

Copyright and the Public Interest

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13. COPYRIGHT AND THE PUBLIC INTEREST. Luther H. Evans. 1949

COPYRIGHT AND THE PUBLIC INTEREST

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COPYRIGHT has a closer connection to today's world struggle than may be apparent at first to some who have not had occasion to consider the wider implications of the subject or may have been engrossed in the detailed problems of particular industries or interests.

The crisis faced by the nations and peoples of the world is as yet unresolved. In part an aftermath of a great war, that crisis also arises from the regrouping and play of deeper forces — economic, military, intellectual. Such forces are closely interrelated: economic disorganization fosters the growth of ideas of social structure which a higher level of production discourages. Military strength may be a powerful support to particular systems of thought and social organization, while political doctrine and personal conviction may be as important military weapons as any others that science has invented.

Whether all will agree that the battles of the mind are the major engagements in today's world struggle, few will contend, I think, that they are of a lesser order of importance. My personal view is that history will record they were crucial;

upon their outcome the internal organization of our society and the external relations of the nations primarily depend.

The battle of ideas may assume the form of written words, pictures, sounds or combinations of these. Whatever the form, the essential problems revolve around those of original creation and production on the one hand and of effective distribution on the other. Each aspect is essential to the other. Neither can be long considered without questions being raised as to the nature of the rights of the creator and the length to which the state should go in extending its protection to all subsequent forms of reproduction of the original creation which in the English-speaking world are grouped under the name of "copyright."

Misled in some measure by the numerous technically complicated details of the subject, many persons may have overlooked the fact that determination of sound copyright policies raises, alike in the domestic and the foreign field, the fundamental issues of our day: preservation of personal initiative with greater equality of opportunity; avoidance of the evils of monopoly with a minimum of state control; freedom and integrity of thought, speech, and communication reconciled to media of mass communication. Copyright properly understood and wisely handled may be at the same time a powerful

stimulus to creation and the means of opening the channels of dissemination of thought, information and debate. Misunderstood, and with its true purposes lost sight of, copyright can become a limitation on creation and a barrier to free interchange and expression. Like many other products of man's genius in the realms both of science and of law, it has a capacity for good or evil depending on his understanding and the use he makes of it.

I propose to speak to you briefly on some of these matters, not as a technician, expert in refinement or the legal applications of particular language, but rather as one who as teacher, author, librarian and delegate to copyright conferences has had occasion both to give consideration to these problems in a broad sense and to make policy recommendations. Indeed, there may be some positive advantages in this approach which both limited experience in some phases of the subject and lack of direct involvement in others may permit me to bring to a fresh consideration of the subject. At many of these copyright discussions I have been impressed by two attitudes: one has been a tendency to approach concrete problems in the light of a fixed idea or a predetermined goal, sometimes at least partly emotional in nature; the other a readiness to discuss issues and principles solely with a view to their pragmatic effects upon

specific interests or even of particular contractual arrangements or pending negotiations. Neither approach has been particularly conducive to progress in domestic legislation or international relations. Without doubt testimony as to the practical effect of any proposal should be given before those who must weigh the evidence, and those with intimate firsthand knowledge of particular situations are best equipped to give such testimony. The balancing of conflicting interests and the weighing of such testimony should be done by others with a broader perspective and in a spirit which makes the public interest the paramount test.

Before giving consideration to certain situations which are of particular interest at the present time, let us look for a moment at the basic concepts underlying all copyright and in particular our United States copyright law. In later applying these principles to concrete situations I may refrain from expressing a final personal judgment as to the proper ultimate solution of each. This may be due more to a desire to emphasize the primary need of proper analysis and formulation of all such problems and the probable effects of the solutions proposed than to any inclination to maintain a position of personal neutrality in these urgent matters.

The diversity of juristic concepts as to the true basis of copyright has impressed many

students of the subject. This has complicated efforts at agreement on definition and statements of principle not only in the international field but has also retarded the solution of pressing practical problems of detail in the domestic law of various countries. Adherents to the view that the right of an author to control, even after publication, the copying or reproduction in any form of the creation of his intellect is a property right essentially identical to that in a physical object moulded by an artisan with his hands or to a crop taken by a farmer from his soil, find it difficult to reconcile themselves to the thinking of those who assert copyright to be a privilege granted by the state for a limited duration in the public interest. Others deny the validity of either of these views and contend that copyright can only be adequately understood as in essence the extension of the creator's personality, that is, as an application of the doctrine of the right of privacy. On other occasions copyright has been spoken of as one of those natural rights more popular in a day of earlier political debate of which we may today be witnessing a revival as we hammer out codes of human and civil rights for universal acceptance.

In the United States, at least, the scope of this philosophic copyright discussion is restricted and the issue at the same time is clarified by the provisions of Article 1, Section 8, of our federal

constitution which clearly disclose that, so far as the lawmaking powers of our Congress are concerned, both the basis and the objective of our statutory copyright is the stimulation of creation. The exclusive statutory rights of authors to their writings may be granted only for such limited periods as, in the judgment of Congress, will tend to promote the progress of science and the useful arts. This language and the philosophy behind it were not a passing inspiration of its authors. Their roots were deep in the English law, beginning with the Act of the 10th of April, 1710, entitled "An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such copies, during Times therein mentioned," known as the Statute of Anne.

Equally revealing is a survey of the copyright legislation of the thirteen original states, ten of whose copyright enactments between 1783 and 1786 recited in their preambles or title clauses a purpose to encourage or improve learning and the progress of civilization and the arts and sciences. The enactments of five of the states made additional references either to "natural equity and justice, honor to their country and service to mankind," as did New York and Georgia, or they went beyond this, as did Massachusetts, New Hampshire, and Rhode Island, in speaking even more specifically of "the

natural rights of all men," coupling this with the further statement of "there being no property more peculiarly a man's own than that which is produced by the labour of his mind." North Carolina's preamble said: "Whereas nothing is more strictly a man's own than the fruit of his study . . ." New Jersey's act of 1783, entitled "An Act for the promotion and encouragement of literature," contented itself with a middle position that "learning tends to the embellishment of human nature, the honour of the nation, and the general good of mankind" and "it is perfectly agreeable to the principles of equity that men of learning . . . should have the profits that may arise from the sale of works secured to them . . ."

Virginia, in the Act of 1785, undertook to secure an exclusive property, as did Maryland, though the latter also spoke of the "encouragement of learned men." Connecticut's goal was to encourage learning, presumably creation, and also the publication of writings. The objectives of both Georgia and New York were restricted to encouraging men "of learning and genius to publish their writings." Pennsylvania and North Carolina refer specifically to encouragement of composition, writing, and discoveries. Delaware passed no copyright legislation.

In brief, ten states used language directed towards encouragement of learning for the pub-

lic benefit coupled with provisions stressing the author's interest; two states dealt only with protection of the author. Four states went much further and also had specific provisions as to adequacy of copies to serve the public and the reasonableness of the price, while a fifth state dealt only with reasonable price.

It is thus apparent that the draftsmen of the copyright clause of the federal constitution had before them more than one philosophic basis for the exercise of Congressional authority in this field and that the choice made was deliberate. This is not to say that the author's property rights were disregarded; on the contrary the very purpose of Section 8 was to confirm and strengthen such property right but not as either a natural right or an end in itself but as, and only as, the recognition of such right furthered the ultimate purpose of promoting the progress of science and the useful arts. This purpose in turn was subordinated to another even wider purpose, namely, "to form a more perfect Union, establish Justice, . . . promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity . . ."

Whatever may be the basis of other national systems of copyright, in the United States the test both of the scope of legislative power and its application to any particular domestic situation is clearly that of the public interest. No-