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ARTICLES

AUTHORS' RIGHTS IN THE ELECTRONIC AGE: BEYOND THE COPYRIGHT ACT OF 1976

By
*Barbara Ringer**

It is a great honor for me to provide this brief introduction to the inaugural issue of the *Loyola of Los Angeles Entertainment Law Journal* and I am particularly gratified that copyright law has been chosen as a principal subject to be considered. Since my retirement as Register of Copyrights in May, 1980, I have had the time and tranquility to do some stock-taking: to reflect on what the Copyright Act of 1976 accomplished and, more importantly, on what it failed to do or left undone. Beyond this, I have been trying to evaluate the role of copyright in our society, especially in light of the continuing revolution in communications, and to predict the course of protection of authors' rights into the next century.

Stated boldly, the recurring question is this: Is our copyright system in the public interest? This question raises another: Is there really such a thing as "the public interest"? The legislative history of the 1976 Copyright Act, with lobbyists for every conceivable special interest swarming over Congress and with compromises and deals on nearly every issue, makes you wonder. It is easy for scoundrels and demagogues to use "the public interest" to cloak their real motives. Worse yet, well-meaning and unselfish people with an abstract ideal of "the public interest" have sometimes awakened to discover that they have succeeded in undermining the very ideals they were trying to serve. In a pluralistic society made up of conflicting private demands, can any law as complex and subtle as a copyright law ever be said to serve the public interest?

Yet, if there is no such thing as the public interest, then elected and appointed officials have nothing to guide them except the conflicting pressures of special interests. I cannot accept this result. In my opin-

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ion, there *is* such a thing as the public interest in copyright, and officials are serving it whenever they follow what their consciences tell them to do. An objective definition of the public interest might be this: Given the political and cultural framework of a particular society and the economic resources at its disposal, the public interest is the aggregate of the fundamental goals that the society seeks to achieve for *all* of its members — not for a majority of its members or for any large or powerful group, but for all of the people within the society. Considered separately, a society's goals are often in conflict with one another, and in that case there must be a balancing. The art of government consists of achieving a harmonious rather than a destructive balance among conflicting goals.

Looking at copyright in these terms, it is obvious that the public interest in the United States is different in 1981 from whatever it was in 1909 or 1950. Obviously, also, the public interest in copyright today in the United States is different from that of a socialist country like the Soviet Union or a developing country like India.

As I see it, there are three related goals that go together to make up the public interest in copyright.

First, to induce authors and artists to create and disseminate original works, and to reward them for their contributions to society. This is one of those truths that nearly everyone holds to be self-evident. It is written into the Constitution of the United States; it is eloquently stated in the Universal Declaration of Human Rights; it is embodied in the copyright laws of nearly every nation on earth. If this were the only goal to be served by a copyright law, there would be no need to limit the duration or scope of protection, even in societies that reject the notion of private property.

Second, to provide the widest possible access to information of all kinds. Until thirty years ago there was no fundamental conflict between the goal of authors' rights and the goal of widest public access to information. The most important limitations on authors' rights pertained to the length of the copyright term (aimed at putting very old works into the public domain) and to various "fair uses" (activities considered reasonable and non-damaging to the author). For many generations these limitations on protection were enough of a safety valve to keep copyright from acting as a constraint on education, scholarship, and the public's "right to know."

This situation has changed radically since 1950, and the reasons are not hard to discover. The proliferation of new devices making it vastly easier and cheaper to reproduce and disseminate copyright

works without their owners' consent has changed the underpinnings on which copyright laws have rested from their beginnings. Authors and their assignees have lost the power to control their markets. On the other side, librarians and teachers are not the only users who have found copyright an inconvenience or inhibition in their efforts to provide ready access to all who seek it.

The efforts of the 1976 Copyright Act to reconcile traditional copyright concepts with the running floodtide of new technological uses of copyrighted material could not, under the circumstances, have been successful. Taken as a whole, they can be said to have been too little and too early. The overly detailed cable television provisions have already been overtaken by events, and the overly general fair use provisions have offered no solutions to video recording. The widely-publicized battles over photocopying resulted in elaborate statutory provisions and voluntary guidelines but did little to solve the real problem. Just as under the old law, a vast amount of illegal copying is being done without being paid for, while some publicly beneficial copying is not being done because of the inconvenience of making copyright arrangements.

On this point of the conflict between authors' rights and free access, it is instructive to compare the situations in the United States and the Soviet Union. The USSR accepts the notion of copyright as a form of private property, and its copyright law is reasonably generous in the protection of authors' economic rights. Since information in the Soviet Union is controlled by the government, copyright has so far not been looked upon as an inhibiting factor for users.

However, let us suppose that, in the next twenty years or so, the technological developments in communications that have already taken place, or that are confidently predicted in this country, extend to individual Soviet citizens as well. Let us suppose that their radios and television sets have access to direct satellite broadcasts, and that the photocopying machines, audio and video recorders, home computers, home photocopiers, and other electronic marvels now within our reach become available to them as well. It will be interesting to see how the copyright laws of the socialist countries deal with the increasing availability of information and the means for its dissemination in the hands of individuals.

If we regard absolutely free access to information as in the public interest, then we could only welcome these developments in countries such as the Soviet Union. And if we welcome them there, we most certainly could not fail to welcome them here. But if every home be-

comes its own information and reproduction center, what happens to the author's copyright? The traditional method for protecting authors, by giving them exclusive rights to control the various markets for their creative works, is being lost. Unless some substitute form of copyright protection can be found, the goals of inducing and rewarding creativity are destroyed.

This, I believe, represents a very real crisis in copyright law throughout the world. In the United States, the new statute does virtually nothing to resolve this crisis.

Third, a fundamental public interest related to copyright is that of freedom of expression — freedom to write and publish whatever one wishes. In the United States, except in relatively minor instances, copyright has not been used as an affirmative device to control or censor what is written and disseminated. But it is important to remember that the potential is always there. In England, statutory copyright evolved from licensing laws aimed at censorship; in the USSR, copyright licensing is part of a system aimed at control over what is written and published. The 1976 U.S. Act created a Copyright Royalty Tribunal with regulatory authority over four compulsory licenses, and many regard this as a step toward further government activity in the copyright marketplace. Any further moves in this direction will have to be carefully evaluated to assure that the goal of freedom of expression is fully safeguarded.

As I have already hinted, I believe that the 1976 Act is a good 1950 copyright law. It is certainly a substantial improvement over the Act of 1909, and it may be resilient enough to serve the public interest for some time to come. But some of its inadequacies are already becoming apparent, and no prophet is needed to foretell the need for substantial restructuring of our copyright system before the end of this century.

For some time it has been possible to sense that, in copyright, something old is dying and something new is struggling to be born. With barely three years of experience with the new Act behind us, it is far too soon to draw conclusions as to the form the next general revision of our copyright law might take. Yet it is not too soon, in my opinion, to begin throwing out some hypotheses and to encourage a public discussion of them.

In these introductory remarks I have suggested that, in the United States, three fundamental goals combine to make up the public interest in relation to copyright: strong copyright protection for individual creators; the widest possible access to information; and the greatest possible freedom of expression. If, as I believe, it is the duty of the copyright

law to balance these goals harmoniously rather than destructively, then our law should go further than the Act of 1976 in fundamental directions.

First: In the length of protection offered to individual authors, our law should be raised to equal the copyright term adopted as the norm by other countries that are highly developed industrially and culturally.

In a general way, this international norm is represented by the latest text of the Berne Convention (the International Convention for the Protection of Literary and Artistic Works). By adopting a term of protection based on the life of the author plus fifty years, the 1976 Act took an important step toward raising the level of U.S. protection to the international standard. Two other equally important steps remain to be taken however: the abolition of formalities (notice and registration) as conditions of protection; and the statutory recognition of the "moral rights" of the author. The individual author, whether an employee or not, should be accorded both pecuniary and personal rights in his or her creation, and the law should go further in preserving these rights as against the first line of users — that is, the publisher or producer who sometimes enjoys disproportionate benefits from the author's work.

Second: This strong protection for the rights of individual authors should be qualified to achieve the goal of the widest possible access.

The 1976 Act provides a patchwork of exclusive rights, outright limitations, and compulsory licenses that is already beginning to fray around the edges. Before undertaking further piecemeal mending or embroidery, Congress should take a hard look at the basic concepts of rights and limitations under copyright systems. There are certain primary uses that should remain within the exclusive control of authors and their assignees and the copyright law should strengthen the legal basis for this control. At the same time, there are certain secondary uses that, as a practical matter, are beyond the control of negotiated licensing. It is time that the law took a systematic approach to all of these secondary uses, to achieve a dual purpose: (1) ready access to the users; and (2) full and fair compensation to the copyright owner. In my opinion, the principal fault of the 1976 Act lies in its confusion in the treatment of primary and secondary uses. In my opinion, the principal fault of the 1976 Act lies in its confusion in the treatment of primary and secondary uses. One result of this confusion is that some primary uses that should be fully within the copyright owner's control are either not protected at all or are subject to compulsory licensing. At the same time, certain secondary uses are unjustifiably given exclusive rights,

with the result that in some cases there are illegal uses without any payment, and in other cases a socially desirable use is inhibited.

Third: An essential element in assuring full payment of copyright royalties is a central clearing payment mechanism to assure that all royalties are paid and that they reach the right pockets. Although the United States is far behind the rest of the world in this area, the vested interests already in existence make reform excruciatingly difficult. Ultimately, some centralized solution will have to be found, but like all provisions of our copyright law, it must assure against any danger to individual freedom of expression.