

THE MYTHOLOGY OF COMMON LAW COPYRIGHT

ABSTRACT

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This paper focuses on the mythology of common law copyright and its American natural law cognate. Copyright scholars are in general accord that copyright has a utilitarian rather than common law or natural law basis. Nonetheless, as other scholars have noted, if common law copyright is a myth, it is a potent and persistent one that has proven highly resistant to debunking. Although the natural rights view of the basis of copyright has been formally discredited, it continues to influence the law in a quiet but determined fashion. Courts and scholars alike have concluded that copyright is not based on a Lockean labor theory, but the ghost of Locke is an especially tenacious apparition which continues to exert a peculiar influence on the law.

This paper is the beginning of a project that will attempt to answer several questions about common law copyright: What is the philosophy of common law copyright, and what are the premises on which it is based? Why has American law, while repeatedly rejecting plain and audacious assertions of common law copyright, nonetheless shown a predilection for more elegant and polite statements of the same theory? Finally, what are its modern implications? The paper attempts to provide both historical and philosophical answers to these questions. It ranges widely in time, tracing the modern theory to the early days of copyright as propounded by the Company of Stationers in the 1700s. The Stationers were the earliest advocates of common law copyright, and if it seems to moderns that their legal case was so improbable that they could not have believed it, it is fair to ask what they *did* believe, and important to understand why these beliefs should have proven so resilient. Next comes a consideration of the operation of common law copyright in a more modern setting, focused on the manner in which sound recordings came to be accorded copyright protection. Advocates of common law copyright believe in what Zechariah Chafee called "the natural justice of copyright," and this section attempts to explain how this view, which corresponds very closely with the philosophy of London's eighteenth-century booksellers, was used in the battle to make records copyrightable.

Finally, the paper considers current implications of the philosophy of common law copyright, beginning with the manner in which the theory has overcome objections that have been posed to it. The paper also attempts to establish the chief elements of the theory. These include an explanation of the origins of copyright law via the substitution of a philosophical past for an historical past, an insistence on the necessary role of the printing press--and more recently the sound recording apparatus--as a means of connecting the author and performer with a broader public, and a general sense that the positive law of copyright is simply an imperfect version of a more ideal copyright based on "natural justice." The paper assesses the ways in which these views have made their way into mainstream copyright law and theory. For while the clumsy and direct formulation of common law copyright has been rejected by the law, it has a more polite cousin which the law is embracing to an increasing extent. One consequence of this embrace has been to venerate outmoded means of transmitting cultural information, such as sound recording apparatus, at the expense of developing technology. Perhaps more importantly, the law's attachment to outmoded technology has committed us to some very improbable propositions about the basis of copyright law, resulting in what I have termed the inversion of culture and copyright. Finally, the paper examines some of the consequences of this inversion, including the relentless expansion of subject matter that is eligible for protection, and the vast uncertainty surrounding the status and extent of the public domain.