

THE MYTHOLOGY OF COMMON-LAW COPYRIGHT

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This paper focuses on the mythology of common-law copyright and its American natural-law cognate. It is a commonplace among copyright scholars that common-law copyright is a myth. Nonetheless, as other scholars have noted, common-law copyright has been remarkably durable, and it seems that no amount of debunking is sufficient to do it in. 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. 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 labor theory, the ghost of Locke is an especially tenacious apparition who continues to exert a peculiar and inappropriate influence.

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, 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 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 modern philosophy of common-law copyright, focused on the manner in which sound recordings came to be accorded copyright protection. Proponents 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, has been used in order to extend copyright protection.

Finally, the paper considers modern implications of the philosophy of common-law

copyright. Among other things, it 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 final section points out some of the most important consequences of the adoption of this polite version of common-law copyright. First it looks at the manner in which the law has embraced the fictions of common-law copyright, and second at the tendency to venerate outmoded means of transmitting cultural information--originally the printing press and more recently sound recording apparatus. The law's attachment to outmoded technology has committed us to some very improbable propositions about the basis 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 understand the operation of the common-law theory in both its impolite and polite versions.