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Kaplan: An Unhurried View of Copyright

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AN UNHURRIED VIEW OF COPYRIGHT. By *Benjamin Kaplan*. New York: Columbia University Press. Pp. ix, 142. \$5.

I can unreservedly recommend *An Unhurried View of Copyright*¹ to specialist and non-specialist lawyer alike as the best springboard I know from which to dive into the murky waters of 1967 copyright problems. The title of this small volume has proved provocative to a number of the other "viewers" of copyright,² but is, in fact, singularly apt. It deserves a moment's notice. First, the "view" Professor Kaplan gives us is one primarily in the sense of the second definition of that noun in my dictionary,³ "as, a just *view* of the arguments or facts in a case," and only secondarily, infinitely gently, though to me strongly persuasively, one in the sense of the sixth definition, "as, to state one's *views* of a debated policy." Second, the view is "unhurried" in the sense that it is presented with grace and wit, with form and in ordered measure, Mozart, not Musorgski. It is plainly the product of calm consideration, real scholarship, and a

1. The book comprises, with emendations, amendatory and supplementary, plus an admirable table of cases and a judicious number of useful footnotes, the three James S. Carpentier Lectures which its author delivered at the Columbia University School of Law in March 1966.

2. Copyright is being "viewed" in the United States today by more people with more concern in more ways than at any time in the past. The existence of this widespread interest is evidenced by the voluminous record of the various congressional hearings on proposed copyright revision legislation which itself comprises only the distillate of an exponentially greater volume of words spawned at seminars, workshops, conferences, proceedings, committee meetings, conventions, caucuses, and canvasses without number, the spate of which continues unabated. Almost all these other viewers are "with alarm," and some seem to feel about an "unhurried" viewer the impatience of a drowning man with an unhurried life guard.

3. M. WEBSTER, *NEW INTERNATIONAL DICTIONARY* 2842 (2d ed. 1959).

needed time of ripening. But it is most assuredly not late, being most timely arrived on the 1967 copyright scene; not dated, reaching as it does not only to the technological realities of the 1967 modes of using copyrighted works, but boldly into the future to suggest that copyright must be so ordered as to stimulate, not stunt, the coming modes which promise so brightly to enlarge the intellectual life of man as machinery has already expanded his physical capacities.

The Author

"Ben" Kaplan is a legend in a number of places. One of these places is the Advisory Committee on Civil Rules to the Committee on Practice and Procedure of the Judicial Conference of the United States. Professor Kaplan was Reporter to the Advisory Committee from 1960 to 1966. In this "hot spot," Ben became legend not by being all-wise and ever-right, but by taking up the wheat and blowing away the chaff from the grain supplied in various idiosyncratic ways by the diverse and quite unashful members. Ben would cheerfully put in better words texts proposed by others to meet this or that problem of federal civil procedure even when he did not agree with the proposal. In the process he usually so illumined the proposal that it was forthwith discarded or straightaway adopted. When the pressure of other demands led Ben to abandon his Reporter's role, the legend compelled his reappointment as a member, and the Chief Justice responded to the compulsion to the unanimous applause of the Committee and its chairman, Dean Acheson.

Another locus of the legend is the New York Copyright Bar, where, though Kaplan is a name to conjure with, opinion is divided as to whether the magic is black or white.

Last—and whether I add the customary "and not least" will sway no one who holds a firm predilection—I shall note that Harvard Law School is another place where the Kaplan legend waxes strongly. The rise of the Third Reich and the call of the army put a period to Ben's career at the New York Bar in 1942, and barely had he resumed that career after Nuremberg when, in 1947, he became first a visiting professor, then a professor, and now, since 1961, Royall Professor of Law at Harvard. In the light of this swift ascent in the academic hierarchy, I am inclined to the judgment of another, who, as part of "an attempt to reclaim for the English language the many fine affirmative words that have been lost it for so long, buried under ponderable prefixes," characterized Ben as "a brilliant, becilic professor."⁴

4. The matter quoted in this sentence is selected, as an example of fair use of copyrighted material, from F. LAMPORT, *SCRAP IRONY* 36, 51 (1961). Miss Lamport shows her "utterable wisdom" in this work as she is, at 2 Bond Street, Cambridge, at least, also well known as Mrs. Benjamin Kaplan.

The Book

The book follows the Carpentier lectures—and all Gaul—by being divided into three parts: I. The First Three Hundred Fifty Years; II. Plagiarism Reexamined; and III. Proposals and Prospects.

In part I, we are led from the chartering of the Stationers' Company by Bloody Mary in mid-sixteenth century England to the enactment of our present United States copyright statute in its general form and principal details in mid-Edwardian America. We are shown a beginning in Crown censorship made stronger by skillful alliance with private privilege, all molded by the political and economic exigencies and opportunities of the printing press. We are led past the familiar landmarks of Mansfield and Eldon, Story and Holmes, to a statutory scheme devoid of sovereign censorship and dominated by a vastly extended range of nearly-absolute private privileges modeled on the classic attributes of the personal property right. The act contains only the most rudimentary recognition of the coming complications that technology will bring. This recognition takes the form of a compulsory license provision intended to prevent copyright ownership from affording an indirect highway to domination in the fields of player piano and phonograph manufacture. Professor Kaplan, by concentrating on the scope of the rights and remedies afforded by copyright in the views of the generations of judges who have spoken to the subject, and by reminding us that abridgments, restatements, dramatizations, and foreign language translations may be, and often are, works of authorship in themselves, sometimes exceeding in artistry the original, gently leads us to recognize that derivative works are not "copies" in the true sense. Thus, he shows that, while absolute and rigorous prohibition over an extended span of time may be appropriate to prevent unauthorized multiplication of a work itself, a conditional and temperate ban over a much lesser span of time may be sufficient to insure an author his due for his contribution to the labors of others who create derivative works.

In part II, Judge Learned Hand tends to dominate the argument, and Professor Kaplan skillfully shows us how Hand's own perceptive and powerful mind led him to make of his lifetime of copyright opinions a masterful compendium of penetrating exegesis of all sides of the question. The problem is, "What is infringement?" A part of the answer is, "That depends." Professor Kaplan shows us a number of the factors upon which Hand and his contemporaries, avowedly, guardedly, or, sometimes, seemingly unconsciously, let it depend. In classic copyright law theory, validity of a copyright does not depend on the quantity or extent of the originality displayed by an author in his work, but only on the fact that it was original—that is, not so derived from a prior work as to be an infringement of a postulated copyright thereof. In classic copyright law theory,

infringement of a copyright is a conclusion solely derived from historical fact—the use that the accused plagiarist made of the copyrighted work—and does not depend on the existence of other sources which he might have used and did not. In actual practice, these theories have not always governed the result: works of striking originality are held infringed by much less “taking” than more commonplace efforts, and barefaced copying is found excusable if the copyrighted work did not commend itself as worthy to the court. Professor Kaplan, through amusing analysis of some divergent “leading” cases, shows us how the relatively monolithic positions of the 1909 Act with respect to what is a “taking”—whether actionable or exempt—has paradoxically created uncertainties as to what is an infringement of copyright and has led to the disorderly growth of copyright-like remedies at common law, with state-to-state discrepancies and anomalies.

In part III, Professor Kaplan pleads for a new expression of American copyright policy rationally arrived at by informed lawgivers and not compromised by logrolling among competing interests, each armed with some political or economic power, each with its own position, obsolescent or emergent, in the technology of modern times. Just as the printing press compelled the attention of the Tudors, so the “computer”⁵ compels the attention of the rulers, real and titular, of the present day.

Copyright in Anglo-American law was descended from censorship and it may be that inept revision and ineffective or overreaching revitalization of copyright today may bring about a rebirth of censorship through economic “side-effects.”⁶ Certainly, some drastic readjustments are required in basic copyright principles to avoid a show-down confrontation with the computer, a meeting from which the computer is as little likely to recede as the tide from its celebrated confrontation with King Canute.

Professor Kaplan notes the sources of some of the difficulties that have troubled copyright law in its attempts to keep up with technology. One, for example, is the “publication” concept which makes a 200-copy edition of a country high school newspaper a publication, but not a nationwide television broadcast. Another is the strained interplay of notions of “performance” and “copy” by which an apparatus owner who receives only electrical emanations and, after

5. I use the term “computer” as short hand for modern techniques of data storage and retrieval, whether referring to various specific devices for electronic “bit” handling, making photo- or micro-records of visually readable text, or whatever may next be devised mechanically or electrically to replace or augment libraries, including their catalogues and their contents.

6. Compare the just and well-stated alarm of G. GIPE, *NEARER TO THE DUST* (1967), with the optimism of M. Muntyan, *What Lies Ahead?*, *SATURDAY REVIEW*, June 10, 1967, at 14, that the interplay of computer and copyright can make authorship even more rewarding socially and financially than the interplay of printing press and copyright.

manipulation of them, delivers counterpart electrical emanations to paying subscribers is "performing" the work represented by the emanations, but is not, apparently, making a "copy" of it. I venture to find in Professor Kaplan's book a regretful dissent from both of these recently judicially-sanctified "principles" which seem to fly in the face of common-sense and have both resulted from, and added to, the over-protectionism which Professor Kaplan expressly deplors.

Professor Kaplan also notes that the impact of the recent Supreme Court destruction of the once growing protectionism of common-law unfair competition concepts,⁷ with consequent resort to the federal constitutional copyright power by those seeking to recover the lost protection, and the threatened absorption of "common-law copyright" for "unpublished" works into the federal statutory scheme, with consequent pressures for special rights and remedies, tend to force upon the proposed comprehensive new federal copyright enactments wholly new diversities of problems and solutions. These pressures will surely require that the basically simple—or as Professor Kaplan puts it, "innocent"—approach of the 1909 Act be abandoned for a much more complex and sophisticated law. In short, the various possible permutations of different kinds of authors, different kinds of works, and different kinds of "takings" may well require for just and effective copyright as many combinations of different kinds of remedies and different rates of recompense extending over different periods of time.

All, of course, is not perfect with *An Unhurried View of Copyright*. It is only fair to note that I am dismayed by Professor Kaplan's blithe disregard of—or, do I detect a mildly annoyed impatience with?—the problems of constitutional law that I see looming before us as attempts are made to extend copyright to subject matter judicially found not copyrightable under the 1909 Act,⁸ to fill the gaps blown by the *Sears* and *Compco* salvo in the protectionist bulwarks provided by the common law of unfair competition, and to destroy without compensation the perpetual protection heretofore enjoyed by unpublished works. But that is another matter to be resolved another day, and for the present I urge you: Do buy this book and don't wait for it to be available for the dialing on your computer console.

*W. Brown Morton, Jr.,
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7. *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964); *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964).

8. 17 U.S.C. § 4 (1964): "The works for which copyright may be secured under this title shall include all the writings of an author."