Copyright and the Right to Credit[1]

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LITERARY PROPERTY consists of the right of first publication, known as "common-law literary property," and the statutory right to control public use after the first publication. It is of concern not only to authors, publishers, and copyright lawyers, but to the scholarly public as well. At meetings of scientists, humanists, librarians, and other users of recorded knowledge—in fact, wherever communication of any kind is discussed—questions about literary property soon come to the fore. When these questions arise, argument and frustration almost inevitably follow, for, as pointed out by one eminent jurist, copyright is the "metaphysics of law."

Certainly there are great difficulties in determining just what the law is. Individuals differ on many points; lawyers disagree; the courts appear at times to contradict each other and, in some cases at least, to disregard principles previously established by higher courts. In addition, there are many points of the intent and application of both common-law literary property and of statutory copyright that have not been interpreted by the courts.

The heights to which confusion may rise in this field are indicated by the seeming paradox that, whereas publication without notice dedicates a book so published to public use, a book that is printed and bound, and that bears no notice of copyright, may, in fact, never have been "published" and may therefore be protected by the common law. Thus, lack of notice alone is no guarantee that a book is in the public domain. Since deposit is not required to secure copyright, failure of the Copyright Office records to show registration is no guarantee that a printed book is not protected as literary property.

On the other hand, a book bearing the copyright notice in the name of the publisher may, under the theory of "beneficial interest," actually be the literary property of the author—whose name, as will be shown here, need not even appear in the book—and the publisher, who is the legal owner of the copyright, may be an infringer of the copyright he legally owns.

In view of the present state of confusion in the protection of literary property, it appears to be only a matter of time until fundamental rethinking of the nature and scope of literary property will become essential. When that is done, a number of aspects of this field that are of great importance to scientists and to other scholars should receive thorough consideration.

The failure of both our common law and our statute to recognize the right of an author to receive credit for what he has created constitutes a serious gap in the protection of literary property. As pointed out by the Illinois Appellate Court, in 1948, in the case of *Morton* v. *Raphael* (*1,* 208–10) an ". . . author has no inherent right to have his name used in connection with his work, his name may be wholly omitted from the work, if the proprietor of it sees fit to do so. . . ." In so speaking, the court merely followed the precedents set for it by other authorities, both in the field of common-law literary property and in the field of statutory copyright. Thus, in the case of *Vargas* v. *Esquire* (*1,* 223–4), the Seventh Circuit Court of Appeals said, in 1947, that Vargas had no right to have his name used in connection with his drawings, and the "Vargas Girl" became the "Esquire Girl." This pattern of decisions was firmly established at least as far back as 1915, when the Appellate Division of the New York State Supreme Court said, in *De-Bekker* v. *Stokes* (*1,* 262) "The plaintiff was not entitled to have his own name appear in the book." In the motion-picture industry, too, there is evidence that the right of an author to credit depends upon some specific act in addition to creation, for it is stated, in *Harris* v. *Twentieth Century* (*1,* 263), that failure of a contract to include the right to screen credit divested the plaintiff of "all rights generally known as the moral rights of authors, which rights include the right to credit as author of a work."

The basic requirement of authors for a right to credit for what they have created was well stated by Judge William Seabury, in 1910, in the case of *Clemens* v. *Press Publishing* (*1,* 20–21):

> Even the matter of fact attitude of the law does not require us to consider the sale of the rights to a literary production in the same way that we would consider the sale of a barrel of pork. Contracts are to be so construed as to give effect to the intention of the parties. The man who sells a barrel of pork to another may pocket the purchase price and retain no further interest in what becomes of the pork. While an author may write to earn his living and may sell his literary productions, yet the purchaser, in the absence of a contract which permits him to do so, cannot make as free use of it as he would of the pork which he purchased. The rights of the parties are to be determined primarily by the contract which they make, and the interpretation of the contract is for the court. If the intent of the parties was that the defendant should purchase the rights to the literary property to publish it, the author is entitled not only to be paid for his work but to have it published in the manner in which he wrote it. The purchaser cannot garble it or put it out under another name than the author's, nor can he omit altogether the name of the author, unless his contract with the latter permits him to do so.

The position of an author is somewhat akin to that of

[1] Extracts from *Literary Property in the United States.* Washington, D. C.: Scarecrow Press (Dec. 1950). Copyright 1950, by Ralph R. Shaw.

an actor. The fact that he is permitted to have his work published under his name or to perform it before the public necessarily affects his reputation and standing and thus impairs or increases his future earning capacity . . . .

However clearly this may define the concept of the right of authors to receive credit for their writings, it was merely the minority opinion of Judge Seabury, for the majority of the court took the opposite position, stating: "Title to the manuscript having passed by the completed contract made on August 3, 1909, the defendant was not obligated to publish it at all, nor could plaintiff compel or prevent its publication with or without his name. The objections, refusals, and wishes of the plaintiff after parting with the title in the property may betray the eccentricities of the author; but they have no greater weight in law than the wishes of a stranger to the transaction after it was consummated."

From the cases cited above it appears that the courts, both state and federal, have ruled quite consistently that an author has neither a common-law nor a statutory right to have his name reproduced in connection with his writings. There seems to be no case, except for the minority opinion of Judge Seabury, which even approaches recognition of the right of an author to receive credit for what he has created. Yet the right to receive credit for his writing may well be a more potent incentive to publication, which is the objective sought by the constitutional grant of copyright, than is the right to share in the direct monetary earnings that may result from the sale of published copies of the author's work.

The reason for the failure of the common law to protect the right to credit probably reflects the fact that, when the common law was first interpreted, and when its precedents were being formulated, the pattern of publication was quite different from the present one. In the early eighteenth century, when Anglo-Saxon civilization progressed to the point of recognizing and protecting literary property, there were few scientific journals. The writings to be protected were not primarily scientific communications, which are written, in large measure, for the purpose of advancing civilization. When our concepts of literary property rights were evolving, the thing to be protected was predominantly the book or pamphlet written for sale and published for profit.

As the types of contributions to knowledge and their various forms of expression have multiplied, the courts have attempted to fit the concepts of another day, which still underlie both common-law literary property and statutory copyright, to modern conditions. However, the problem of the right of authors to receive credit for what they have created appears to be one of the many areas that have been neglected.

The right to credit—i.e., the right to receive recognition for constructive contribution to the written record of science—is a very important one. Publication of contributions to knowledge is the only form of advertising considered ethical among the professions. Although the man who writes a book may expect or hope for monetary profit, that is seldom true of contributors to American scholarly periodicals. In our modern civilization, with probably as many as 50,000 scholarly journals, few of which pay their contributors, the only compensations an author receives from making his writings available to the world are the satisfaction of contributing to knowledge and the investment in his professional future, which results in stimulation of his professional advancement or recognition of his contribution. If his name need not be included, the incentive for publishing scientific literature would be greatly reduced.

All of this, of course, seems fairly academic, because rarely would a publisher of a reputable scientific periodical want to omit the name of the author of any of its articles. The reputations of its authors build the reputation of the journal. There are, however, two respects in which this concept of a "right to credit" might be of vital importance to scholars.

The less important of these deals with the right to credit in quotations from an author's text. If the right to credit were recognized in law, then failure to credit the source would be a violation of law, instead of being merely bad manners, and the situation would be rapidly improved. The more important aspect of the right to credit, however, is that it may be in direct conflict with the right to restrict or control distribution, which is inherent in both common-law literary property and in statutory copyright.

Periodical articles, which are published by the tens of thousands, are not often protected in the name of the author. If they are protected by statutory copyright at all, it is in the name of the publisher. The commercial publisher's interest in publication is the sale of copies of the entire issue or volume for profit. If he does not sell copies at a profit, he will soon be a bankrupt ex-publisher. The author, however, may be interested in the widest possible dissemination of his writings, and if someone were willing to reprint 10,000 copies of his article for free distribution, that would provide a great additional profit to the author in terms of professional credit. In such a case, the author's judgment must be conditioned by the fact that, if enough articles were reprinted from any journal, it might reduce the sale of the journal to such an extent that there would be no journal in which to publish.

Of course, such a contingency seems very remote. Scholarly journals generally provide reprints to the author. Since the number of reprints is ordinarily limited only by the number the author wants and is able to pay for, there appears to be no evidence that reprinting of articles reduces the sale of journals; on the contrary, there is some evidence that it may increase the sale of journals by providing samples of their content to a wider public.

Since both the common-law literary property and statutory copyright are clearly for the benefit of *authors,* and the rights of proprietors and publishers are secondary and derived from the rights of authors,

the principle of the right to credit should receive recognition, even if there were evidence of some conflict between that right and the needs of publishers.

In the present state of the common-law literary property and of statutory copyright, it is quite clear that authors do not have the right to require that their names be published in connection with their writings. In those cases in which a contract is involved—which is not normally the case in any formal sense when contributions are sent to scholarly periodicals—the contract can protect this right. When no formal contract is involved, the author appears to have no recourse, under the present state of the law, if his article is published without his name.

The right to credit is important, and if revision of our literary property laws to meet twentieth-century conditions is ever undertaken, this right should receive serious consideration.

Reference

1. SHAW, R. R. *Literary Property in the United States.* Washington, D. C.: Scarecrow Press (1950).

The Hall of Fame

Bertha L. Lyons, *Curator*
Hall of Fame, New York University

JOSIAH WILLARD GIBBS, a physicist and one of America's outstanding scientists, has just been honored by election to the Hall of Fame, and honored by a majority of lay persons, in no way connected with science. We say by a majority of lay persons, because the Electoral College of the Hall of Fame includes only nine scientists out of the total of 113 distinguished men and women from every walk of life who cast ballots in the election of 1950. In this election a majority vote was the requisite for inclusion in the Hall, and Gibbs received 64 votes. The votes recorded for the other candidates chosen were as follows:

William Crawford Gorgas	81 votes
Woodrow Wilson	77 "
Susan B. Anthony	72 "
Alexander Graham Bell	70 "
Theodore Roosevelt	70 "

The origins of the Hall of Fame are closely allied with the growth and development of New York University, which had bought a tract of land in the Bronx, now known as University Heights, for the establishment of an uptown campus. In 1896 the Gould Memorial Library, the Hall of Philosophy, and the Hall of Languages were planned. When the drawings for these buildings were submitted to the University Council, an architectural relief and foreground were suggested, which subsequently took the shape of the Colonnade, which now half encircles the three original buildings. This was a costly bit of architecture to a university not heavily endowed; hence Henry Mitchell MacCracken, then chancellor, had to make it functional, and this he did by making it an American citadel of fame. He immediately enlisted the interest of Helen Gould (later Mrs. Finley J. Shepard), and through her generosity the Hall of Fame was built; it was officially dedicated in 1901. It is not alone a monument to the architect, Stanford White, but it is today a national institution, for the cultivation of our traditions in a time when they are being attacked from within and without, by exalting those who founded or sustained our nation.

"Every American is a shareholder in the Hall of Fame" literally and figuratively, for, in the elections, any American citizen may propose the name of a man or woman who was a citizen of the United States, and who has been deceased twenty-five years or more. Nominations are called for on April 1 preceding an election year, and close on April 1 of the election year. Elections are held every five years.

New York University, through its senate, administers the affairs of the Hall of Fame, but only in the capacity of trustee for the nation. No one connected with the university has a voice in the elections, the choices being entirely in the hands of the Electoral College, which is made up of eminent men and women, from every state in the union and from every field of endeavor, who give their services to the university. The electors are permanent choices, made by Ralph W. Sockman, director of the Hall of Fame, and ratified by the University Senate. Since the elections take place only at five-year intervals, the Electoral College is constantly being reinforced by new members to replace those electors who pass away or who find it necessary to resign.

The nation really owes a vote of thanks to the men and women who, through the years, have served as electors, for their appraisal of the nation's great. We are constantly being asked by the public, "What is an elector's yardstick of fame or greatness?" At first blush, this would seem to be a fairly simple question, but when one sees some of the names hopefully submitted by the public for inclusion in the Colonnade, one wonders! A former elector, Henry van Dyke, once briefly defined fame as ". . . a durable good renown, earned by service, approved by the wise, and applauded by the common voice. . . ." Dr. van Dyke added, "The electors are not chosen to confer