

# Marquette Law Review

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Volume 4  
Issue 2 *Volume 4, Issue 2 (1920)*

Article 4

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1920

## Jurisdiction of Courts of Admiralty

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James G. Jenkins, *Jurisdiction of Courts of Admiralty*, 4 Marq. L. Rev. 81 (1920).  
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## THE LAW OF COPYRIGHT.

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In the year 1710, in the reign of Queen Anne, there was passed by the English parliament for the first time an act for the encouragement of learning, said to have been drafted by Swift, which declared that an author should have for a limited time the exclusive right of publishing his production, and enacted certain penalties for the piracy of the work. For over sixty years thereafter there was waged a most remarkable legal warfare between the jurists with respect to the character, nature and origin of literary property; whether the right of property in literary work existed at the common-law or by force only of the statute, and whether if existing at the common-law, the right was taken away or abridged by the statute in question. The courts of chancery held with unanimity to the doctrine that independently of legislation there was by the common-law the right of property in the author of published works. In 1774, however, the House of Lords by an equally divided court—that is to say, by a vote of six to five of the Judges, Lord Mansfield, the twelfth judge, through motives of delicacy declined to vote, because he had decided the question in the King's bench—held to the doctrine that any common-law right after publication had been taken away by the statute of Anne, and that all rights of authors were to be gauged by the provisions of that statute. *Donaldson vs. Becket*, 4 Burrows, 2498. That doctrine has since prevailed in England. The nature of copyright, in this forensic battle, lasting over half a century was, of course, most thoroughly considered and ably discussed and was resolved into four antagonistic theories concerning the nature of literary property.

*First:* That intellectual productions constitute a species of property founded in natural law, recognized by the common-law, not lost by publication, and not taken away by legislation.

*Second:* That an author by the common-law has the exclusive right to control his works before, but not after publication.

*Third:* That the right was *not* lost by publication, but was destroyed by the statute.

*Fourth:* That copyright did not exist at common-law, was a monopoly created and regulated by statute alone; and that no

right other than that granted by the statute existed in the author.

The fundamental question—underlying and common to these four conflicting theories—is whether the right to one's literary production is a natural right to property covered by the same general principles which underlie all property, or whether it is an artificial right created by and subject to be destroyed by legislative act.

It was urged in behalf of the natural right to literary production that the origin of property by natural law rested upon preoccupancy; although the writers on natural law differ in their reasoning, some saying that this right by preoccupancy rested upon social compact, a tacit or implied agreement that the first occupant should become the owner. Others repudiate the idea of social compact and declare the right to arise by the act of occupancy alone, but all agreeing that in primitive ages he who first occupied was entitled to hold, and that the act of occupancy gave birth to ownership.

It was urged that preoccupancy being first possession, is given by creation, by production; that he who creates is the first possessor of the thing created; that occupancy implied labor—for example, that the taking and holding possession of unoccupied lands at an early day was not possible without labor, and in later times represented distance overcome, toils endured and dangers passed; or, as Locke expresses the thought, the deer at large in the forest, the fish swimming in the sea, are the common right of all; but the law of reason gives the game to him who hath caught it, who hath bestowed his labor upon it, who hath reduced it to possession. The principle is as old as property itself that what a man creates is his to enjoy to the exclusion of any other, and is based upon the necessities of society and is essential to the promotion of industry. Thus Abraham maintained his right to a well because he had "digged this well" (Gen. XXI, 30); and over a century later (assuming the correctness of time as stated) Isaac, his son, successfully claimed the well as his father's property. (Gen. XXVI, 18.)

In the highest state of the law title by production is the best and strongest title. To him belongs the harvest whose toil has produced it; to him the fruit who has planted the tree. This is the natural mode of acquiring property. Succession, purchase, gift, are derivative. In the one case property is obtained by the sweat of the brow; in the other its acquisition is not inconsistent

with idleness. In this sense it matters not whether the labor be of the body or of the mind. The fundamental law recognized no difference between the poet and the peasant, and it was said that there is no consideration for the inviolability of property which is not applicable as well to the mental labor of the poet as to the physical labor of the peasant. It was sought to distinguish them in this, that property, the result of manual labor, is corporeal; that of mental labor without material substance. A mere intellectual creation, composed of ideas, conceptions, sentiments and thoughts, is an invisible, intangible creation of the mind communicated by language and that, as material substance is an essential attribute of property, there can be no property in intellectual labor. This, on the other hand, was declared to be erroneous because, it was said, materiality was not essential to the identity of a thing and that if identification can be determined, it matters not whether the thing be corporeal or incorporeal; and that such identification was possible is manifest, since the work of one poet or author is easily distinguished from that of another. It was also urged that corporeal possessions perish, while intellectual creation is immortal.

The second theory assumed the existence of literary property before publication, but that it was lost by publication; that while the author had right to his work remaining in manuscript, by its publication he abandoned it to the public. Against this contention it was urged that there can be no abandonment of property without consent of the owner, and that implies an intention to abandon; that the author does not agree to abandon or to transfer his literary property to the public by its publication; that he simply gives the perpetual use of his work for a certain consideration, but that the public has not the right by multiplication of copies to render the work worthless to the owner. The contestants, however, said that there was a strong analogy between literary production and invention and that as the latter is clearly a monopoly, the former must be and is only therefore protected by statute and not by common-law. This reasoning, however, was repudiated by so great an authority as Sir William Blackstone, who declared the argument illogical and unjust.

The third contention assumed common-law property in published works, but asserted its destruction by the statute. This rested upon the construction of the statute. It is unnecessary to present the legal argument advanced upon the one side or upon the other

of this contention. It is sufficient to say that three of the four judges of the King's bench decided that the common-law right of property was not taken away by the statute, and that in the House of Lords, the ultimate tribunal, six of the twelve judges, counting Lord Mansfield, were of the same opinion. But the decision of the House of Lords, as I have said, by vote of six to five—Lord Mansfield abstaining from voting—was to the effect that the common-law right of property in a published work was destroyed by the statute and no right of property in a publication thereafter existed except by force of and under the statute. This has since been the law of England, although its soundness has received the protest of such learned jurists as Lord Campbell and Mr. Justice Coleridge.

I have thus given a brief history of the conflict waged upon this subject in the courts of England. One will observe that this question of such great interest and moment to all engaged in intellectual labor, was determined and settled in England by a vote of six to five. If Lord Mansfield had not been influenced by an over nice sense of delicacy and had voted according to his convictions, the decision would by reason of an evenly divided court, have been the other way. This fact demonstrates that the law is an exact science. And this fact also leaves one at liberty to make up his mind which contention is correct, since the former "lords of creation" to whom was confided the duty of judgment, were unable to agree with respect to it.

It is perhaps well to note here that the act was drafted, promoted and procured to be passed by authors and booksellers in their interest; and their action was suicidal, for amid all the judicial differences to which it gave rise, there was always a majority of the judges in favor of the view that but for the statute an author was entitled to perpetual copyright. This is only another illustration of the truth that an act of the legislature is not always a sovereign remedy, and is often mischievous. In this instance it proved a veritable boomerang for authors, but in the interest of the public in general many reasons could be suggested why perpetuity of copyright is not desirable.

The Constitution of the United States grants to the Congress "power to promote the progress of science and useful arts by securing for limited times to authors and inventors exclusive right to their respective writings and discoveries." By a recognized

rule of construction, since we borrowed this doctrine of protection from the mother country, we took it with the construction of the law which had been there declared; so that it must be held to be the law of this country that an author by publication of his work has only such property right in it as is reserved and secured to him by the acts of Congress enacted in pursuance of the Constitution, and such has been declared to be the law by the Supreme Court of the United States in the case of *Wheaton vs. Peters*, 8 Peters, 591, decided in the year 1834. It is proper to say that this decision, like that of the House of Lords of England, rests upon the divided opinion of the judges, four agreeing to the judgment of the court, two dissenting and one being absent and not voting. The minority opinion declared that—"The great principle on which the author's right rests is that it is the fruit or production of his own labor, and that labor by the faculties of the mind may establish a right of property as well as by the faculties of the body." This division of the judges fortifies the conclusion before suggested that the law is an exact science. Whether for right or for wrong, it must now be taken as settled law that the Constitution of the United States by the clause referred to, and the statutes passed by Congress in pursuance thereof, do not affirm an existing right in the author, but created one, and that such right can only be upheld when the provisions of the law have been complied with and for the limited time prescribed.

The avowed object of the constitutional provision is to promote the dissemination of learning by inducing intellectual labor in works which will promote the general knowledge in science and useful arts. It sought to stimulate original investigation, whether in literature, science or art, for the betterment of the people that they might be instructed and improved. The production, to come within the protection of the law, must therefore be innocent and not injurious to the public peace or morals. It must be original and be a material contribution to useful knowledge. It must not be seditious, libelous, immoral or blasphemous. It need not necessarily be of literary merit, for many productions lacking this quality constitute valuable additions to useful knowledge and are sources of information valuable to the public. The production, however, must have some value as a composition, sufficiently material to lift it above utter insignificance and worthlessness.

The Congress has frequently acted upon the subject of copyright, extending from time to time as seemed desirable the subjects which are deemed to come within the constitutional provision. The protection which originally was limited to maps, charts and books, has been extended to include books, pamphlets, maps, charts, dramatic and musical composition, engravings, cuts, prints, photographs or negatives thereof, paintings, drawings, chromos, statuary and models or designs intended to be perfected as works of art.

The Constitution authorizes the securing to authors of the exclusive right to their writings. This word "writings" is, however, to receive a liberal interpretation; it is not limited to the actual script of the author. The word means the literary production of the author and includes all forms of writing, printing, engraving, etching, etc., by which the idea in the mind of the author is given visible expression. This is illustrated by the *Sarony* case, 111 U. S. 53, where copyright protection was allowed for a photograph—and this before the act of Congress which specified photographs. A photograph is in a sense a purely mechanical reproduction and in that sense is not within the protection of the Constitution; but the selection and arrangement of costume, drapery and other accessories of the photograph, the pose of the person, the arrangement of the subject so as to present graceful outlines, the arrangement and disposing of light and shade, the suggesting and evoking the desired expression, were held to be the products of the photographer's intellectual invention of which he was the author, and the exclusive use of that product of the mind was held to be secured to him by the law. The author is he who really represents, creates or gives effect to the idea, fancy or imagination, whether in writing, print, picture or statue.

Can the copyright law be extended to include mere advertisements? In England it undoubtedly can, for they are included within the act, and the parliament of Great Britain is unlimited in power. There it was held that a catalogue of curios and rare books offered for sale by a bookseller was within the protection of the statute; not, however, as an advertisement, but because it contained original matter, the product of intellectual labor. So also in *Grace vs. Newman*, Law Rep. 19, Eq. 623, a stone and marble mason was protected in the sale of a volume of lithographic sketches of monumental design from cemeteries and

church yards, the court observing that it was full of interesting matter which would often be referred to and consulted as well by persons who contemplated their own death as by others in reference to those who have died. It was a collection of designs of artistic merit, tending to the cultivation of artistic taste. The ruling would probably be sustained in this country upon the ground that it was a book of reference or of art. In a case decided in the year 1882, the court of England expressly ruled, however, that a mere advertisement, whether in writing or by picture, is within the protection of the statute. *Maple vs. Inmorr Army & Navy Stores*, 21 Ch. Div. 369.

In this country, however, it must be borne in mind the federal government, unlike that of Great Britain, is one of delegated powers, the Constitution of the United States being a grant of power and not a limitation upon power. By the constitutional provision upon the subject of copyright, the power lodged with Congress is not unlimited. It is restricted to the promotion of the progress of science and the useful arts. The protection was intended for the encouragement of learning and not of mere industry unconnected with learning and science. The sciences are of a fixed, permanent and durable character and do not comprehend the fluctuating and fugitive advertisements which change daily and are but of temporary use. The article entitled to protection must have by itself some useful purpose other than as a mere advertisement or designation of the subject to which it is attached. The statute is not designed as a protection to traders in the particular manner in which they may shout their wares. *Higgins vs. Kluppel*, 140 U. S. 428; *Mott Iron Works vs. Clow*, 82 Fed. 316.

By the statute, copyright may be acquired only by a citizen of the United States or a resident therein, or by a citizen or subject of a foreign state or nation when such foreign state or nation permits to citizens of the United States the benefit of copyright on substantially the same basis as its own citizens, or when such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement this country may at its pleasure become party to such agreement. Copyright is granted for a term of twenty-eight years with a right to a further term of fourteen years upon compliance with the terms of the statute within six months before the expiration of the first term. This



provision for the extension of time inures in the case of the death of the author to the benefit of his widow or children. To entitle an author to copyright, he must before publication of his work deliver or mail to the librarian of Congress a printed copy of the title of his book or other article, or a description of the work, if it be a work of the fine arts; and within ten days after the publication of the work he must deliver to such librarian two copies of the book or article, or a photograph of the work if it pertain to the fine arts. The fee is but a trifling sum. The work published must have inscribed on it the fact that it is copyrighted or the author cannot maintain his action for piracy.

An interesting question arose whether the publication of a work in serial form in a magazine before the deposit by the author of the title as required by the statute, would invalidate a copyright subsequently procured. It was ruled that the statute did not mean that such publication should be in completed form only, but that it should not be given out to the world until the title of the work was deposited as required; that such construction did not prevent the serial publication of any work, but merely required the deposit of the title prior to such serial publication, and that serial publication without such deposit of the title amounted to a dedication of the work to the public. This question arose in the case of Oliver Wendell Holmes' work, "The Autocrat of the Breakfast Table," published first serially in the Atlantic Monthly and afterwards copyrighted as a book. *Holmes vs. Donohue*, 77 Fed. 179, decided 1896; *Holmes vs. Hurst*, 174 U. S. 82, decided 1899. The requirement that the title shall be deposited before publication cannot be tortured into meaning that deposit of the title subsequent to publication is sufficient. The requirement of the law is plain and simple and as the author can have no right except through the law, he must comply with its provision. It, however, affords me gratification to be able to state that Oliver Wendell Holmes and his family received the benefits of the law and reaped large profits from the sale of his work for a period of thirty-seven years before anyone questioned his title to the copyright or sought, contrary to good morals, to deprive them of the exclusive right to the mental labor of that distinguished author.

The literary world is now laboring to procure uniformity of copyright law among all civilized nations so that the rights of an author shall not be circumscribed by the boundaries of the

country of which he is a citizen, but shall be international and coequal with the boundaries of civilization. International agreement is the one thing now needed to fully protect the author and to prevent international piracy. To this desirable end, international conventions have been held—notably one at Berne—and publicists and jurists as well as authors are agreed that it is just and desirable. It is to be hoped that these efforts may not prove unavailing and that at no distant day the civilized nations of the earth will in respect to this matter be ranged upon the side of honesty and justice in the proper protection of the property of the brain.

I have thus sought to give, as succinctly as I could, a comprehensive insight into the laws of copyright. One will observe that the law affords great protection to the labor of the brain, fostering intellectual effort, preserving the fruits of that labor to its creator and protecting him from literary piracy: Under such encouragement it is not surprising that literature and art have received fresh impetus, stimulating all worthy efforts to promote learning, to develop science and to cultivate the arts, resulting in the increase of the general fund of human knowledge, the cultivation of taste, the development of the arts, and to the betterment of mankind.