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A RESPONSE TO MR. Y'BARBO'S REPLY

*L. Ray Patterson**

This is a response to Mr. Y'Barbo's reply to the article by me and Judge Birch, who, in view of the constraints of his office, has left the task wholly to me.

Perhaps the least salutary feature of American society is the extent to which special interest groups shape the law in the legislative process as it affects them. Bankers influence banking legislation, securities firms influence securities law, and lawyers influence legislation according to their special interest, plaintiff lawyers opposing, defense lawyers promoting, tort reform. No special interest group has been more successful in this endeavor than copyright owners, a success that entitles them to the epithet of copyrightists.¹

That Mr. Y'Barbo is a copyrightist is suggested by three ideas he expresses in his article:

- that first amendment protections are already embedded in contemporary copyright law;
- that copyright is intended to provide the proper balance between author and author (so that the public is not a part of the copyright equation); and
- that the consumer/competitor distinction in copyright law is absurd.

These three ideas support the natural law concept of copyright, which in practical terms means the copyright umbrella can be extended to new communications technology with little or no change. Maintaining the status quo, of course, is important for copyrightists because change may inhibit their expansion of the copyright monopoly by privatizing copyright law. Thus, if first amendment protections are already embedded in contemporary

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¹ Professor Jessica Litman has proved this point in two articles: Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857 (1987); Jessica D. Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275 (1989).

copyright law, the first amendment is less likely to be used to prevent the process of privatization; if copyright is to provide a proper balance between author and author, the impact of copyright on the consumer is not a matter of concern; and if the distinction between the consumer using the work and the competitor infringing the copyright is rejected, it frees the copyright owner to license the use of copies of copyrighted works after they have been sold and placed on the library shelf. This is because for infringement purposes, the distinction between the use of the work by the consumer and the use of the copyright by the competitor is eliminated.

The right to license the use of copies that have left the stream of commerce, of course, is an enormous expansion of the copyright monopoly, and monopoly is the natural predicate for censorship. But if one only transmits the work via television or the computer, arguably the work remains in the stream of commerce, a justification for licensing access to, and use of, the work. The ideas that first amendment protections are embedded in copyright law and that there is no distinction between the consumer and competitor thus serve as a shield to protect the practice of private censorship in the form of licensing the right to read works, whether published or transmitted through the ether.

The predicate for this scenario is that the purpose of copyright is to protect author against author rather than to benefit the public. But neither the copyright statute, precedent, nor reason supports that position. The statutory right of fair use mandates that the public be a part of the copyright equation.² And precedent against the parochial function of copyright is found in both the copyright clause of the U.S. Constitution and rulings of the Supreme Court. The first says that Congress shall have the power to promote the progress of learning, a goal that, one can reasonably assume, is not limited to authors but includes the public at large.³ Indeed, evidence to support this view is found in President George Washington's message to Congress that preceded the enactment of the

² 17 U.S.C. § 107 (1994).

³ U.S. CONST., art. I, § 8, cl. 8 ("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.").

1790 Copyright Act.⁴ More recent precedent is the several rulings of the U.S. Supreme Court that copyright is primarily to benefit the public, only secondarily to benefit the author.⁵ Clearly, then, the Supreme Court views the public interest as an important component of copyright law.

The idea that copyrightists use to demean the public interest in copyright law—that the *raison d'être* of copyright is to induce authors to create works—is a stale fiction that has been used for centuries by publishers in their lobbying efforts in legislative bodies and litigation efforts in courts. In 1643, for example, the booksellers of London petitioned Parliament for new censorship legislation that would protect their copyrights, arguing that without such laws, authors could not feed their families and “many pieces of great worth and excellence will be strangled in the womb.”⁶ More recently, in *American Geophysical Union v. Texaco, Inc.*,⁷ the court reasoned that if it did not grant the copyright holder the right to license others (for a fee) to copy an article for research purposes, authors would not be able to support their families.⁸

Both arguments are suspect, the first because in 1643 the author in England was not entitled to copyright, which had been developed by, for, and limited to printers and publishers, the second because

⁴ “[T]here is nothing which can better deserve your patronage than the promotion of science and literature. Knowledge is, in every country, the surest basis of public happiness.” GEORGE WASHINGTON, AN ADDRESS TO THE 1ST CONGRESS (1790), reprinted in COPYRIGHT IN CONGRESS, 1789 TO 1904 at 115 (Thorvald Solberg ed., 1905).

⁵ See, e.g., *Fogerty v. Fantasy Inc.*, 510 U.S. 517, 524, 29 U.S.P.Q.2d (BNA) 1881, 1884 (1994) (“The primary objective of the Copyright Act is to encourage the production of original literary, artistic, and musical expression for the good of the public.”); *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349, 18 U.S.P.Q.2d (BNA) 1275, 1279 (1991) (“The primary objective of copyright is not to reward the labor of authors, but [t]o promote the Progress of Science and useful Arts.”); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429, 220 U.S.P.Q. (BNA) 665, 672 (1984) (“The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved.”); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158, 77 U.S.P.Q. (BNA) 243, 253 (1948) (“The copyright law, like the patent statutes, makes reward to the owner a secondary consideration.”); *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) (“The sole interest of the United States and the primary object in conferring the [copyright] monopoly lie in the general benefits derived by the public from the labors of authors.”).

⁶ 1 A TRANSCRIPT OF THE STATIONER'S REGISTERS 587 (Edward Arber ed., 1875).

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

⁸ *Id.*

the subject of the litigation in *Texaco* was articles in learned journals, the authors of which, as is customary, received no compensation. One may reasonably ask: is an uncompensated author deprived of resources to support his or her family when the purchaser of a publication in which the writing appears makes a personal copy for research purposes? An affirmative answer comes very close to suggesting phantom reasoning, which is the natural companion of legal fictions in that its foundation is ideas generated by emotion rather than logic.

The notion that copyright is a muse for authors that must be managed so as to enable authors to use each other's works in creating their own is a classic example of phantom reasoning. Consider the fact that England's greatest authors—Chaucer, Shakespeare, and Milton—wrote without the benefit of copyright. Moreover, one can reasonably infer that it is not copyright, but the desire to express oneself as a result of talent that causes aspiring authors to occupy the proverbial garret in a starving state.

Reason in support of the notion that the public is only an incidental beneficiary of copyright is weak because no one, in so far as I know, has explained why the beneficiaries of so important and pervasive body of law as a copyright should be limited to one class of persons, namely authors, real and fictional in the form of corporate employers. That copyright is solely for the benefit of authors, of course, is the extreme formulation of the natural law copyright, resting on the notion that an author is entitled to copyright because he or she created the work, an idea that assumes a fantastical quality when applied to corporate entities. But as the corporate application shows, the natural law copyright is both trite and banal, trite because it has no condition other than creation, and banal because its only beneficiary is the author, real or fictional. Surprisingly, however, Mr. Y'Barbo will find support for his position in the early English copyright, a private-law copyright that was limited to printers and publishers, which lasted in perpetuity, and protected only the copyright owner. The weakness in this evidence, of course, is that the private copyright was limited to entrepreneurs and did not encompass the creator.

The Statute of Anne⁹—the first English copyright statute that served as model for the U.S. Copyright Act of 1790—created the first public law copyright and for the first time gave the author the ownership of the copyright of his or her work. The new statutory copyright, however, did not come into existence until the work was printed. Except for this change and the limited term, the new public law copyright retained the essential features of its predecessor, presumably because of its long-continued existence. Although the ownership of the statutory copyright was initially vested in the author, the change proved at first to be more cosmetic than substantive. This was because the publishers ignored the changes.¹⁰ Even so, conscious of the resentment against the monopoly that the earlier copyright represented, publishers managed to obscure the fact that copyright continued to be a publisher's monopoly by claiming that copyright was an author's right. The author, in short, was the shield for the monopoly of the publishers, who never publicized the fact that despite the Statute of Anne they were the copyright owners (as assignees of authors).

The early private-law copyright, of course, was a natural law copyright based on the sweat-of-the-brow rather than creative effort, which Parliament rejected when it enacted the Statute of Anne and made copyright a statutory grant. This English history is relevant today for two reasons. First, the language of the copyright clause is taken directly from the title of the Statute of Anne, the model for the 1790 Copyright Act.¹¹ Consequently, litigation by the booksellers in eighteenth century England, brought in an effort to negate the limitations on copyright that the Statute of Anne imposed, resulted in a House of Lords decision in 1774¹² that constitutes an annotation of the copyright clause, drafted in 1787.

⁹ Statute of Anne, 1710, 8 Anne, ch. 19 (Eng.).

¹⁰ This is made apparent in the debate in the House of Commons on the Booksellers' Bill (to extend the term of copyright), which was introduced immediately after the House of Lords had rendered its decision in *Donaldson v. Becket*, 4 Burr. 2408, 98 Eng. Rep. 257 (H.L. 1774), in which the Lords rejected the booksellers claim that copyright was a natural law right that existed in perpetuity. 17 THE PARLIAMENTARY HISTORY OF ENGLAND, FROM THE EARLIEST PERIOD TO THE YEAR 1803. 1078-1110 (London, William Cobbett ed. 1771-1774).

¹¹ 1790 Act, 1 Stat. 124; 1st Cong., 2d Sess., c. 15.90 Act.

¹² *Donaldson v. Becket*, 4 Burr. 2408, 98 Eng. Rep. 257 (H.L. 1774).

The second reason for the relevance of English history is the lobbying efforts of copyrightists directed to reviving the features of the early private-law copyright with the use of fictions. The two most notable fictions are: 1) that the transmission of electronic signals become a writing if they are recorded as they are broadcast; and 2) that the employer of an author who creates a work in the course of his or her employment is deemed to be the author.¹³ Taken together, the two fictions effectively mean that copyright law in the United States has become the private preserve of media conglomerates.

The catalyst for the expanded fictions in the copyright statute, of course, is new communications technology, which has provided the copyright industry a motivation for expanding the copyright monopoly in order to secure a strangle hold on the electronic dissemination of learning materials, the subject matter of copyright. To defeat the safeguards of free speech provided by the first amendment and the limitations on Congress' copyright power in the copyright clause, the copyrightists have resorted to a subtle, but effective, tactic. They publish pronouncements about copyright law that become a part of copyright culture, which then becomes a part of thinking, especially judicial thinking, about copyright. The most effective of these pronouncements seems to be that copyright is a natural property right of the author, an idea that the U.S. Supreme Court rejected in its first copyright case.¹⁴ General ignorance about copyright law means that the copyrightists pronouncements remain unrefuted, but it is a simple fact of life that explains the success of this effort. Everyone tends to process information according to their culture rather than the content of the information. Thus, the idea that copyright is a property of authors to protect the rights of authors deeply embedded in our culture justifies the monopoly even while its primary beneficiary is the manufacturer of the book, not the creator of the work.

The danger here explains why the copyright clause is a limitation on, as well as a grant of, congressional power. These limitations

¹³ These two fictions are derived from interpretations of 17 U.S.C. § 101 (1994) and 17 U.S.C. § 201(b) (1994), respectively.

¹⁴ *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834).

come from the title of the Statute of Anne in England,¹⁵ and the reasons for the limitations in the English act are relevant to the reasons for the limitations in the copyright clause. Briefly stated, they were that copyright had been used as a device of censorship and an instrument of monopoly, and the limitations were intended to prevent a similar use of copyright in the future. The language “for the encouragement of learning” in the title of the Statute of Anne and its counterpart, “to promote the Progress of Science” in the copyright clause were not mere slogans, but words that expressed a substantive purpose, to prevent statutory copyright from being an unlimited monopoly, the predicate of censorship, as the experience with its predecessor proves beyond a reasonable doubt.

The learning purpose, of course, is protected by the first amendment and the copyright clause, protections that are a product of the fact that both constitutional provisions are a product of the same history of political oppression and press control generated by religious controversy in England. The fact that the first amendment protects the freedom of religion as well as the press is not coincidental.

Nor is the fact that the copyright clause also protects the freedom of speech, although in ways seldom acknowledged. The general view seems to be that copyright protects the author’s right of free speech, but in fact it protects the public’s right of free speech by reason of the fact that it limits copyright to the author’s own original writings for a limited time, limitations that protect the public domain. The point can be made clearer in light of the three policies manifested in the copyright clause: the promotion of learning, because it so states; the protection of the public domain, because copyright is limited to original writings and exists only for limited times; and the public’s right of access, because “the exclusive Right” that Congress can grant to authors is the exclusive right of publication, which insures public access.¹⁶ Recall that under the Statute of Anne, copyright was available only for printed books.

¹⁵ “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.” Statute of Anne, 1710, 8 Anne, ch. 19 (Eng.).

¹⁶ See L. Ray Patterson, *Copyright and “the exclusive Right” of Authors*, 1 J. INTELL. PROP. L. 1 (1993).

If, as the framers determined, constitutional protections against the abuse of copyright were necessary when copyright was limited to printed works, there is no reason to assume that the protections are less needed when copyright is applied to the electronic dissemination of works. Watershed events such as the rise of the computer call for a return to fundamentals, which in the case of copyright are found in the copyright clause and the first amendment. They provide the starting point for finding solutions to legal protection for new means of disseminating information. The task of following reason to its logical conclusion, however, is not easy when the self-interest of a few media conglomerates are at risk. This is why it is silly to assume that the first amendment has no relevance to the learning process that is to a large extent governed by copyright law, and dangerous to reject the distinction between the competitor who infringes the copyright and the consumer who uses the work.

Copyrightists would do themselves—and the law—a great favor by joining in the search for the proper solution without focussing on how to use copyright law to enhance guaranteed profits, even though the effort entails the abuse of constitutional rights and corruption of the learning process. They should accept the fact that first amendment protections are not embedded in copyright law; that the public interest is an important component of copyright law; and that the consumer/competitor distinction is important for the proper administration of copyright law.