The Mythology Of Common-Law Copyright

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This paper focuses on the mythology of common-law and natural-law copyright (for my purposes "common-law" and "natural-law" copyright are interchangeable). It is a commonplace among copyright scholars that common-law copyright is a myth. Nonetheless, common-law copyright has been remarkably durable, and it seems that no amount of debunking is sufficient to do it in. The natural-rights view of the basis of copyright and patent has been formally discredited, but it continues to influence the law in a quiet but determined fashion. While courts and scholars alike have concluded that the true justification for intellectual property law is utilitarian, and that copyright is not based on a Lockean theory of labor investment, the ghost of Locke is an especially tenacious apparition which continues to exert a peculiar and inappropriate influence on the law.

What is to account for the influence of the common-law or natural-law vision? This paper attempts to provide both historical and philosophical answers to this question, proceeding in three parts. It begins in the early days of copyright with the Company of Stationers, perhaps the earliest advocates of common-law copyright. If it seems to moderns that the Stationers' legal case was so improbable that they could not have believed it, it is a fair question to ask what they *did* believe, and to see why these beliefs should prove so amenable to future advocates of expansive copyright laws. Second, the paper considers the modern philosophy of common-law copyright, focusing on the manner in which sound recordings were accorded copyright protection. Proponents of common-law copyright believe in what Zechariah Chafee called "the natural justice of copyright," and this section of the paper attempts to explain how this view, which corresponds very closely with the philosophy of London's booksellers, has been used in order to provide copyright protection to a wide range of subject matter not previously protected. Finally, the paper considers modern implications of the philosophy of common-law copyright. Among other things, the paper contends that 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. The paper concludes by pointing out some of the most important consequences of the adoption of this polite version of common-law copyright, including the veneration of certain means of transmitting cultural information, notably the printing press and the sound recording apparatus. The law's attachment to outmoded technology has committed us to some very improbable propositions about the necessity of copyright law--propositions which have their origins in the desperate desire of London's booksellers to connect their own interests with the interests of authors, and propositions which, if understood properly, may help us to reject the common-law theory in both its impolite and polite versions.