Copyright, Derivative Rights, and the First Amendment

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ABSTRACT

THERE IS AN INERADICABLE CONFLICT between the First Amendment and even the narrowest copyright. Recent changes in copyright law have exacerbated the conflict by extension of rights over derivative works that could result in ownership of ideas, supposedly ruled out by copyright law. Minimal copyright in works of fact as opposed to works of fiction would reduce though not eliminate copyright interference with freedom of information.

INTRODUCTION

There is a basic, built-in conflict between intellectual freedom and intellectual property which is directly reflected in a conflict between the copyright law and the First Amendment to the Constitution. A property right is a right to exclude others from some use of something; giving property rights to one is at the same time putting limitations on the freedom of others, and expanding property rights means contracting others' areas of freedom. Intellectual property is in this no different from other kinds of property, though the particular nature of some of the main "objects" of intellectual property leads to unique problems of drawing the line between excluded uses and permitted uses, and to problematical consequences no matter where the line is drawn. The justification for limiting the use of intellectual objects is presumably this: property rights in intellectual objects are granted as an incentive to the production of more intellectual objects; some freedom is given up as the price

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for the future enjoyment of a larger pool of valuable objects. "American intellectual property law can be thought of as a bargain between individual creators and the public. In exchange for granting authors and inventors exclusive rights in their writings and inventions, the American public is to benefit from the disclosure of inventions, the publication of writings, and the eventual return of both to the public domain" (U.S. Congress, 1986, p. 188). The question about any such bargain is whether the terms are fair. The bargain is a bad one if it fails to enlarge the pool of valuable objects beyond what it would otherwise have been, or if it grants more exclusionary power than needed to yield the same increase in the size of the pool, or if it grants exclusions that should not be granted because the grant conflicts with more fundamental values. The extent of property rights granted under copyright appears to have been expanded considerably in the 1976 revision of the copyright law; the terms of the bargain have changed. Before discussing this expansion, let us take a fresh look at the basic restrictions that copyright law has, in the past, placed on the use of intellectual products; the bargain may be an odd one in ways not quite realized.

Copying and Describing

The "writings" of an "author" are the objects subject to copyright, both "writings" and "author" being understood in unusual ways (17 U.S. Code, § 102). The category of writings includes "literary works," which are any works expressed in verbal or numerical symbols and not just works of "literature"; but it also includes musical, choreographic, pictorial, graphic, and sculptural works, motion pictures and other audiovisual works, and sound recordings. The notion of an author is correspondingly expanded. Here we will consider only "literary works" because they are arguably basic to any question of conflict between property and intellectual freedom and have special characteristics that make them uniquely problematical.

To be protected, a literary work must be fixed in a "tangible" medium of expression—i.e., it must exist as a written-down sequence or array of symbols, a recorded text. And what it is protected against is, at the very least, unauthorized literal copying—i.e., reproduction by others, without permission, of the same sequence or array of symbols. This only begins to describe the extent of protection; but even this basic protection against literal copying raises a basic problem.

The publication of the text of a literary work counts as a public *event* and sometimes a major event. One way of describing such events is that the event is the making of a public statement to the world.

This is accurate at least for works that claim to tell something true about the world. Such works say: This is the way things are or were, or, This is the way people should think of the world or this is the way things should be or should not be. Such public statements are particular kinds of extended *speech acts* with the speaker addressing an indefinite and unknown audience (Austin, 1962; Searle, 1969; Levinson, 1987, pp. 226-83). Such speech acts can be described in countless ways, but there is one particular, uniquely privileged, kind of description. We can describe the particular type of speech act, or its topic or subject matter, or its major thesis—for example, that it offers a plan for protection of tropical rain forests, that it expounds a new theory of irregular phenomena, and so on. We might summarize the things said briefly or at length. But any other description we give, if challenged or questioned, will ultimately be backed up by repeating some or all of what was actually said or written—i.e., the very words used in the very order in which they were used. The person to whom we report on others' speech acts can always, and frequently will, press us by asking, "But what did they actually say?" and the standard response—the response called for—is to quote verbatim from the utterance or published text. This is basic to the description of speech acts; verbatim reproduction of the words used furnishes a unique standard description of the act which is an appropriate test of the accuracy of most other kinds of reports on speech acts.

But of course the production of a verbatim repetition of the words used in performing a speech act is just what is controlled by copyright law. It is the production of a copy. If a published text is protected by copyright, it is protected against others reporting on it using the unique standard description of the text, but this is certainly odd. For whatever the bundle of rights associated with the ideas of freedom of speech and of the press, it surely must be thought to include the right to read and watch and listen, and the right to tell others what one has read, seen, and heard, and specifically the right to tell others as precisely and accurately as possible what one has read, seen, and heard. There are further rights such as to criticize, for example. But the further rights seem to presuppose a prior right to report. The right to criticize would be of little value if one were not free first to describe what one was criticizing. And it is at least a bizarre rule that would allow reporting—but not reporting that was as precise and accurate as possible—that would allow reports of public statements to the world only so long as those reports were not "too accurate." Yet this seems to be what basic copyright does—it forbids certain descriptions of speech acts as impermissibly accurate.

One might say that this odd property of copyright was of no practical importance whatever—i.e., that no one cares if reporting is done in private, and that there is no *need* to engage in such "maximally precise and accurate reporting" in public. Even if that were true, it would still leave us with a prima facie conflict between copyright and the First Amendment. By restricting the freedom to produce a certain kind of description of a certain category of public events, the copyright law certainly looks like a law that abridges freedom of speech and of the press. But the First Amendment of the Constitution says that Congress shall make no law that does this.

Note that we cannot, by verbal description, produce copies of the other kinds of objects protected by copyright; "literary works" really are in a different category. A verbal description, no matter how detailed, never becomes a copy of a painting or motion picture. Only musical works—scores and not recorded performances—share this feature with literary works, that decribing (note by note) can amount to producing a copy, though a verbal description of a score is an unusably awkward sort of copy of the score (compare Goodman, 1968). It is this special characteristic of symbolic systems that is at the root of the sharpest conflict between intellectual freedom and intellectual property. The very nature of symbolic systems guarantees the conflict.

It might be argued that the story discussed earlier is mistaken about "making a public statement." Publication should not be described that way. Publication is rather an invitation to the public to buy a copy of what the author has to say—i.e., not a public saying but a public offer to "say" privately. But this simply relocates the basic problem, for now what is forbidden is an overly accurate description of what is up for sale. In other cases of goods for sale it would seem crazy to forbid a maximally accurate description of what was for sale. Here, however, it is explicitly forbidden. You may not be told what is being offered for sale except in general terms lest, by being told what is for sale, you come to acquire it and therefore lose interest in buying it (Arrow, 1971, p. 148). Copyright forbids certain kinds of description of public events.

As defenders of copyright are quick to point out, copyright is far from being the only limitation on freedom of speech that the courts have permitted (Patry, 1985, p. 467; Pool, 1983, pp. 55-74; Stone, 1983, pp. 1425-31; Levy, 1987, pp. 238-42; U.S. Congress, 1988). Laws against blasphemy, obscenity, seditious libel, fraud, deceit, misrepresentation, limitations on the rights of scientists to publish or even publicly discuss their research have regularly been enacted by legislatures and upheld or not overturned by courts. Almost no

one reads the "no" in "no law abridging freedom of speech and of the press" to mean "not any at all." The Constitution does indeed *say* "no law," but the Constitution requires interpretation, and under judicial interpretation, "no law" is found consistent with many laws limiting intellectual freedom. Not being lawyers or judges, we may be permitted to wonder how this can be.

Idea and Expression

Legal scholars argue that two factors eliminate any real conflict between copyright and the First Amendment. The first is that copyright extends only to expression and not to ideas expressed; the second is that fair use allows some unauthorized use even of protected expression.

The first of these factors was given statutory recognition in the 1976 Copyright Revision Act; copyright protection does not extend to "any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such works" (17 U.S.C. § 102 [1976]). It is generally understood that this means that *information* is not subject to copyright; facts, data, and pieces of information cannot be copyrighted (Francione, 1986). People cannot be prevented from borrowing and using the concepts and facts presented in a work, though they can be prevented from copying the text itself. If copyright did protect ideas, "there would certainly be a serious encroachment upon first amendment values," said the chief authority on the subject, Melville Nimmer (1970), but since ideas are "free as air" (Brandeis cited in Gorman, 1982, p. 577), since copyright places no restriction on the use of the information contained in a work, it imposes no significant limit on First Amendment freedoms (Denicola, 1979; Nimmer & Nimmer, 1990).

The idea/expression distinction is not, however, an easy one to make clear or to apply in practice. If the term *expression* referred to the text of a literary work—that is, the bare string or array of symbols—while the term *idea* referred to the meaning or content of the text, there would be a real distinction; one, moreover, that corresponds to commonsense notions of the relation between words and ideas, words being thought of as vehicles for the communication of ideas from one mind to another (Reddy, 1979). Copyright would protect the vehicle, not the ideas (concepts, propositions, notions) conveyed.

But this cannot be the distinction. If it were, copyright would not protect against paraphrase or translation, both of which are attempts to express the same ideas but to express them differently, in the same or different language. A translation from English into

Hungarian may not share a single word with the original, and, if copyright protected only the original verbal surface, unauthorized translation would be no infringement, but it is. And "in copyright law paraphrasing is equivalent to outright copying" (Nimmer & Nimmer, 1990, vol. 3, pp. 13-202 quoting Donald v. Meyer's TV Sales and Service, 426 F. 2d 1027 [Tex. Cir. 1970]). Hence the idea/expression distinction is not a straightforward one between a text (string of symbols) and its content. Long ago, Judge Learned Hand wrote that "copyright cannot be limited literally to the text, else a plagiarist would escape by immaterial variations" (*Nichols v. Universal Pictures Corporation,* 1930). If expression is protected, but (expression) is more than the text of the protected work, what is it and how is it distinguished from unprotectable idea?

The reigning view seems to be that idea and expression represent two poles of a continuum of overall similarity (Nimmer & Nimmer, 1990, vol. 3, sect. 13.03). Surface verbal similarity is part, but only part, of the reckoning. Beyond verbal similarity, a work may be found to infringe on copyright because it resembles another work too closely in, for instance, the structure of character and action portrayed (at least if it is a work of fiction). Two stories might be held to be "impermissibly similar" though their texts had no words in common and though one was not a translation of the other, because the subject matter of the one tracked that of the other too closely—e.g., involving similar characters doing similar things, or "similarities of treatment, details, scenes, events, and characterization" (*Reyher v. Children's Television Workshop,* 1976, p. 91). Too much "borrowing" not only of verbal surface but of content counts as borrowing "expression" rather than "idea." Judge Learned Hand's "abstractions test" is usually referred to as expressing the distinction (*Nichols v. Universal Pictures Corporation,* 1930): a work can be described in terms of patterns or schemata of increasing abstractness, and two works may resemble each other by both instantiating a pattern at one level of generality or abstractness while differing at the next level of specificity. If they resemble each other only at a high level of abstractness, they resemble only in "idea," while if they resemble each other at a low level of abstractness (high level of concreteness or specificity), their resemblance is one of "expression."

So how do we distinguish using "expression" (forbidden) from using "idea" (permitted)? The answer is discouraging: "Obviously, no principle can be stated as to when an imitator has gone beyond copying the 'idea,' and has borrowed its 'expression' ... the test for infringement of a copyright is of necessity vague ... [and] decisions must therefore be inevitably *ad hoc*" (*Peter Pan Fabrics, Inc. v. Martin Weiner Corp.,* 1960, p. 489). This is not surprising if what is required

is not to distinguish uses of material from different realms (form versus content, symbols versus what they symbolize, words versus concepts) but to judge degree of overall similarity of form *and* content. It has the consequence that Judge Hand noted: "Nobody has ever been able to fix that boundary, and nobody ever can...the line, wherever it is drawn, will seem arbitrary" (*Nichols v. Universal Pictures Corporation,* 1930, p. 122). And no general line can be drawn; each case must be considered ad hoc. What is allowed and what is forbidden cannot be told in advance; appeal to an idea/expression distinction simply amounts to asserting that copyright permits uses that result in works that are not too similar to the original without giving us any rule for telling how similar is too similar. It is hard to see how this distinction could guarantee that there will be no serious conflict between copyright and the First Amendment. It is not going to be comforting to be told that we are free to borrow the "ideas" expressed in a work if that means only "the most general ideas" and not the "specific details"; and can it be satisfactory that the boundary between the permitted and the forbidden cannot be described or predicted in advance even in principle?

Derivative Rights

"There has been a quiet revolution in copyright law and the copyright industries. Copyright, which once protected against only the production of substantially similar copies in the same medium as the copyrighted work, today protects against uses and media that often lie far afield from the original" (Goldstein, 1983, p. 209; compare Brown, 1984). The 1976 revision of copyright law has many notable features, some of which are well known and some not (for an extended review see Zissu, 1986). Copyright was made automatic upon the first production of a "tangible expression." The term of copyright was extended to life plus fifty years. Protection was granted not just to works of specified kinds, but to "original works of authorship fixed in any tangible medium of expression, *now known or later developed,* from which they can be perceived, later reproduced, or otherwise communicated, either directly or with the aid of a machine or device (17 U.S.C. § 102 [1976]). Rules were laid out for library photocopying, and supplemented by guidelines on interlibrary provision of photocopies proposed by the National Commission on New Technological Uses for Copyrighted Works (CONTU). The "idea/expression" distinction was formally incorporated into the law, as was the fair use doctrine. The 1976 act hedged on treatment of computer programs, and CONTU was charged with formulating proposals for subsequent action. The CONTU proposals, extending copyright protection to computer programs, were adopted by

Congress in 1980 as an amendment to the 1976 act (National Commission on New Technological Uses of Copyrighted Works, 1979). These changes are highly significant, but for our purposes the most striking change in the law is this addition to the list of exclusive rights conferred by copyright: "to prepare derivative works based upon the copyrighted work" (17 U.S.C. § 106 [1976]). The act defines a derivative work as "a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, *or any other form in which a work may be recast, transformed, or adapted*" (emphasis added) (17 U.S.C. § 101 [1976]). This is a long way from the simple right to make copies. It was not until 1880 that copyright law even recognized a copyright holder's exclusive right to "dramatize or translate their own works," a German translation of *Uncle Tom's Cabin* having been held noninfringing in 1853 (Goldstein, 1983, p. 213). In 1909 the right to abridge was added, along with the right to "make any other version thereof, if it be a literary work" (Copyright Act of 1909, sect. 1). As the 1976 act extended the scope of copyright to works in any tangible medium of expression, *now known or later developed,* so it extended the rights of the copyright holder not just to make particular types of derivative works, but to produce works based on an earlier original and subjected to *any* kind of recasting, transformation, or adaptation. Taken at face value, this represents a huge extension of proprietary rights, and a correspondingly huge restriction on others' freedom to make use of a work. And it casts doubt on the claim that copyright protects only expression and not the ideas expressed.

Let us try to imagine how we might proceed if we did want to grant ownership in the ideas expressed in a literary work (for a different view see Hopkins, 1982). To be at all plausible, our procedure would either have to require a proof of the novelty of ideas expressed (similar to the patent system's requirement of novelty but sharply different from copyright's minimal requirement of "originality" which is simply "not copied"), or else would have to give rights not to particular ideas but rather to a complex structure of ideas. A person who writes an article about copyright is not going to be given property rights in the bare idea of a work, or of a copy, or of a right; it will have to be either a demonstrably new idea or else a particular structure of ideas—say, the entire conceptual structure expressed in a written work (the "unique and protected mosaic" as Judge Kaufman puts it [*Harper & Row Publishers v. Nation Enterprises,* 1983]). Let us put aside the case of the "demonstrably new idea" (interesting though it be) and concentrate on the case

of the structure of ideas. How would we go about protecting the ideas, the conceptual structure, the intellectual content, of a literary work? The first things we would prohibit would be: translation, paraphrase, summarization, reorganization or rearrangement of content, making popularizations, writing expanded versions of the original, writing "imitations" of the original in which one tried to "translate" the original into a new subject area or apply it in a new way. One would try to prevent other uses as well—indirect uses such as doing other things that necessarily assume or presuppose the protected ideas. But prohibition of copying and of making derivative works would come first. To cover all bases, one would forbid not just a specific list of prohibited types of use but would include an indefinite omnibus clause prohibiting "any other form in which a work may be recast, transformed, or adapted." In other words, one would take one's wording from the 1976 Copyright Act. The steps one would take, in what almost everyone would agree was an unconstitutional grant of property in ideas, are largely the same steps that have already been taken. The more unauthorized transformations of a text we forbid, the greater the control we are giving the copyright holder over the content of the text; if we forbid *all* transformations of a text, we are giving, as nearly as we practically can, complete control over the content. When we remember that copyright forbids not only copying of whole works but of any quantitatively or qualitatively substantial part (and what is substantial can be a couple of hundred words out of hundreds of thousands), we see that what is forbidden now looks like this: it is forbidden to produce works containing "substantial" parts copied from or based on parts of an original or any transformation of the original. This cannot be compatible with any ordinary understanding of intellectual freedom.

Fair Use

If the idea/expression distinction fails to resolve the First Amendment conflict, and if new derivative rights appear to exacerbate it, the whole burden now falls on the doctrine of fair use which has, in the past, been seen as a "cure-all" for such problems (Francione, 1986, p. 522). The 1976 Act, for the first time, codified the doctrine, saying that "the fair use of a copyrighted work, for purposes such as criticism, comment, news reporting, teaching...is not an infringement of copyright" (17 U.S.C. § 107 [1976]). There is no precise rule for determining fair use; a non-exhaustive list of factors to be considered in deciding fairness of use includes purpose, the nature of the work, the amount and "substantiality" of the portion used in relation to the whole work, and the effect of the use on the potential

market for, or value of, the copyrighted work. Other factors are taken into account at times (the public interest, "good faith," "fair dealing"), but it is generally agreed, by commentators and recently by the Supreme Court, that the effect on the market for the copyrighted work "is undoubtedly the single most important element of fair use" (*Harper & Row, Publishers v. Nation Enterprises,* 1985, 2233). The fact that only a small part of a copyrighted work is copied will not suffice to satisfy courts of fair use; in the important case of *Harper & Row v. Nation,* the majority of the Supreme Court found that the *Nation* had infringed the copyright in ex-President Ford's memoirs by publishing an article that quoted 300 of the more than 200,000 words of the original. Even a small amount of quotation and paraphrase can be found detrimental to the market for the original work. It is important to remember that there are two distinct elements in the question of market effect: potential (not necessarily actual) effect on the market for the work allegedly infringed, and potential effect on the market for derivative works based on that original. Courts have apparently not so far taken markets for derivative works much into account, but have "generally inclined to identify potential markets with the market in which the work was first introduced," a "persistent error" according to Goldstein (1983, p. 233). Uses of copyrighted works that might be considered fair when only the effect on the original was considered could be thought unfair if they might have an effect on a derivative work that the author of the original has made, intends to make, or might sometime intends to make.

The limitations of the fair use defense in resolving conflicts between intellectual freedom and intellectual property (application of the fair use doctrine being primarily concerned with protection of markets) is suggested not only by Harper & Row but also by the case of *Wainwright Securities v. Wall Street Transcript Corp.* (1977). Wainwright produced reports on corporations, analyzing finances, profit expectations, strengths and weaknesses, etc.; the *Transcript* published abstracts of the Wainwright reports. Wainwright sued, alleging copyright infringement and unfair trade practices. The *Transcript* argued that its use of the reports was a fair use, that publication of the abstracts was simply "financial news coverage entitled to the protection of the first amendment" (*Wainwright Securities v. Wall Street Transcript Corp.,* 1977, p. 95). They pointed out that *The Wall Street Journal* also reported the Wainwright publications as news events, including accounts of the analyses and conclusions of the original reports. Admitting that "the question of the first amendment protections due a news report of a copyrighted research report is a provocative one" (p. 95), the court held on appeal that "the Transcript appropriated almost verbatim the most creative

and original aspects of the reports" (p. 96), and that it had "the obvious intent, if not the effect, of fulfilling the demand for the original work" (p. 96). This was not legitimate news coverage or fair use but rather "chiseling for personal profit" (p. 97).

It is clear (and emphasized in the Supreme Court decision on Harper & Row) that the fact that an abstract is offered as a news report is not sufficient to establish that it is fair use; "the fact that an article arguably is 'news' and therefore a productive use is simply one factor in a fair use analysis" (*Harper & Row, Publishers v. Nation Enterprises,* 1985, p. 2231), and not necessarily a determinative one. *The Wall Street Journal* had presumably not adversely affected Wainwright's market even though it too quoted extensively from the originals and reported significant findings. Denicola (1979) thinks that the *Transcript* made "significantly greater use of plaintiff's expression than was necessary" to report on the publication (p. 312. Compare with Gorman, 1982, pp. 576-78). This suggests that paraphrase would have been acceptable instead of direct quotation, but it was the reporting of significant findings ("the most creative and original aspects of the reports") that produced the putative effect on the market, and paraphrase would have had the same effect (and paraphrase is equivalent to "outright copying," though Gorman [1982] suggests that "even substantial paraphrasing" might have been tolerated if the abstracts had incorporated critical assessments of Wainwright's reports [p. 578]).

Given decisions such as this, it is clearly in the interest of producers and publishers of abstracts to claim that abstracts are not derivative works and do not substitute for the originals (see Lieb, 1980; Cambridge Research Institute, 1973, pp. 164-65; Weil et al., 1983a; Weil et al., 1983b). This is, of course, clearly false in many cases. An abstract (an informative abstract at any rate, as opposed to an indicative or descriptive one) is a short abridgement, which implies either that it is a derivative work or that only length makes the difference between (derivative) abridgements and (nonderivative) abstracts, which is implausible. And for the user, abstracts, like review articles and syntheses, do indeed often substitute for the originals; that is their great merit (Bernier, 1968). If abstracts are derivative works and so forbidden unless authorized, or if they are not derivative works but may nevertheless be forbidden because they adversely affect a market, the conclusion seems inescapable that appeal to fair use will not suffice to avoid damaging limitations on the freedom of information. The system of communication that we depend on requires not only the production of original intellectual products, but of the communication of various forms of information about those products. The system of communication cannot be subject to

the limitation that nothing flowing through it may adversely affect the market for any original work; if anything is an impermissible limitation on freedom of speech, this looks like it. As Denicola (1979) says, the fair use defense removes "those barriers to use that are not needed to preserve the economic incentive to produce," but "the first amendment, however, demands much more...when the objective of free speech requires access to the expression of another, the property interest created by copyright law must yield, regardless of the economic impact" (p. 303). It would be a mockery to say that free speech is protected just up to the point at which it begins to affect commercial interests.

There is a way of reconciling copyright and the First Amendment, however, at least for one great category of copyrighted works—i.e.,the "factual" as opposed to the "fictional."

Fact, Fiction, Function

The development of new information technology has exacerbated the conflicts inherent in copyright law in ways described in a wide-ranging survey by the Office of Technology Assessment (OTA), *Intellectual Property Rights in an Age of Electronics and Information* (1986). The vastly increased ability of private citizens as well as commercial and noncommercial organizations to copy, manipulate, and transmit vast quantities of information quickly and cheaply has changed the copyright environment in ways still not well understood. The ability of copyright holders to enforce their rights to copy is lessened by the widespread availability of computers and digitally-stored information. The ability and the incentives to create new information products have increased stupendously, but the copyright ban on unauthorized production of derivative works makes it dangerous to take advantage of the ability (Office of Technology Assessment [OTA], 1986, pp. 162-65. See also Warrick, 1984). These are central, but by no means the only, problems of copyright in the information age.

The OTA report bravely raises the question of whether copyright should be thought of as proprietary at all, rather than as regulatory, confined to the commercial exploitation of intellectual products (Office of Technology Assessment, 1986, pp. 190-93. See also Zimmerman, 1986). (If regulatory, private use would not be limited by copyright while, if proprietary, private use would be subject to control.) It proposes that the time may have come to abandon a uniform system of copyright protection for all types of works, and suggests the need to consider different treatment for works falling into the three categories of works of "art," works of "fact," and "functional works"—i.e., those that describe procedures or, like

computer programs, both describe and actually implement a procedure (Office of Technology Assessment [OTA], 1986, pp. 64-88). This suggestion seems particularly appropriate in the context of First Amendment conflicts (though that was not one of OTA's concerns).

The writers of the OTA report were thinking of a trichotomy of all the kinds of copyrightable objects, but let us confine our attention only to "literary works," excluding computer programs from that category (to which they were assigned as a result of the CONTU recommendations, which may turn out to be a mistake), and consider only a dichotomy of works of "fact" and works of "fiction." (The category of works of "fiction" is intentionally narrower than that of works of "literature"; historical works, for instance, may well be considered works of literature but will count as works of "fact.") Let us suppose that works of fiction are given the full range of protection currently given them subject to the "idea/expression" limitation in its incorrigibly vague form (and let us admit frankly that this amounts to protection of ideas in an everyday nonlegal sense). For works of fact, let us suppose that no protection is granted beyond protection against substantially complete and literal copying, thus returning to the earliest understanding of copyright protection.

One might justify "thick" protection of works of fiction on the following grounds: the characters and incidents of a novel or play are (at least in prototypical cases) invented by the author, and the speech act in which they are presented to the world has the somewhat paradoxical characteristic of "bringing truths into existence" (this is not the orthodox view of speech acts. For that orthodox view, see Searle, 1979). That is, if the author writes that the character George murdered his brother, this is now a "fact" in the imaginary world created and populated by the author; it would make no sense for subsequent writers to try to show that George "really" did not commit a murder. That is a distinguishing feature of imaginative, as opposed to "factual," works. If you can be said to have created a world, you might plausibly be given rights not only over the text of the work that presented that world, but over the "world" itself, the particular imaginary world of the work. Protection might thus be "thick," extending not just to the verbal surface but to the "world" behind that surface.

For works of fact, a new standard of infringement would have to replace the idea/expression distinction—say, a "fact/expression" distinction: the facts presented are not copyrightable, only the very words used to present or express them. (Here one could appeal to the "clear distinction" test of the case of *Baker v. Selden,* a test very

different from the idea/expression distinction [101 U.S. § 841. Compare the discussion in OTA, 1986, pp. 62-63].) On that understanding, if we take the facts presented in a work and use them to create a new work, we cannot infringe copyright, for the facts are not subject to copyright. Questions of fair use do not arise if what was used was factual matter rather than the verbal surface of the work. Infringement would be a matter of "substantial taking" of expression—i.e., verbatim text. The idea/expression distinction as usually understood would not apply: substantial similarity of overall content would not constitute infringement, since content (the factual matter itself) was not copyrightable at all. "Infringement of copyright must [in such cases] be based on a taking of literary form, as opposed to the ideas or information..." (*Harper & Row, Publishers v. Nation Enterprises,* p. 2242). Francione (1986) argues at length that "for logical and practical reasons the infringement standards for fictional and factual works must be different," as "the distinction between fact and expression is simply different from the distinction between idea and expression" (p. 566). He may not be right in claiming that the standards *must* be different; the proposal here is that they *should* be different in order to avoid the conflict between intellectual property and intellectual freedom.

To some degree, this distinction between "thin" protection for factual works and "thick" protection for works of imagination is already recognized by the courts, the protection afforded factual works being generally "thinner" than that afforded works of imagination (see especially Gorman, 1982). But protection for works of fact is far from the minimum proposed. Presumably the "thinning" of protection for factual works could come about by the evolution of judicial interpretation (on this subject, see Levi, 1949; Dworkin, 1986). But working against the recognition of only "thin" protection for works of fact are at least three distinct features. First, there is the courts' apparent inclination toward a "labor theory of copyright," affording protection to works of fact to compensate for the labor expended in their preparation even though their contents are, in theory, unprotectable. Despite their overt recognition that facts and information are not protectable, courts have often, explicitly or implicitly, decided for relatively "thick" protection of factual works as a way of recognizing the effort going into their production. There will be no copyright incentive to produce works like directories, the contents of which are preeminently pieces of unprotectable information if others are allowed to take the information and rearrange it at will, but incentives must be protected. Francione describes in detail the strategies by which protection is granted to bodies of information that could not be granted to separate pieces

of the "body." There is a fatal analogy between surface and content that may be at work here. Words are not separately copyrightable but strings of words are. Why not also say that, though individual pieces of information are not copyrightable, collections of such pieces are? So "Although individual facts and their unadorned expression are not protected by copyright, the law has chosen to ignore the dictates of algebra and affords to the summation of one hundred or one million such elements a significant measure of protection" (Denicola, 1981, p. 527). He thinks that is appropriate; but protecting a body of information against copying, reformulation, and transformation is protection of content, and it is clear to others that in many cases courts "have in a pragmatic sense afforded protection to simple ideas" (Hopkins, 1982, p. 405).

Which leads directly to the second point, that of derivative rights. Standard copyright doctrine has it that "compilations," which are collections of facts or pieces of information, are copyrightable but that only their arrangement and, at least in some cases, their selection is protected (Denicola, 1979; Francione, 1986, p. 593). The lay observer would conclude that rearrangement and reorganization of a compilation would not be infringing, and some court decisions lend support to this view. For instance, in the case of *New York Times Co. v. Roxbury Data Interface, Inc.*, Roxbury prepared a cumulated personal name index to the *New York Times* Index and the *Times* sued for infringement but lost (434 F.Supp 217. Compare Gorman, 1982, pp. 574-75; Denicola, 1979, pp. 532-33). But could one count on such re-uses of data being regularly allowed? No, for another court might well find such an index to an index to be a derivative work, "and that the right to create that new index was within the plaintiff's copyright monopoly" (Gorman, 1982, p. 575). The problem is a general one in that even if the content of a work consists of unprotectable facts or information, if there is a clear relation of transformation between an original work and another work, the other may be held to be an impermissible derivative work. It is futile to try to guess how judges are going to interpret the derivative right clause of the copyright act; but the prohibition against unauthorized derivative works stands, as Gorman (1982) notes about the First Amendment, as a "brooding omnipresence" over the copyright environment (p. 586). The idea of one work being a copyright infringement because it is *based on* another, and hence a derivative work, is a rich potential source of conflict.

The third and perhaps the major barrier to full recognition of a different status for works of fact and works of fiction is the copyright doctrine that paraphrase is equivalent to copying. Again the special nature of symbolic products complicates the picture; for if the text

of a factual work is protected *against paraphrase,* the ability to make use of the content of factual works is restricted.

The way this works is as follows. Suppose one text presents a series of "facts." Since facts are not copyrightable, it must be permissible to use them, in particular to communicate these facts to others. But if both the new text and the original text succeed in communicating the same facts, then the new text will look like a paraphrase of the first text. For the main test of a good paraphrase of a text is whether it serves as well as the original to communicate the information conveyed by the original; and conversely, if one text serves as well as another for that purpose, it stands in the relation of being a paraphrase to that other text. If the fact to be conveyed is that George murdered his brother, then any text that does convey that fact (directly at least, not just by implication) will do so because it is another way of saying that George murdered his brother. But then, by copyright doctrine, it is impermissibly similar to the original. But *any* text that managed to convey the fact in question would be impermissibly similar; if all impermissibly similar expressions are forbidden, it is not permitted to use the *fact* that George murdered his brother except indirectly or nonverbally.

Copyright doctrine has long recognized, at least in a few cases, that there is no practical alternative to allowing direct quotation: idea and expression "merge," and one must allow use of verbal expression on pain of granting monopoly ownership in a fact (see Francione, 1986, p. 573). But the generality of the problem seems not to have been acknowledged, though at least one court has come close, noting that: "Factual works are different. Subsequent authors wishing to express the ideas contained in a factual work often can choose from only a narrow range of expression" and noting, significantly, about one statement that "just about any subsequent expression of that idea is likely to appear to be a substantially similar paraphrase of the words with which Landsberg expressed the idea" (*Landsberg v. Scrabble Crossword Game Players, Inc.,* 1984, p. 488). But no one seems to have made the point in full generality (Francione comes closest but apparently cannot bring himself to talk bluntly in terms of paraphrase. See Francione, 1986, pp. 570-75). The court's odd phrase "substantially similar paraphrase" is telling; for outsiders, the whole point of paraphrase is to convey the information of the original, and the idea of a paraphrase that was not in that sense "substantially similar" is the idea of a *poor* paraphrase. The better a paraphrase, the worse it is in copyright. But it has to be stated as bluntly and forcefully as possible: forbidding paraphrase, or forbidding *good* paraphrase, amounts to forbidding use of the fact or information conveyed by the text paraphrased. The ban on

paraphase is flatly inconsistent with the ban on copyright in fact or information. As long as the ban on paraphrase continues, copyright in factual works will continue to present conflicts with the First Amendment.

Conclusion

The extenion of derivative rights to apply to "any...form in which a work may be recast, transformed, or adapted" is potentially the means of drastic further curtailment on the freedom to use ideas and information presented in copyrighted works—only potentially, for all depends on how courts come to understand the new wording of the law. When it comes to works of art and entertainment, we may not find the expansion of property rights of much concern from the point of view of intellectual freedom; does it matter, from that point of view, that we are forbidden to make rock videos or interactive computer graphics based on someone's short story or poem? When it comes to works of fact, however, the matter is different. The freedom to use and, in particular, to inform others about information is not one we can afford to see curtailed.

But as we have seen, even the thinnest copyright does have that effect—i.e., the inability to quote prevents the most accurate description of others' speech acts. The conflict between intellectual freedom and intellectual property is guaranteed by the basic character of linguistic communication—that accurate description produces a copy or a paraphrase of what is said. In the past, the fair use doctrine was held to provide the needed loopholes that would mitigate the conflict. Recent constricted applications of that doctrine reduce the number of loopholes (without closing them all, to be sure). As long as copyright in works of fact is granted, the conflict will continue. Since those with economic interests in copyright are certain to keep up pressure wherever and whenever possible to preserve and extend the range of protection, those concerned with intellectual freedom have to face the prospect of perpetual struggle to preserve the freedom to communicate and to use publicly available information.

It is inevitable that the question of incentives for the production of factual works should arise, however, whenever it is proposed that copyright protection for factual works should be thin and protect only against exact copying. The idea was, as we saw at the beginning, that copyright was a bargain made to increase production of intellectual products; but if copyright does not extend to factual information, it hardly provides incentives to the production of new factual information. And in fact this is so; scientists and scholars do not do original research they would otherwise not do in the expectation of making money by the sale of copies of their books

or journal articles (or of movie rights). Basic scientific research is directly subsidized, mostly by governments; scholarly research is subsidized too by academic appointments that allow time and provide some resources for research (often insufficient, but not seriously supplemented by sale of copies of books). Government itself collects basic economic and social information and supports applied research in agriculture and medicine. In these areas it is not research that is supported by copyright but the publishing industry. If the copyright bargain was made in the hope of thereby increasing the supply of new factual information, of new knowledge, it is a bargain that was badly made for it does not have that result. And if the result of the bargain is that rights to use information are restricted, it is doubly bad, giving away what should not have been given away without any return.

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