

# Book Review

## Textual Monopolies: Literary Copyright and the Public Domain

reviewed by Anthony Julius

Edited by Patrick Parrinder and Warren Chernaik, Office of Humanities Communication, King's College London. Publication Number 8. Published with The Centre for English Studies, School of Advanced Study, University of London. January 1997. £10.00.

Copyright law comprises two opposing principles. The first principle, expressed as a proposition, can be put thus: literary works are the property of their authors until alienated by them and should be treated no differently from other forms of private property. The second principle is: literary works are written out of other literary works (writers in creative dialogue with their forebears) and are thus common property, part of the cityscape of the public domain.

The first principle may be defended by a combination of arguments about the nature of private property and the nature of literary creativity. While the second principle may likewise be defended by a comparable combination, the tendency has been to emphasise the specifically literary arguments; there has been little support for arguments that would circumscribe – or, more radically, deny – the claims of private property in general.

These principles are, each one of them, persuasive and coherent. Copyright law, by contrast, is neither. Diminished by its embrace of both principles, faithful to neither, it leaves its constituencies – authors, publishers and readers – dissatisfied. If it is to be defended, it has to be on policy grounds. It represents a settlement, not a deduction. It is not derived from an examination of the question: what is the nature of literary creativity? Instead the question is: how should the claim of the author to perpetual copyright and the claim of the public to instant and unrestricted access be balanced? There is thus no place in its final formulations for the triumphant declaration, *quod erat demonstrandum!* One consequence of this is that copyright law is unstable and subject to revision. It is always going to be open to the objection that it gives undue weight to one or other competing interest. In this passage from principle to interest, which is a decline in theoretical standing, the potential rationality of copyright law is sacrificed.

Because copyright law is thus a politically rather than intellectually contested terrain, not grounded in one principle but in a plurality of incompatible principles, it tends not to attract the attention of jurists (compare contract law or criminal law). This is because it is an obvious mess and thus hardly conducive to jurisprudential inquiry other than of a deconstructive kind in which its various incoherences are held up to critical scrutiny; see, for example, the essay by Fiona Macmillan Patfield in the volume under review. It does increasingly attract, however, the attention of literary critics and it is an obvious candidate for study by those concerned with the emerging 'law and literature' discipline. This is the case, I believe, for three reasons.

First, because it regulates the production of literary works, it determines what can, and cannot, be written (or published, at

any rate) no less decisively than more conventional censorship laws. In a sense, it determines the literary critic's field of study. To adopt the language of proscription, we might say that plagiarising works are censored by copyright laws. Indeed, this censorship is of a radical nature; it does not merely deny the plagiarist the right to publish his work, it actually refuses to acknowledge the work's existence. It declares the work to be a mere copy of another work. Herein lies the distinctness of copyright as censorship: while most censorship laws suppress the dangerous (or what is perceived to be so), copyright law suppresses the phony. But in doing so, it makes discriminations which may not be accepted by literary criticism.

This leads to the second reason for the literary study of copyright. While sensible critics seek to avoid consideration of the tedious and irresolvable question of precedence – which came first, aesthetic doctrine or positive law, the theory of literary creativity or the practice of copyright protection? – the examination of the ideology of literature implicit in copyright law (an ideology which is not to be reduced to the banal worship of originality) can lead to worthwhile results. Patrick Parrinder's essay in this volume points in just this direction.

Third, and rather more prosaically, it affects the kind of research that may be undertaken by critics and the constraints on their teaching. While universities may be in practice a 'copyright-free zone', there is still great resentment at the restrictions on the copying of, and the general lack of inexpensive access to, canonical modern works, especially when those works are actually unavailable. Often the problem is not, 'We don't want to pay for this expensive copyright work' but rather, 'We can't get hold of it at all because it is out of print, so we have to copy it from a library edition.' Copyright laws aren't just hard on the plagiarist, they're also hard on the scholar and the student.

The papers in this collection, first delivered at a 1994 London conference organised by The Centre for English Studies, address all these questions with intelligence and moderation. While the overall bias of the papers favours the 'public domain' side of the argument – that is, the second of the two competing principles – the publishers' perspective is also represented. What I missed was any extended examination of the relation between moral rights and copyright. This is an important relation not least because what may be a defence to a copyright claim could amount to an admission of culpability in an alternative claim for breach of a moral right. The best example is parody. There is a moral right to object to derogatory treatment of one's work. Such treatment may be a parody, and parodies are protected as distinct and non-plagiarising versions of the original parodied works.

Overall, an impressive and valuable collection. 

**Anthony Julius**

*Mishcon de Reya*