself or herself desired to publish the manuscript, he or she would have to comply with the terms of the copyright statute or the work would go into the public domain.

As to official letters, Story equivocated, saying that it may be doubtful that any public official could publish them without the

²⁹ 9 F. Cas. at 346.

³⁰ *Id.* at 347. The provisions of section 9, based section 6 of the 1790 Act, read as follows:

"And be it further enacted, That any persons or persons who shall print or publish any manuscript whatever without the consent of the author or legal proprietor first obtained as aforesaid, (if such author or proprietor be a citizen of the United States, or resident therein,) shall be liable to suffer and pay to the author or proprietor, all damages occasioned by such injury . . . ; and the several courts of the United States empowered to grant injunctions to prevent the violation of the rights of authors and inventors, are hereby empowered to grant injunctions, in like manner, according to the principles of equity, to restrain such publication of any manuscript as aforesaid."

Law of Feb. 3, 1831, § 9.

sanction of the government, at least when secrecy may be required. He also said that it may be the duty of the government to publish such papers, but this did not give private persons the right to publish them. He concluded, however, that it was not necessary to dispose of the point in this case "because, of the letters and documents published by the defendants, not more than one fifth part are of an official character."³¹ This was a curious conclusion since it meant that uncopyrightable material could have copyright protection merely because it was contained in a copyrighted work; even so the conclusion was consistent with his natural law philosophy, as he explained it in his *Commentaries on Equity Jurisprudence*.³²

Story rejected the defendants' argument that because Congress had purchased the manuscripts of the letters and documents for "the liberal price of 25,000 dollars,"³³ they had become public property that could be published by anyone. This was an entirely inadmissible conclusion, he said, for if this were so, "every private person had an equal right to use any other national property at his pleasure, such as the arms, the ammunition, the ships, or the custom houses, belonging to the government."³⁴

The analogy is faulty because it compares physical objects and intangible rights. The proper analogy requires the same type physical objects, for example, ships and books (finished products) or the drawings for ships and manuscripts for books (material for creating the finished products). The fact that one cannot use the ships or books owned by the government does not of itself mean that one cannot build a similar ship or reprint the books, for there is a distinction between the use of physical objects and the exercise of an intangible right.

Story's error, in short, was that he failed to distinguish the copyright of a work and the physical object in which the work is fixed. The irony is that Story used this distinction when he justified his conclusion by saying that "the government purchased the manuscripts, subject to the copyright already acquired by the

³¹ 9 F. Cas. at 347.

³² STORY, *supra* note 22.

³³ 9 F. Cas. at 347.

³⁴ *Id.*

plaintiffs in the publication thereof.”³⁵ Thus, the government had, the manuscripts and the plaintiffs the copyright.

As to defendants’ right to abridge the materials, Story said that this “is the real hinge of the whole controversy, and involves the entire merits of the suit.”³⁶ Having already concluded that “the defendants’ work cannot properly be treated as an abridgment of that of the plaintiffs; . . .,”³⁷ he moved on to the issue of whether “this is a justifiable use of the original materials, such as the law recognizes as no infringement of the copyright of the plaintiffs.”³⁸ The passage that is the source of the fair use doctrine is thus a passage about copyright infringement, which, in light of the abridgment and translation doctrines, he enlarged. “It is certainly not necessary,” he said, “to constitute an invasion of copyright, that the whole of a work should be copied, or even a large portion of it, in form or in substance.”³⁹ Thus, Story’s definition of infringement was copying in whole or in part, by duplication or imitation. The test is harm to the original work, as shown by his comment, “If so much is taken, that the value of the original is sensibly diminished, or the labors of the original author are substantially to an injurious extent appropriated by another, that is sufficient, in point of law, to constitute a piracy pro tanto.”⁴⁰ This followed from the fact that copyright is the property of the author. “The entirety of the copyright is the property of the author; and it is no defence, that another person has appropriated a part, and not the whole, of any property.”⁴¹ And the harm does not “necessarily depend upon the quantity taken, whether it is an infringement of the copyright or not”⁴² and other factors are to be considered. “It is often affected by other considerations, the value of the materials taken, and the importance of it to the sale of the original work. . . .”⁴³ The harm was to be determined by factors such as “the nature and

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 348.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 348.

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."⁴⁴

Quoting an English case, Story revealed his natural law bias (committing what the U.S. Supreme Court in *Feist* was to determine to be constitutional error) when he said " 'None are entitled to save themselves trouble and expense, by availing themselves, for their own profit, of other men's works, still entitled to the protection of copyright.' "⁴⁵

The theory of unjust enrichment thus explains why Story concluded that there was an invasion of plaintiff's copyright, not so much because of harm to plaintiff as of value to defendant.

[E]very one must see, that the work of the defendants is mainly founded upon these letters, constituting more than one third of their work, and imparting to it its greatest, nay, its essential value. Without those letters, in its present form the work must fall to the ground. . . . It seems to me, therefore, that it is a clear invasion of the right of property of the plaintiffs, if the copying or parts of a work, not constituting a major part, can ever be a violation thereof, as upon principle and authority, I have no doubt it may be. If it had been the case of fair and bona fide abridgment of the work of the plaintiffs, it might have admitted of a very different consideration.⁴⁶

The opinion thus concludes with a natural law coda.

⁴⁴ *Id.*

⁴⁵ *Id.* at 349 (quoting *Lewis v. Fullarton*, 2 Jur. (London) 127 [3 Jur. 669], 2 Beav. 6).

⁴⁶ *Id.* at 349.

IV. THE LEGAL CONTEXT OF *FOLSOM*

The legal context of *Folsom* was copyright as a limited statutory grant. The relevant statute, the 1831 Copyright Act,⁴⁷ gave the copyright holder "the sole right and liberty of printing, reprinting, publishing, and vending" the copyrighted work.⁴⁸ One committed an infringement of a book by doing or causing, one of three acts: printing, publishing, or importing the work without the permission of the copyright holder.⁴⁹ The statutory language thus does not support Story's view that infringement includes the copying of a portion (even a small portion) of a copyrighted work either in form or substance. Moreover, these rights were limited to citizens and residents of the U.S.,⁵⁰ evidence that Congress, at least, did not consider copyright to be a natural law right, which, indeed, it could not be since copyright did not protect the work in manuscript, as a natural law copyright would do. Thus, the copyright protected the book only as it was published. Moreover, unlike the infringement of books, the infringement of prints, engravings, maps, charts, and musical compositions included the act of copying them.⁵¹

The difference between printing and copying as infringement is best demonstrated by the concept of piracy, a sin of the publisher, and plagiarism, a sin of the author. Piracy is the publishing of a copyrighted work without permission but with the author's name. Plagiarism is the copying a work, in whole or part, without permission and taking the copied material as one's own. Plagiarism, of course, does not require a copyright, for the conduct and effect are the same whether or not the copied material is protected by copyright. Thus, protection from piracy is a matter of the copyright statute and protection from plagiarism is a matter of common law.

Under the 1831 Copyright Revision Act, copyright was a limited statutory grant as in the 1790 Act which was a copy of the first English copyright statute, the Statute of Anne,⁵² which had

⁴⁷ 4 Stat. 436-39.

⁴⁸ § 1.

⁴⁹ § 6.

⁵⁰ § 8.

⁵¹ § 7.

⁵² Statute of Anne, 8 Anne, cl. 19 (1710).

changed the early private law copyright in England—which was in fact a natural law copyright—to a limited statutory monopoly. And only three years after the 1831 Revision Act was enacted, the U.S. Supreme Court confirmed the statutory monopoly theory of copyright in *Wheaton v. Peters*.⁵³ While bound by *Wheaton*, Story ignored it, but *Folsom* should be considered in light of the Supreme Court decision.

The issue in *Wheaton* was whether Peters, who had succeeded Wheaton as Supreme Court reporter, infringed Wheaton's reports of Supreme Court cases in publishing his "condensed" reports. Since there was a question as to whether Wheaton had complied with the copyright statute, the parties argued and the Court considered whether an author was entitled to a common law copyright based on the natural law in addition to the statutory copyright. In practical terms, the issue was whether copyright is a common law right under the natural law or only a statutory grant created by Congress, for if copyright were a common law right, the statutory grant would be superfluous.

Since the two theories—natural law and statutory monopoly—were fully argued and considered in *Wheaton* when Story was a member of the Court, he must have been familiar with them and conscious of the fact that the Court had rejected the natural law theory in favor of the statutory monopoly theory. Against this background, one is justified in concluding that Story's use of natural law copyright ideas in deciding *Folsom* is a classic case of intellectual dishonesty, and that the *Wheaton* case was one of his targets.

The best evidence of this is the holding that the assignees of papers, public and private, of a former President of the United States, from a legatee of the former President was entitled to copyright for publishing the papers, although the assignor had sold the papers to the United States Government. To reach this result, Story used a natural law concept, the sweat-of-the-brow doctrine, that the U.S. Supreme Court has since held to be unconstitutional.⁵⁴

⁵³ 33 U.S. (8 Pet.) 591 (1834).

⁵⁴ *Feist Publications, Inc. v. Rural Tel. Co.*, 499 U.S. 340 (1991).

V. THE LEGAL SOURCE OF COPYRIGHT

Because *Wheaton* rejected the common law copyright derived from natural law and affirmed the statutory monopoly copyright, it will be useful to consider the legal source for each copyright: property law for the unlimited natural law copyright, and public domain law for the statutory monopoly copyright.

The traditional view is that copyright, whatever its jurisprudential basis, is a property right, and thus a subset of property law. The argument here is that this view is in error and that copyright is best seen as a special kind of property created from public domain materials and is thus best treated as a subset of public domain law. The importance of the point, of course, is that copyright is ultimately governed by the rules derived from its source, property rules or public domain rules.

Preliminarily, it is useful to note that Story, who treated copyright as a subset of property law, explained why copyright is in fact a subset of public domain law in *Emerson v. Davies*, only four years after *Folsom* when he said:

In truth, in literature, in science and in art, there are, and can be, few, if any, things, which, in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before. No man creates a new language for himself, at least if he be a wise man, in writing a book. He contents himself with the use of language already known and used and understood by others. . . . The thoughts of every man are, more or less, a combination of what other men have thought and expressed, although they may be modified, exalted or improved by his own genius or reflection. If no book could be the subject of copyright which was not new and original in the elements of which it is composed, there could be no ground for any copy-right in modern times, . . .⁵⁵

⁵⁵ *Emerson v. Davies*, 8 F. Cas. 615, 619 (1845). But here, as in *Folsom*, Story had an ulterior motive. In *Emerson* the ulterior motive was to justify copyright for compilations of public domain material.

This passage tells us that all works are necessarily composed of materials taken from the public domain, which must be protected lest it be exhausted by too many natural law copyrights that, unlike the statutory monopoly copyright, have no boundaries. Natural law copyright begins when a work is created and presumably extends beyond the author's death to infinity, since there is no measure for its termination.

The most obvious example showing that one of the purposes of copyright is to protect the public domain is that the copyright statute excludes ideas from copyright protection. While we cannot know, we can guess that except for the copyright statute, courts would long ago have given common law protection to ideas. Thus, copyright as a subset of public domain law protects the public domain, just as copyright as a subset of property law protects property.

The major obstacle to viewing copyright as a subset of public domain law is that the law of the public domain is underdeveloped; however, the reason for this shows its importance. The reason is that public domain law is hidden in the law of free speech, a conclusion that is not as novel as it may seem to be. The public domain designates material owned by everyone and thus by no one, and a moment's reflection will show that freedom of speech depends in a large measure upon the existence of a public domain.

The relationship of the public domain to free speech has a historical, as well as a logical, base. In England there was no public domain during the reign of press control when copyright served as a device of censorship because of the religious controversy that Henry VIII precipitated by his break with Rome.⁵⁶ A monarch concerned for his crown is not disposed to allow a free press that might attempt to persuade the people to favor a monarch of a different religion. At least, Mary the Catholic, Elizabeth I the Protestant, James I, perhaps a closet Catholic, certainly Charles I, who lost his head over religion, the libertine Charles II, and James II, who lost his crown for preferring Catholicism, were not so disposed. They attempted to control the output of the press and it was not coincidental that a few years after the Glorious Revolution

⁵⁶ See LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVES 114-42 (1968) (discussing the Star Chamber Decree of 1586 and 1637 and the Licensing Act of 1662).

assured Protestant succession to the throne, the public domain was created by the demise of censorship legislation which was the only legal support for copyright.⁵⁷ When the first copyright statute was enacted in 1710,⁵⁸ it was designed so that it protected the newly created public domain; copyright was for original writings that were published and lasted only a limited time. These conditions meant that copyright could not be used to capture public domain material and the protected works would go into the public domain after a relatively short term.

As the reasons for, and thus the source of, the First Amendment and the copyright clause of the U. S. Constitution, the religious controversy in England is historical evidence that the former requires the public domain and the latter protects it. The single most persuasive item of evidence of the correlation is the fact that the title of the Statute of Anne—the English remedy for the natural law copyright that had served the cause of monopoly and censorship so well—was the source of the language for the copyright clause.⁵⁹ The lesson the framers learned was that the natural law proprietary copyright prevented the development of the public domain and its return would undermine, if not destroy what its demise created. This explains why in 1841, the constitutional principle of copyright was that one is entitled to only a limited monopoly of material taken from the public domain and then only if its use benefits society.

This principle alone requires that copyright be a subset of public domain law, but Congress, with the aid of lobbying from the copyright industry, has ignored this point and made legislative

⁵⁷ The Licensing Act of 1662, 13 & 14 Car. II, cl. 33 (1662) (making publication of a work protected by copyright to be as much of an offense against the act as publishing a work without the licenser's imprimatur). The Act constrained sunset provisions, but was renewed from time to time, the last time for two years. The statute was allowed to lapse in 1694.

⁵⁸ The Statute of Anne, 8 Anne, cl. 19 (1710).

⁵⁹ The title of the Statute of Anne read: "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." *Id.* The copyright clause reads: "*The Congress shall have Power . . . To promote the Progress of Science and use Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.*" U.S. CONST. art. I, § 8, cl. 8. The copyright clause is italicized to distinguish it from the patent clause.

The most significant point about the clause is that it is a limitation on as well as a grant of congressional power.

changes to defeat it. Copyright has ceased to be subject to the conditions of publication, notice, deposit and registration, has been given an extended term, and protects against plagiarism as well as piracy. Indeed, the protection against plagiarism may be the most important factor in the change, for it was the first and prepared the way for the other. Story's goal in *Folsom* was not for the fair use doctrine, but protection for the author against plagiarism. Plagiarism implies ownership of the work, the basic tenet, although unarticulated, of the natural law copyright and Story's need for copyright to protect against plagiarism as well as piracy gave him both his conviction for the need, and the basis for, a change in the law that was to have global consequences in the world of copyright law.

VI. FOLSOM'S CHANGE OF COPYRIGHT

Story's expansion of infringement to include plagiarism is one key to understanding *Folsom* and the fair use doctrine. Plagiarism is a natural law doctrine that implies the author's writings are his or her property and thus that copyright is a subset of property law as a natural law property right.

The natural law copyright, however, can be described as being trite and banal; trite because there is only one condition for it to come into existence (the creation of a work), and banal because the only interest protected is that of the author (since the function of property law is to protect the property owner). The two characteristics mean that the public interest is only an incidental beneficiary of the natural law copyright. The best evidence of these points is in the legacy of *Folsom*, as found in the in modern fair use decisions, which are just as logically dubious as their nineteenth century progenitor.

Three fair use decisions—*Basic Books, Inc. v. Kinko's Graphics Corp.*,⁶⁰ *Princeton University Press v. Michigan Document Servs., Inc.*,⁶¹ and *American Geophysical Union v. Texaco, Inc.*⁶²—illustrate the point. In *Kinko's* and *Princeton Univ. Press*, the courts

⁶⁰ 758 F. Supp. 1522, 18 U.S.P.Q. (BNA) 1437 (S.D.N.Y. 1991).

⁶¹ 99 F.3d 1381 (6th Cir. 1996).

⁶² 37 F.3d 881, 32 U.S.P.Q.2d (BNA) 1545 (2d Cir. 1994).

limited the right of professors and students to use photocopies of excerpts from copyrighted works made by a commercial copyshop, although the professor chose the excerpts and requested the copies. The courts simply read out of the statute the language "multiple copies for classroom use," using the novel solution of attributing to the principal a duty of the agent that destroys the principal's stated statutory right.⁶³ In *Texaco*, the court limited the right to engage in uninhibited use of published material for research, holding that a subscriber who paid \$2400 a year for three subscriptions to a learned journal must pay a license fee in order for an employee scientist to copy an article from the journal for research purposes.⁶⁴ The reasoning in this case measures up to that in *Kinko's* and *Princeton University Press* for intellectual dishonesty. The subscriber was a for-profit corporation that spent \$87,000,000 a year on research, which somehow meant that the subscriber was using the journal with a profit motive.⁶⁵

Arguably, the faulty reasoning in both cases rivals, and may even be superior to, that of *Story* in *Folsom*. The 1831 Copyright Act did not specifically say that the papers of a former President purchased by the United States could not be copyrighted by the assignees of the President's legatee. The 1976 Act does say that "the fair use of a copyrighted work, . . . for purposes such as . . . teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."⁶⁶

Thus, modern courts continue to use the concept of fair use taken from *Folsom* to expand the copyright monopoly. The difference is that while *Folsom* enlarged a very narrow copyright, the modern cases enlarge a very broad copyright. Thus *Folsom* limited an author's right to use a copyrighted work, which respected the market boundary for copyright; indeed, the *Folsom* test was centered on the market impact of the competitive use. The modern view, promoted by copyright owners, is that the fair use doctrine limits the right of individuals to use a copyrighted work for their personal purposes regardless of market impact.

⁶³ See *Kinko's*, 758 F. Supp. 1522; *Princeton Univ. Press*, 99 F.3d 1381.

⁶⁴ See *Texaco*, 37 F.3d 881.

⁶⁵ *Id.*

⁶⁶ 17 U.S.C. § 107 (1994).

VII. THE CONTEMPORARY RELEVANCE OF *FOLSOM*

We now come to the main point. The fair use doctrine as created benefitted authors in two respects: it enhanced the right to publish and protected the right to create works.⁶⁷ Contemporary fair use adds a third benefit for the author or copyright owner: it protects the right to license the use of a copy of a work after that copy has been sold. Thus, if as a matter of fair use a teacher can copy only 1000 words from a prose work,⁶⁸ if he or she copies 1,050 words, he or she is guilty of infringement. To avoid infringement, the teacher must get permission from the copyright owner, and the copyright owner can require a licensing fee as a condition for permission.

This result is possible only if fair use is an excused infringement and only if it encompasses personal use by individuals as well as competitive use by authors. The idea that fair use is an excused infringement is a product of *Folsom* in which Story merely redefined infringement, a redefinition that resulted in what came to be known as the fair use doctrine.

How fair use, which was clearly required only of competing authors, came to encompass personal use is a story too complex to report in detail and I report it in summary fashion. There are three points. First, until the 1909 Copyright Act, the copyright owner of a book had only the right to print, reprint, publish, and vend the book, but the copyright owner of a work of art also had the right to copy it.⁶⁹ All prior copyright statutes had adhered to

⁶⁷ So long as another could abridge or translate a work, the exclusive right to publish was very narrow; and unless an author could use another's work to create his or her own, the creative process was fraught with peril.

⁶⁸ This is the amount prescribed in the Copyright Act, *Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions*, H. REP. NO. 94-1476 at 68 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5682, which is merely a part of the legislative history not a provision of the Copyright Act; the problem is, it is not law.

⁶⁹ The 1790 Act granted the rights of "printing, reprinting, publishing and vending" the copyrighted work, sec. 1, but it was an infringement "to print, reprint, publish, or import" the copyrighted work. 1 Stat. 124-26, §§ 1-2 (1790).

The 1802 Amendment provided copyright protection for engravings and prints. 2 Stat. 171-72 (1802). The grant of rights section provided that the copyright owner had the right "of printing, reprinting, publishing, and vending" the prints. § 2. But it was an infringement for another "to engrave, etch or work, . . . or in any other manner copy or sell, . . . or import for sale . . ." the copyrighted work. § 3.

this dichotomy—the right to print books and the right to copy to works of art—but the 1909 Act provided that the rights to print, reprint, publish, *copy*, and vend applied to all copyrighted works. The significance of the change as applied to books is seen in the fact that the right to publish a book applies to the whole book, while the right to copy a book applies to copying the book in whole or in part.

Second, in the 1976 Act, Congress gave the copyright owner the right to reproduce the work in copies and, as a separate right, to distribute copies to the public. The effect was to divide the act of publication—printing and public distribution—into two separate rights. The right to copy a book as a separate right is the basis for the claim that to copy any portion of the book is infringement, which, in turn, is the basis for the copyright holder's claim of the right to license the use of books on the library shelf.

Third, the separation of the right of publication into two steps limited only by fair use inevitably meant the extension of the defense of fair use—originally available only to authors—to individual users. The benefit was one that the user could well do without, for, as the Classroom Guidelines show, it resulted in a

The 1831 Revision Act granted the rights "of printing, reprinting, publishing, and vending" the copyrighted work. 4 Stat. 436-39 (1831). The infringement of books was to "print, publish, or import . . . any copy of such book, or books, without the consent of the person legally entitled to the copyright thereof . . ." § 6. But the infringement of "any print, cut, or engraving, map, chart or musical composition" was to "engrave, etch, or work, sell, or copy . . . or import for sale . . ." § 7.

The 1870 Revision Act granted for "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 fine arts . . . the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same; . . ." 16 Stat. 212-17, § 86 (1870). The infringement of books was to "print, publish, or import, or, . . . sell . . ." § 99. For "any map, chart, musical compositions, print, cut, engraving, or photograph, or chromo, or . . . painting, drawing, statue, statuary, or model or design intended to be perfected and executed as a work of the fine arts" it was an infringement to "engrave, etch, work, copy, print, publish, or import" the work. § 100.

The 1909 Revision Act granted the copyright owner the right "To print, reprint, publish, copy, and vend the copyrighted work;" § 1(a). The 1909 Act neither distinguished the infringement of various works nor defined infringement, providing only "That if any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable: . . ." § 25.

Note that the 1870 revision act was reenacted in 1873 as Part of the Revised Statutes, Title 60; and the 1909 Act was later codified as Title 17 of the U.S. Code.

definition of fair use and a defined right is a limited right.

There must be an explanation of why Congress failed to understand the changes it made in the 1976 Act and why courts have consistently failed to understand that fair use was intended to be required only of competing authors, not individuals. The explanation for Congress' failure is simple: Congress allowed the copyright industry to draft the Copyright Act.⁷⁰ Also, the lobbyists for the industry knew exactly what they were doing—providing a statutory base for a natural law copyright in deed if not word. For example, the copyrightists claimed that the common law copyright under state law and the statutory copyright under federal law resulted in a needless and confusing dual system of copyright protection. The argument, of course, was wrong because the common law copyright was not a copyright at all, only the right of first publication. As the saying goes: when statutory copyright came in, common law copyright went out. There was, in short, no system of dual copyright protection. But getting rid of the common law copyright was necessary to grant statutory copyright from the moment of fixation, which is to say creation, a characteristic of natural law.⁷¹

The explanation for the judicial failing is more subtle and complex. We start with the point that few judges know very much about copyright law, which, until recently, was a backwater subject in law school. Consequently, judges are amenable to the claims of copyright lawyers that copyright is a plenary property right and that another's use of a copyrighted work without permission is unfair. Since property is the basis of the common law system, judges see no reason to reject the copyrightists' claim, a tradition that goes straight back to Story.

The question of whether copyright is a natural law property right or statutory monopoly is a question of how shall we treat copyright law. This is a policy question and there are arguments to support either choice. European countries, for example, use the natural law theory of copyright, the Anglo-American tradition has been the

⁷⁰ See Jessica Litman, *Copyright, Compromise and Legislative History*, 72 CORNELL L. REV. 857 (1987) (discussing the history and development of the 1976 Act).

⁷¹ Fixation rather than creation was the requirement because under the Constitution, Congress can provide copyright only for "writings." U.S. CONST. art. I, § 8, cl. 8. Therefore, even though created, work had to be fixed before Congress could grant it copyright protection.

statutory monopoly theory. The policy choice in the U.S., however, is not open to change easily, because it was made in 1787 and put into the U.S. Constitution. Indeed, there is a good argument that in the 1976 Copyright Act Congress came perilously close to enacting an unconstitutional statute and avoided this error only by including the fair use doctrine.

The judicial branch, however, has committed the sin that the legislative branch narrowly avoided. Courts, by and large, have given fair use, part of a statute granting a statutory monopoly, a natural law interpretation. In jurisprudential terms, the legal sin is to use a theory in administering the statute that differs from the theory used in drafting and enacting the statute. There is much evidence of this error, but our main concern is the fair use doctrine where, perhaps, the error exists in its most egregious form.

Fair use is a derivative concept, derived from the concept of copyright of which it is a part. If copyright is a natural law right, fair use is a natural law concept, an excused infringement and a defense. If copyright is a statutory monopoly, fair use should be viewed as a limitation on the monopoly in the public interest, which means that it is an affirmative right, not excused infringement. The paradox is that while U.S. copyright is a statutory monopoly copyright, fair use is treated as a natural law right to protect that monopoly.

The folly of a natural law fair use in administering a statutory monopoly copyright is shown by the extension of fair use to encompass personal use by individuals. First, except for the fact that fair use is treated as a natural law concept, it would not have been extended to individual use. Second, while fair use is denoted a defense, it is in fact a requirement. Thus, to use a copyrighted work a person must fulfill certain requirements to avoid infringing the work. Perhaps this makes sense when a competing author is making use of another's work; but it makes a mockery of the constitutional purpose of copyright—the promotion of learning—when an individual is using a copy of the work for study, research, or scholarship.

Folsom's legacy is that it made the claim that copyright is a natural law property right a part of copyright culture. But the harm of the legacy has not been realized. That harm is that copyright has come to represent a conflict between two fundamen-

tal policies of our society: property rights and free speech rights. The paradox here is that both rights are natural law rights and natural rights, by definition, should not conflict.

Thus, we need to reorient our thinking about copyright and fair use. Joseph Story was, no doubt, an honorable and decent man of high intelligence, but his service to the cause of jurisprudence must be downgraded by reason of his treatment of copyright. No doubt he was sincere, but he was also human, and the evidence is that he reshaped the concept of copyright infringement not for the public's interest, but his own. He was, after all, an author himself and the garret was not to him a desirable place to live. And it may be that, being an author of legal treatises, he viewed copyright as a muse. After all, to paraphrase Dr. Johnson, no one but a blockhead would write a legal treatise except for money.