January 1975

Authority of the Register of Copyrights to Deny Registration of a Claim to Copyright on the Ground of Obscenity

Dan W. Schneider

Follow this and additional works at: https://scholarship.kentlaw.iit.edu/cklawreview

Recommended Citation

Dan W. Schneider, Authority of the Register of Copyrights to Deny Registration of a Claim to Copyright on the Ground of Obscenity, 51 Chi.-Kent L. Rev. 691 (1975).

Available at: https://scholarship.kentlaw.iit.edu/cklawreview/vol51/iss3/2
AUTHORITY OF THE REGISTER OF COPYRIGHTS TO DENY REGISTRATION OF A CLAIM TO COPYRIGHT ON THE GROUND OF OBSCENITY

DAN W. SCHNEIDER*

It is not clear whether the Register of Copyrights has authority to deny registration of a claim to copyright when the claim is based on allegedly obscene material. Neither the Constitution\(^1\) nor the Copyright Act\(^2\) expressly confer such authority, and no case law holds that such authority exists or properly may be exercised. Commentators, nevertheless, have concluded that administrative authority to so deal with obscenity does exist and that its exercise is permissible.\(^3\) In this article, then, examination of the arguments raised and conclusions drawn to support the existence of such administrative authority is undertaken, and effort is made to demonstrate that the Register may not have the authority he is currently believed to have or that if he does, his exercise of that authority necessarily would be subject to substantial practical, constitutional and policy limitations.

Current Copyright Office policy not to deny registration on the ground of obscenity undoubtedly explains the absence of recent litigation on this point and tends to moot the inquiry. Administrative policy, however, can be changed. As long as the prevailing view favoring the existence of authority remains unexamined, an arguably impermissible change in policy remains a live possibility. In an area riddled with copyright, administrative and constitutional problems, most of which re-

* Member, Oregon State Bar; LL.M. Candidate, Columbia University; J.D., Willamette University. This article is an expanded version of a paper awarded first prize in the 1974 Nathan Burkan Memorial Competition at Willamette University College of Law.


691
main unresolved, it seems instructive to review, identify and possibly clarify the areas of confusion.

Since the central question whether the Register has authority to deny registration of a claim to copyright when that claim derives from allegedly obscene material has not been definitively addressed by a court or by the Congress, implicit subquestions demand review and analysis: 1) Does an obscene work constitute copyrightable subject matter? 2) Does the Register of Copyrights have administrative authority to deny registration of a claim to copyright on the ground of obscenity? and, 3) What limitations attach to the Register's authority?

**DOES AN OBSCENE WORK CONSTITUTE COPYRIGHTABLE SUBJECT MATTER?**

**The United States Constitution**

The Constitution grants Congress power "to promote the Progress of Science and the Useful Arts by securing for limited Times to Authors . . . the exclusive Right to their respective Writings." This power is not expressly limited to certain kinds or qualities of writings. The Constitution does not expressly require that a work be free from obscenity before it qualifies for copyright protection. Several courts, however, have intimated that the Constitution impliedly requires that a work be free from obscenity or immorality before its author may seek the benefits and protection of the law. Where these judicial intimations appear, the courts either were imparting merely dicta or were seeking arguably tenuous support for a denial of injunctive relief based on "unclean hands." In these cases, the courts were not addressing directly the issue of the copyrightability of obscenity.

**The Copyright Act**

Congress has provided that copyright may be secured for "all the writings of an author." Section five of the Copyright Act enumerates

---

6. See note 36 infra. See generally text accompanying notes 36-54 infra,
AUTHORITY OF THE REGISTER OF COPYRIGHTS

classes of writings for which registration is permissible but cautions that the enumeration is not an exhaustive definition of copyrightable subject matter. Though Congress might have provided that an obscene work is not a "writing" or that obscenity is not generated by an "author," it did not do so. In reference to whether an obscene work falls within the realm of copyrightable subject matter, the Copyright Act is silent.

The Regulations

Congress has given the Register of Copyrights authority to "make rules and regulations for the registration of claims to copyright." Accordingly, the Register has published rules in the Code of Federal Regulations respecting registration of claims. Words, short phrases, titles, mere ideas, systems, blank forms not conveying information, and works consisting merely of information that is common property are not subject to copyright, and application for registration of claims respecting such items will not be entertained. The Regulations do not indicate whether obscenity is proper subject matter for copyright. Furthermore, there would seem to be no reliable analogy between the material not subject to copyright under the regulations and obscenity. The Regulations list material which would seem deficient in quantity, originality or formal concreteness, while obscenity suffers from lack of literary, social or artistic quality.

Case Law

As early as 1879 an observer recognized that specification of the "qualities . . . essential to bring a literary work within the general scope and spirit of the law is a [matter] which has been left to judicial determination." Existing support, therefore, for the proposition that obscene material is not fit for copyright protection can be found in court opinions. While court opinions ground this proposition on

8. Id. § 5.
9. See Nimmer on Copyright, supra note 5, § 36.
12. Id. § 202.1.
16. Khan v. Leo Feist, 165 F.2d 188 (2d Cir. 1947); Davilla v. Brunswick-Balke
varying theories, in almost every case the proposition is raised to bar injunctive relief sought by authors of allegedly obscene works. It has been suggested that the proposition exemplifies an application of the "clean hands" doctrine, but a look at the various derivational theories reveals that some courts would understand the proposition to be a more broadly-based, more independent legal principle.

The General Moral Principles Theory

Under the general moral principles theory, denial of relief for alleged infringement of an obscene work is based on general moral demands. One English court of law in an action for damages and several English and American courts of equity in suits for infringement have refused to lend their aid to an author or publisher of a work which subverts the public morality. The author of an 1879 treatise, summarizing the earlier cases, worked this theory into a general proposition, upon which later courts and writers heavily rely: "[p]rotection of the law will not be extended to a publication which is obscene, or has a positive immoral tendency."


17. Howell's Copyright Law, supra note 5, at 45. The "clean hands" doctrine requires that "he who comes into Equity must come with clean hands." W. DeFuniak, Handbook of Modern Equity 39 (2d ed. 1956).

18.Traditionally, commentaries concerning the Register's power to deal with obscenity and those concerning the copyrightability and protectability of obscenity treated cases dealing with obscenity and copyright protection as a single indistinguishable group. Distinctions, however, appear crucial to a thorough understanding of the breadth and reach of the case law. To simplify discussion and analysis, therefore, those cases have been organized into three groups, and each case has been pigeonholed based on the theory expressly or impliedly used by the court to justify and explain its decision. To further ease analysis, the theories have been labeled the "general moral principles theory", the "property theory" and the "constitutional theory."


In *Stockdale v. Onwhyn*, a court of law noted that courts of equity had refused injunctive relief to publishers of obscene works but stated that the doctrine formulated in equity was based on *dictum* and in any event could not guide the law.\(^2\) The court then decided that, "[u]pon the plainest principles of the common law, founded as it is, where there are no authorities, upon common sense and justice this action cannot be maintained."\(^3\) Although the court partially relied on a property theory,\(^4\) the conclusion that obscenity must remain unprotected rested largely on general moral demands.

Infringement suits in equity brought to court other cases using the general moral principles theory. Only *Shook v. Daly*, *Richardson v. Miller* and *Broder v. Zeno Mauvais Music Co.*, however, concerned allegedly obscene materials.\(^5\) In *Shook*, plaintiff's request for injunctive relief for piracy of the play *Rose Michael* was denied. Relying in part on the court's duty to the public and in part upon its inherent ability to protect material offensive to the public, the court stated: "If this play, or any literary production, is of that immoral character, it is no part of the office of this court to protect it by injunction or otherwise. The rights of the writer are secondary to the rights of the public to be protected from what is subversive of good morals."\(^6\) In granting plaintiff's injunction in *Richardson*, the court spoke to defendant's contention that playing cards were not a fit subject for copyright. Indecency or immorality in the form of expression embodied in plaintiff's work would cause the court to deny the requested remedy.

22. Stockdale v. Onwhyn, 108 Eng. Rep. 65 (K.B. 1926). In this case, a publisher sought to maintain an action for damages against a subsequent publisher for the sale of a pirated edition. The defense successfully claimed that the obscene nature of the work made it unprotectable and barred the claimant from relief.

23. Id. at 66.

24. *See generally* text accompanying notes 29-35 *infra*.

25. Broder v. Zeno Mauvais Music Co., 88 F. 74 (C.C.N.D. Cal. 1898); Richardson v. Miller, 20 F. Cas. 722 (No. 11791) (C.C. Mass. 1877); Shook v. Daly, 49 How. Prac. 366 (N.Y. Sup. Ct. 1895). The other infringement suits concerned materials not obscene yet otherwise objectionable. In Southey v. Sherwood, 35 Eng. Rep. 1006 (Ch. 1817), the work was libelous in character. Relying partially on the property theory, the court postponed the grant of equitable relief until the plaintiff established his right to the property in an action at law. In Hoffman v. LeTraunik, 209 F. 375 (N.D. N.Y. 1913), defendant successfully argued that plaintiff's "gag monologue" was not proved sufficiently original with plaintiff to warrant a preliminary injunction. Delivering dictum, the court said: "To be entitled to copyright, the composition must be 'original, meritorious, and free from illegality or immorality'." 209 F. at 379. [See also Comment, 6 S. Dak. L. Rev. 109 at 110-11 (1961).] Stone & McCarrick v. Dugan Piano Co., 220 F. 837 (5th Cir. 1915) concerned advertising material so full of puffing and outright misrepresentation that it deceived and misled the public. The court refused to aid the plaintiff, whose hands were soiled. *Id.*

26. 49 How. Prac. at 368.
Absent an *inherent* indecency, however, there would be no moral basis to refuse equitable relief. Although playing cards could be used to gamble in violation of the law, the *Richardson* court found nothing immoral or indecent in the cards themselves. The court, therefore, ruled the cards entitled to the protection of the law.\(^{27}\) The *Broder* case raised the question whether the words “the hottest thing you ever seen” used in plaintiff’s song made the song “obscene and vulgar.” The court answered the question affirmatively, finding, in the context of the song, that the word “hottest” had indelicate and vulgar connotations. Noting that “musical compositions of an immoral character [are] not . . . protected by copyright,”\(^ {28}\) the court denied plaintiff’s request for injunctive relief. The *Broder* court’s reliance on cases using the property theory and cases using the constitutional theory suggests that it believed the legal principle concerning immoral works was based on more than general moral principles, but aside from the impact of *stare decisis*, the opinion of the court does not support such a broadly-based proposition.

The Property Theory

Under the property theory, denial of relief to a plaintiff whose work is obscene is based on a conclusion that the plaintiff can have no property in obscenity. Since publication of an obscene work offends the law, the law will not allow anyone to claim property in the form of expression embodied in the published work, and the court will declare any claim to copyright to be a legal impossibility.\(^ {29}\) This “contraband” fiction is useful, though it is an obvious fiction when expressed in this form.\(^ {30}\) A more realistic understanding of the theory

\(^ {27}\) 20 F. Cas. at 723. It should be noted that recent United States Supreme Court decisions may partially invalidate the theory used though not the conclusion drawn by the *Richardson* court. In determining obscenity, it is relevant to consider who is exposed to the material, *Redrup v. New York*, 386 U.S. 767 (1967) (willing viewers); *Ginsberg v. New York*, 390 U.S. 629 (1968) (minors), as well as the manner in which the material is purveyed, *Ginzburg v. United States*, 383 U.S. 463 (1966) (pandering). See also *Interstate Circuit Inc. v. Dallas*, 366 F.2d 560 (5th Cir. 1966) (interpreting Ginzburg).


\(^ {30}\) The property theory is a logical concomitant of the bifurcated property rights which are created when a government permits copyright. One person may hold a property right in the pages, type, binding and cover of a book, for the theft of which he may seek and obtain restitution or replevin, yet another person having a claim to prop-
would merely declare that there is no enforceable property right in obscenity. "The production of a seditious, blasphemous, immoral or libelous work is a violation of law, and therefore such a work is not entitled to protection as property."\(^{31}\)

In *Stockdale v. Onwhyn*, plaintiff sought damages for defendant's unauthorized production of a book professing to be the history of a courtesan's love life.\(^{32}\) The court agreed with the defendant's assertion that the book contained "highly indecent matter" and denied plaintiff's request for damages. For this decision, Chief Justice Abbott relied on the general moral principles theory and expressly abstained from use of the property theory. Judges Littledale and Bayley, however, appear to have based their concurrence in the result strictly on the property theory. They reasoned that where sale of the book offended the law, the plaintiff could have no property right in the book. Without a property right, there could be nothing on which to base a suit.

The only American decision to offer the property theory did so by way of *dicta*.\(^{33}\) The 1860 Massachusetts Court said where there are no rights, there can be nothing to vindicate, and where a work is obscene, there are no property rights.

Two older English chancery cases sound the same principle, using the same rationale. The first case involved libelous subject matter. The court denied a request for injunctive relief until the plaintiff could establish his property right in an action at law. The court further indicated that "[p]ublications may be of such a nature that the author can maintain no action at law . . . on that which he calls his property, but which the policy of the law will not permit him to consider his property . . . ."\(^{34}\) In *Lawrence v. Smith*, the defendant contended that the blasphemous nature of plaintiff's book prohibited the court of equity from granting the requested injunction.\(^{35}\) Since the legality of the work was in doubt, the court postponed any decision on plaintiff's request until plaintiff could prove in an action at law that he had property in the work.

\(^{31}\) *Drown's Treatise*, *supra* note 14, at 182 (emphasis added).
\(^{34}\) Walcot v. Walker, 32 Eng. Rep. 1, 2 (Ch. 1802).
\(^{35}\) 37 Eng. Rep. 928 (Ch. 1822).
The Constitutional Theory

Under the constitutional theory, the United States Constitution is read to exclude obscene material from the realm of copyrightable subject matter. The grant of power to Congress impliedly is limited to writings which tend to "promote the Progress of Science and the Useful Arts." A corollary that the Copyright Act impliedly permits certification only for works which have the requisite promotional tendency is occasionally appended to the constitutional theory.

A classic case, Martinetti v. Maguire, denied injunctive relief to both plaintiff and defendant, each of whom claimed the other was presenting a pirated version of the claimant's play. Since plaintiff's rights derived from one who copied the original manuscript, plaintiff was not entitled to injunctive relief. Although defendant held exclusive rights from the original author, defendant's play "Black Crook" was currently being performed from a pirated manuscript copy of plaintiff's play "Black Rook." The original manuscript sent to defendant by the original author had not yet arrived, and defendant had been unable to wait for the mail. The court found each party equally at fault, and then declared the manuscript too devoid of originality to afford suit and too like a spectacle to be classified a dramatic composition. In the court's judgment, therefore, neither party was entitled to copyright protection. Furthermore, the court said:

A dramatic composition which is grossly indecent, and calculated to corrupt the morals of the people [cannot be copyrighted]. The exhibition of such a drama neither ['promotes the progress of science and the useful arts,' but the contrary. The Constitution does not authorize the protection of such productions, and it is not to be presumed that Congress intended to go beyond its power [in legislating statutory copyright protection] . . . to secure their authors and inventors the exclusive right to the use of them.

Although Martinetti has been cited by most authorities as a foundation stone for the proposition that obscenity is not entitled to copyright protection, it is possible to view the Martinetti court's comments concerning obscenity and copyright as dicta.

36. U.S. Const. art. I, § 8. It can be argued that the constitutional phrase "to promote the Progress of Science and the Useful Arts" does not act as a limitation on "Writings." It seems instead to be an explanatory justification for granting a national Congress the power to enact copyright legislation. If the constitutional theory is the only currently plausible rationale for the proposition that obscenity is not fit for copyright protection the possibly strained constitutional construction should be re-examined.

37. 16 F. Cas. 920 (No. 9173) (C.C. Cal. 1867).

38. Id. at 922.

In *Barnes v. Miner*, injunctive relief was sought for plaintiff's stage show alternating motion picture scenes with imitative performances of currently popular performers. The court found that defendant's allegedly infringing stage show was similar to the plaintiff's only in plan. The particular form of expression embodied in defendant's show was sufficiently dissimilar from the form embodied in plaintiff's show. There being, therefore, no infringement of a protectable aspect of plaintiff's work, no injunction was issued. The court, perhaps unnecessarily, also made these comments:

> The provision of the Constitution (§ 8, Art. I) not only limits the power of Congress in enacting copyright laws to matters which 'promote the progress of science and the useful arts,' but serves to aid us in defining the words 'dramatic composition' found in the statute, for it is not to be supposed that Congress intended to include any compositions that would not tend to [so promote progress].

The court then indicated that even if the mere plan of representation employed by the plaintiff was deemed copyrightable, the "spectacular" work in question did not tend to promote the progress of science and the useful arts and therefore was not entitled to protection from infringement.

The most recent cases dealing with the issue whether obscenity constitutes copyrightable subject matter appear to rely primarily on the constitutional theory. In *Bullard v. Esper*, the court denied injunctive relief to both parties, stating that the "copyright provisions under which both [parties] seek certain rights and certain protection, were never intended to protect illegality or immorality." The court cited article I, section 8 of the United States Constitution and noted that obscene movies for which relief was sought had no tendency to "promote the Progress of Science and the Useful Arts." In 1963, a New York trial court denied plaintiff's suit for common law copyright infringement. Plaintiff had performed a skit in audition for defendant's "strip-tease" satire, "Gypsy," and alleged at trial that defendant pirated her musical choreographic composition. Although the court based its denial on the absence of a tendency to promote artistic prog-

40. 122 F. 480 (C.C.S.D. N.Y. 1903).
41. *Id.* at 490.
42. 72 F. Supp. 548 (N.D. Tex. 1947).
43. *Id.* at 548.
It is not clear whether the skit failed to contain the necessary modicum of creativity demanded of an "original" work, or whether the skit was unworthy because obscene. Since the language of the opinion did not suggest that the court used the Roth tests, it seems likely that the court found absence of creativity rather than objectionable obscenity.

Four other noted opinions concerned the defense of immorality in infringement suits. Primarily cited for their contributions to the development of the judicial test of obscenity, they can be read impliedly to support the proposition that obscene material is not fit for copyright protection. While a fair reading suggests these cases do support that proposition, brief summaries show the support to be of limited strength.

In Simonton v. Gordon, a tale of a white man's sordid affair with a West African native woman followed by her death and his return to England, when tested by contemporary literary standards, was not found to be unworthy of copyright protection. Although the Simonton court acknowledged the principle that a claim to copyright in obscenity is unprotectable, the court chose to apply that principle only in cases concerning obvious obscenity. In Davilla v. Brunswick-Balke Collender, defendant raised the issue of obscenity only on appeal. Since the pleadings failed to frame the issue for trial, the Court of Appeals for the Second Circuit expressly did not consider the argument. In Cain v. Universal Pictures Co., the court directed some attention to the test used to determine obscenity, but did so by way of clear dictum and without deciding whether obscene material is entitled to copyright protection. Finally, in Khan v. Leo Feist, the court found the de-

46. Citing Barnes v. Miner, 122 F. 480 (C.C.S.D.N.Y. 1903) for authority, the court said: [W]here a performance contains nothing of a literary, dramatic or musical character which is calculated to elevate, cultivate, inform or improve the moral or intellectual natures of the audience, it does not tend to promote the progress of science or the useful arts." Dane v. M. & H. Co., 136 U.S.P.Q. 426 at 429 (N.Y. Sup. Ct. 1963).

47. See generally NIMMER ON COPYRIGHT, supra note 5 § 10.2. In the concept of authorship, "[t]here is involved at least a minimal element of creativity over and above the requirement of independent effort." Id.

48. See generally text accompanying notes 132-149 infra.


50. 12 F.2d 116 (S.D. N.Y. 1925).
51. Id. at 124.
52. 94 F.2d 567 (2d Cir. 1938), cert. denied, 304 U.S. 572 (1938).
54. 165 F.2d 188 (2d Cir. 1947).
defendant's claim that plaintiff's song was salacious, lewd and immoral to be without merit. In that opinion, there seems to be an assumption that an obscene work is unfit for copyright protection, but the court did not expressly so assume.

Summary and Analysis

A cursory look at relevant case law might suggest and, to some reviewers, indeed has suggested long-standing broadly-based authority for the proposition that obscene material is not a proper subject for copyright. A closer look, however, calls the proposition, or at least its breadth, into question. Fair and proper treatment of the cases appears to reveal a proposition narrow and limited in effect. Significance attaches to such a reading for this reason: the more narrow the proposition, the less service it can legitimately provide as theoretical support for the existence of administrative authority.

Under the general moral principles theory, Stockdale v. Onwhyn, an 1826 English case, posited new judge-made law that the publisher of an obscene work could not maintain an action at law to enforce and protect his copyright. Shook v. Daly, Richardson v. Miller and Broder v. Zeno Mauvais Music Co. established the principle that equity will not enjoin an alleged infringement of plaintiff's copyright if the work on which plaintiff bases a claim for relief is obscene.

Using the property theory, courts have said there can be no property in obscenity, since its very existence offends the law. This reasoning was applied in the early nineteenth century, primarily by English courts, and only Stockdale has any direct, albeit partial impact.

Martinetti v. Maguire and Barnes v. Miner teach that the Constitution impliedly excludes obscenity from the realm of copyrightable subject matter, but arguably do so only by way of dicta. Dane

58. 20 F. Cas. 722 (No. 11791) (C.C. Mass. 1877).
59. 88 F. 74 (C.C.N.D. Cal. 1898).
60. Since neither Lawrence v. Smith, 37 Eng. Rep. 928 (Ch. 1822) nor Walcot v. Walker, 32 Eng. Rep. 1 (Ch. 1802) dealt with obscenity, they provide only limited support for a general proposition concerning obscenity.
61. 16 F. Cas. 920 (No. 9173) (C.C. Cal. 1867).
CHICAGO-KENT LAW REVIEW

v. M. & H. Co. speaks in constitutional theory terms, but probably can be read to deny injunctive relief on grounds other than obscenity. In Bullard v. Esper, the court held narrowly, based on the language of the Constitution, that equitable relief will be denied where the subject matter is obscene. Only by implication, therefore, does Bullard propose that obscenity is not copyrightable.

Case law, then, does show that a court of equity, on one of three theories, may deny injunctive relief to a claimant who bases his claim on obscene material. If Stockdale remains good law, a court of law faced with the same claimant will deny relief in an action for damages. Further, it seems clear that the constitutional theory and arguably the property theory each support the proposition that obscene material is not a proper subject for copyright. Since the general moral principles theory relates only to courtroom denial of injunctive relief, however, it can only support a proposition concerning injunctive relief. It cannot logically dictate that obscenity is not copyrightable subject matter.

Unless Martinetti, Barnes and Dane offer more than dicta, Bullard stands alone, or perhaps with Stockdale, to propose by implication that obscenity is not copyrightable subject matter. Even if Martinetti and Barnes hold that obscenity is outside the realm of copyrightable subject matter, and if Bullard is read expansively also to so hold, the case law cannot be read to invest administrative authority in the Register of Copyrights. Roth v. United States (reaffirmed in this regard by Miller v. California) held that materials which are properly determined to be obscene are not protected by the first amendment. These two decisions do support the proposition that obscene materials are not fit for positive, court-initiated injunctive relief, and they may even assist the Bullard proposition that obscenity is not copyrightable subject matter, but it is a long, and perhaps unfounded, step to the principle that the Register has authority to deny registration of a claim to copyright where the claimant tenders obscene material.

64. 72 F. Supp. 548 (N.D. Tex. 1947).
65. It would be non sequitur to allow one to have property (copyright) in something (obscenity) in which the law will not allow one to have property. This result, however, obtains only with the extreme form of the property theory. The modified version would not logically support the general proposition excluding obscenity from the realm of copyrightable subject matter. The modified version prohibits only enforcement of property rights and does not abrogate property interests.
DOES THE REGISTER OF COPYRIGHTS HAVE ADMINISTRATIVE AUTHORITY TO DENY REGISTRATION OF A CLAIM TO COPYRIGHT ON THE GROUND OF OBSCENITY?

Copyright Office Policy

In 1958, in response to Presidential inquiry, the Attorney General wrote that "the Register's authority to deny registration of a claim to copyright in the circumstances envisaged is not clear." Due to a dearth of cases testing the Register's authority and an absence of statutory definiteness, the outer limits of the Register's discretion remain undefined. In view of the absence of a well-defined understanding of the Register's authority, the Register has promulgated administrative policy statements concerning denial of registration on the ground of obscenity.

In 1941, the Register said:

The Copyright Office is not an office of censorship of public morals. In passing upon applications for registration of such material, the only official interest to be exercised is in deciding the question as to whether or not the material is copyrightable and hence registrable.

Citing Drone's Treatise, the Register reiterated the premise that courts consider an immoral work to be violative of law and therefore not entitled to protection as property, and he declared that premise to be an "established rule of American copyright jurisprudence." He then announced the 1941 policy saying, "[r]egistration of [obscene] material, when its nature is brought to the attention of the examiner in the copyright office, is refused." Although he gave two additional bases for the policy, primary justification came from an extension of

70. 44TH ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS 29 (1941). See Nimmer ON COPYRIGHT, supra note 5, § 95 n.370; Derenberg, COPYRIGHT LAW, 35 N.Y. U.L. Rev. 650 at 654 (1960). The Register's authority to promulgate such policy has not been disputed, though it would seem that authority to promulgate policy relating to discretionary power presupposes possession of that discretionary power—a power which, in the case of denial of registration on the ground of obscenity, the Register may not have.
71. Id.
72. Id.
73. Id.
74. First, Congress did not intend copyright protection to inure to obviously uncopyrightable productions. Second, to allow copyright in obscenity would create unsound policy, since one branch of government (the Copyright Office) would protect the author, while another branch of government (the Post Office Department) would sub-
the property theory. The Register appears to have concluded that the extreme form of the property theory had current vitality and that it buttressed not only denial of injunctive relief by a court of equity, but denial of registration of a claim to copyright by the Copyright Office as well.

In apparent response to the 1958 Attorney General's opinion, the Register of Copyrights reversed the policy of the Copyright Office. Difficulties involved in implementing the 1941 policy in accordance with constitutional and practical demands, absence of a clear duty in the Register to deny registration where obscenity was tendered, and the questionable posture as federal censor which the 1941 policy promoted were among the factors mentioned by the Attorney General which undoubtedly predicated the new policy. By this new policy the Register decided to limit "the examination [of claims to copyright] to the statutory formalities without examining the literary or artistic merits from the viewpoint of obscenity or immorality of the material itself." The Copyright Office has said informally that questions concerning obscenity are to be raised, "if at all, as equitable defenses in copyright infringement suits where a court [can] consider all the circumstances of the individual cases."

As long as current policy remains unchanged, no harm will be incurred by those making application for registration of a claim. Administrative policy, however, is subject to change. "There is no guarantee that the present relatively liberal attitude toward registration will not one day regress to a much more restrictive interpretation of the Statute, thereby seriously impairing the protection available to persons creating works on the fringes of copyrightability."

In view of the constitutional limitations connected with restrictions

75. See generally note 65 supra.
76. NIMMER ON COPYRIGHT, supra note 5, § 95 n.370; Derenberg, Copyright Law, 35 N.Y.U.L. REV. 650 (1960); Letter from the U.S. Copyright Office to author, January 25, 1974.
77. Among these difficulties, see generally text accompanying notes 132-149 infra (the constitutional test of obscenity); text accompanying notes 150-169 infra (the possible due process and APA demands concerning hearings); text accompanying notes 170-171 infra (the already onerous administrative burden of the Copyright Office).
on freedom of expression, and in consideration of the practical administrative problems involved, the Copyright Office probably would not change the present administrative policy regarding obscenity without serious thought and discussion. Power to make such a policy decision, however, may not reside within the Copyright Office. As long as it is generally believed that the Register has authority to deny registration where obscenity is tendered, it would follow that he has unquestioned authority to establish policy relating to the exercise of that authority. Conversely, if he is not empowered to deny registration where obscenity is tendered, he cannot have the authority to set policy relating to a power unpossessed.

Administrative Authority: Sources, arguments and analogies

Administrative action is legitimate only when taken in accordance with authority derived from some lawful source.81 Even if the cases which deny infringement relief on the ground of obscenity are interpreted broadly to postulate that obscenity is not proper subject matter for copyright, by neither logic nor sound administrative law can they be read to vest or acknowledge authority in the Register to deny registration on the ground of obscenity. In discussing common law as a source of administrative authority, one writer has said, "where the matter has been squarely presented, ... the judicial response has almost always been that administrative power must emanate from some other source."82

The Constitution does not confer significant authority on administrative or executive officers other than the President.83 Although some courts have argued that obscenity is impliedly excluded from copyrightable subject matter by the Constitution, the use of that theory is limited to infringement suits. Case law cannot be read properly to bestow administrative authority.

Section 1052 of the Trademark Act expressly authorizes refusal of registration of a trademark application if it comprises or consists of obscene matter.84 In contrast with this section, "[t]he copyright stat-
ute is silent with regard to the authority or duty of the Register of Copyrights to pass administratively upon the question whether the materials submitted to his office for registration may be rejected on the ground that the matter submitted is obscene and, for that reason incapable of copyright protection."\(^5\) The Register has argued that the Copyright Act impliedly prohibits registration of claims based on obviously uncopyrightable productions;\(^6\) however, in reviewing administrative discretion under a statute expressly proscribing obscenity,\(^7\) one Federal District Court has said "[a]ssuming [but expressly not deciding] power in the Post Master General to withhold obscene matter from dispatch in the mails temporarily, a grant of discretion to make a final determination as to whether a book is obscene and should be denied to the public should certainly not be inferred in the absence of a clear and direct mandate."\(^8\) In contrast to the argument urged by the Register, since the statute under review in Grove Press, Inc. v. Christenberry\(^9\) more resembled the Trademark statute than the Copyright Act, it appears that some courts would take a restrictive view of authority bestowed under the Copyright Act.

Absence of an express source of administrative authority coupled with the statutory presence of a general grant of rule-making power\(^9\) has provoked varying conclusions as to the kind and scope of administrative authority vested in the Register. Amid varying and indefinite understandings of the Register's power to deal with obscenity, a thorough appraisal of that power necessitates consideration of related powers held by the Register in reference to other aspects of the registration process and related powers held by other administrative officials in reference to obscenity.

account of its nature unless it a) consists of or comprises immoral, deceptive or scandalous matter. . . .

\(^86\) See note 74 supra.
\(^87\) 18 U.S.C. § 1461 (1970). This section declares obscenity to be non-mailable and punishes the knowing use of the mails to transport obscene matter.
\(^89\) Id.
\(^90\) 17 U.S.C. § 207 (1970). Comments on the Register's authority to deny registration of a claim to copyright in allegedly obscene material traditionally ignore the question of legislative authority to promulgate a rule concerning obscenity and focus on the Register's discretionary authority absent relevant "legislative" regulations. Discussion in this article similarly focuses on discretionary authority vested in the Register in the absence of a legislative rule concerning obscenity. As to the Register's power to promulgate such a rule, see note 93 infra.
Caruthers Berger has said that even absent express statutory delineation of the Register's authority to deny registration, "the extent of such authority may be gleaned from the various provisions specifying the works eligible for copyright." The existence of administrative authority to promulgate rules on a particular subject does not depend on [express or necessarily implied delegations of power] but may be found in the legislative grant to the administrator of general rule-making power. The Attorney General has suggested that "the authority conferred upon the Register by §207 [of the Copyright Act] 'to make rules and regulations for the registration of claims to copyright' confers precisely [the power and authority here under consideration]." He supported this view by reference to Bouvé v. Twentieth Century Fox Film Corporation, which contained the statement that rule-making power "must contemplate the exercise of some discretion not only in the making, but in the administration of rules." In Fox Film, however, the court noted that the Register's discretion is not unlimited. He has, for example, no power to refuse a properly tendered claim "based upon material which is actually the subject matter of copyright." The Fox Film statements, supported in substance by Bailie v. Fisher and Brown Instrument Company v. Warner, can be read to exclude obscenity from the realm of copyrightable subject matter and to demonstrate the Register's authority to deny registration where obscenity is ten-

91. C. Berger, Authority of the Register of Copyrights to Reject Applications for Registration, in STUDIES ON COPYRIGHT 395 (Copyright Society of the U.S.A. ed. 1963). As noted earlier, however (see text accompanying notes 10-13 supra), there may be a vital distinction between the kinds of subject matter excluded under Regulation 202.1 and obscenity.

93. 41 Op. Att'y Gen. 395, 400 (1958). This view, that, in the absence of specific "enabling" regulations, authority to deal with obscenity impliedly derives from general rule-making power, perhaps begs the question. It would seem that rule-making power could not be employed to promulgate a rule whose contents call for administrative action beyond the scope of duties legislatively granted to the Copyright Office. See 2 K. Davis, ADMINISTRATIVE LAW TREATISE § 5.03 at 298 and § 5.05 at 315 (1958). If the Copyright Act impliesly bestows on the Register authority to deal with obscenity, the Register clearly could promulgate a rule respecting obscenity. Similarly, if he has no authority under copyright legislation to deal with obscenity, then the Register arguably cannot promulgate a rule which permits administrative action beyond the scope of granted powers, even though the Register possesses general rule-making power. Regardless whether a rule concerning obscenity would be classified as interpretive or legislative and thus more susceptible or less susceptible, respectively, to judicial review and invalidation, determinations of obscenity seem outside the area of Copyright Office expertise and therefore beyond the scope of rule-making power.

94. 122 F.2d 51 (D.C. Cir. 1941).
95. Id. at 55.
96. 258 F.2d 425 (D.C. Cir. 1958).
dered. Since, in *Bailie* and *Brown Instrument*, courts approved the Register's decision that the works under review were outside the realm of copyrightable subject matter, those cases do suggest that the Register performs more than a merely ministerial duty. The subject matters at bar, however, were clearly outside the classes of copyrightable works enumerated in sections Four and Five of the Copyright Act.98

Opinions vary as to the type of authority bestowed upon the Register. In *Fox Film*, the court made these comments:

It seems obvious that the Act establishes a wide range of selection within which discretion must be exercised by the Register in determining what he has no power to accept. . . .99 It does not follow, however, that he has power to exercise uncontrolled discretion in refusing registration of material which is subject to copyright merely because he disagrees with the author as to how it shall be classified.100

Most authorities conclude that the Register's role is basically ministerial, particularly in view of the wording in section 11 of the Copyright Act,101 although the case law suggests that he has some discretionary functions.

A distinction which may have turning significance has received scant reviewer attention. Responses vary remarkably to the question whether the determination of obscenity is one of fact or one of law, revealing a noticeable absence of Supreme Court direction.102

98. In *Bailie*, the complainant tendered a cardboard star with two flaps which when folded back enabled it to stand as a display. The Register and the reviewing court found the tendered star clearly not a work of art. In *Brown Instrument*, the reviewing court denied the mandamus action brought to compel registration of an uncopyrightable mechanical recording apparatus.

99. 122 F.2d at 53.

100. Id. at 54.

101. 17 U.S.C. § 11 (1970) reads as follows:

REGISTRATION OF CLAIM AND ISSUANCE OF CERTIFICATE—
Such person may obtain registration of his claim to copyright by complying with the provisions of this title, including the deposit of copies, and
upon such compliance the Register of Copyrights shall issue to him the certificate . . . . (Emphasis supplied.)


102. See, e.g., *Jacobellis v. Ohio*, 378 U.S. 184 (1964), wherein Mr. Justice Brennan joined by Mr. Justice Goldberg suggested that the Court should give broad review and make an independent constitutional judgment as to obscenity. In Mr. Justice Harlan's partially concurring opinion in *Roth v. United States*, 354 U.S. 476 (1957), he suggested that the question of obscenity is not an issue of fact but a sensitive constitutional judgment.
sor Davis has indicated that the absence of direction indicates a basic Supreme Court hesitance, noting that the court rejects the fact/law distinction when it proves unworkable. 108

“There appears to be some confusion as to whether the discretion in determining whether an item is qualified as a work of art is a question of law . . . a question of fact . . . or a question of mixed law and fact.”104 Drone’s Treatise105 and an early opinion of the Attorney General106 designate the determination of obscenity as one of fact. Professor Davis treats the determination of obscenity as one of mixed law and fact.107 His view is also voiced in a 1915 Opinion of the Attorney General108 and by the Federal District Court in King Features v. Bouvé: “[The Register] has no power to refuse or deny registration of a claim to copyright which is entitled to registration under the Copyright Act. Whether an applicant or claimant has complied with the law so that his claim is entitled to be registered raises questions of fact and law to be decided by the court.”109

Whether material offered to the Register properly could be copyrighted as a book was held to be a question of law in the Twentieth Century Fox Film case.110 The defendant had tendered what the

Recent Supreme Court decisions do not clear the confusion. In Miller v. California, 413 U.S. 15 (1973), Mr. Justice Rehnquist categorized questions concerning “appeal to prurient interest” and “patent offensiveness” as questions essentially of fact, yet he declared that appellate courts have “ultimate power . . . to conduct an independent review of constitutional claims. . . .” Id. at 25. Mr. Justice Brennan concurring in the result in Jenkins v. Georgia, 418 U.S. 153 (1974) remarked that “[t]he Court’s new formulation [of the test of obscenity] does not extricate [the Court] from the mire of case-by-case determinations of obscenity.” Id. at 162. Since the Court in fact reviewed the film at issue in Jenkins and ruled it legally “clean”, the determination of obscenity in practice appears to entail matters of mixed fact and law.

103. “The United States Supreme Court is usually less concerned with fidelity to the literal meaning of ‘law’ and ‘fact’ in a verbal formula than it is with providing a system of review that will be sound and workable.” K. Davis, Administrative Law Text 555 (3d ed. 1972) [hereinafter cited as Davis’s Text].


105. Supra note 14 at 187.

106. 28 Op. Att’y Gen. 557, 561 (1911). This opinion does not directly deal with obscenity, but rather with the Register’s determination of whether a tendered work is properly a work of art.

107. 4 K. Davis, Administrative Law Treatise § 30.01 at 189 (1958) [hereinafter cited as Davis’s Treatise].


109. 48 U.S.P.Q. 237, 242 (D.D.C. 1940). At issue here was the Register’s right to deny registration of a claim based on bound comic strips. The Register had demanded the claimant to send in newspaper copies, but the court found that first publication was in the tendered bound form and that statutory compliance otherwise existed. The court granted claimant’s request for compelled registration.

110. 122 F.2d 51 (D.C. Cir. 1941).
Register contended were page proofs of contributions to periodicals, requiring a two dollar fee per contribution. Although the decision indicates that the Register does have some discretionary authority in determining what materials are copyrightable, the court found the Register's conclusion to be reviewable and in this case erroneous. In *Grove Press v. Christenberry*, the court held the Postmaster General's interpretation and application of the obscenity mailing statute to involve "questions of law and not questions of fact." Thus, even when a statute expressly proscribed obscenity, the court did not find an administrative officer vested with discretion to determine finally the question of obscenity.

Particularly in view of the constitutional sensitivity inherent in potential restraints on freedom of expression and the fine and hazy line between obscenity and protected speech, any governmental determination of obscenity must involve close attention to the constitutional requirements. Although the Court, in *Miller v. California*, stated that matters of obscenity are essentially questions of fact, the continued promulgation of constitutional requisites applicable to that determination indicates that the court views the determination as one of mixed fact and law.

The ministerial/discretionary distinction and the fact/law distinction are important not only for the light they shed on the size and shape of the Register's authority, but also for the consequences attaching to each distinction. Depending on the view taken of the fact/law problem, the scope of review takes on differing dimensions. Similarly, mandamus may or may not issue depending on the role (ministerial or discretionary) the Copyright Act carves out for the Register.

**Limitations on the Register's Authority**

If the register does have authority to deny registration of claims

111. 175 F. Supp. 488, 495 (S.D.N.Y. 1959), aff’d, 276 F.2d 433 (2d Cir. 1960).
115. See text accompanying notes 117-131 infra.
on the ground of obscenity, that authority would be quite limited. Judicial review, constitutional demands and administrative burdens would so restrict the exercise of authority as to make the exercise practically undesirable if not legally impermissible. Additionally, major questions of policy militate against any productive use of this authority.

Judicial Review

Although decisions of the Register of Copyrights are not subject to review by the Librarian of Congress, they are subject to judicial review and correction. It can argued that the Register's decisions concerning subject matter qualifications involve statutory construction and interpretation and that, as an agency head charged with administrative action under that same statute, his decisions should be given "great deference" or even "controlling weight" by a reviewing court. Reviewing courts have been willing, however, to re-examine and evaluate the Register's decisions without restraint. In King Features v. Bouvé, the court disapproved of the Register's decision concerning subject matter classification and said that "findings of fact and conclusions of law made by the Register of Copyrights may be reviewed by the court, and they are neither conclusive nor binding upon the court . . . ." In an infringement suit, the court denied relief to a claimant even though the Register had granted registration, finding the subject matter at bar (a graphic recording machine) not properly copyrightable. Thorough review on the merits was undertaken by courts in Brown Instrument Company v. Warner, Bailie v. Fischer and Bouvé v. Twentieth Century Fox Film Corporation. In Brown Instrument and Bailie, the courts agreed with the Register's decision, but in Fox Film the court found the Register's conclusion erroneous.

The amount of weight to be given the administrator's decisions

117. 40 Op. Att'y Gen. 263 (1941); NIMMER ON COPYRIGHT, supra note 5 § 95.1.
118. NIMMER ON COPYRIGHT, supra note 5 § 95.1.
121. Taylor Instrument Co. v. Fawley-Brost Co., 139 F.2d 98 (7th Cir. 1943), cert. denied, 321 U.S. 785 (1944).
122. This procedure is strongly recommended as the best way to deal with the problem of obscenity. (See text accompanying notes 172-176 infra.) The Court has the time, the expertise and the setting fully and fairly to determine obscenity.
is unclear, but the cases reviewing Post Office determinations of obscenity emphasize the sensitivity necessary when dealing with freedom of expression and suggest that a reviewing court should provide something akin to thorough re-examination. In *Grove Press v. Christenberry*, the court said the Postmaster General "has no special competence to determine what constitutes obscenity," and remarked that such a determination is uniquely for the courts even if viewed as a question of fact. "It is no less the duty of this court in the case at bar to scrutinize the the book with great care and to determine for itself whether it is within the Constitutional protections afforded by the First Amendment, or whether it may be excluded from those protections because it is obscene under the *Roth* tests." The Supreme Court has not defined authoritatively the scope of judicial review demanded in a case involving an administrative determination of obscenity. The Federal District Court in *Grove Press*, however, suggested that the *per curiam* reversals of *One, Inc. v. Olesen* and *Sunshine Book Company v. Summerfield* on the authority of *Roth* indicate the use of a full review on the merits. In contrast to *Grove Press*, another Federal District Court, in *Big Table, Inc. v. Schroeder*, posited that a reviewing court may reject the administrative decision only if it is unsupported by substantial evidence. The court, however, limited this conclusion to administrative decisions based on authority properly exercised pursuant to statutory grant; therefore, only if the Register has the authority to deny registration on the ground of obscenity would the rule in *Big Table* apply.

Professor Davis noted generally that courts have power to review administrative decisions based on questions of law or mixed questions of fact and law. In the context of judicial review, where courts sometimes substitute their judgment for that of an administrator, Professor Davis hypothesized:

Substitution of judicial for administrative judgment is often rather clearly desirable, especially when the statutory purpose is unclear . . . [and including cases] involving problems which: 1) transcend the single field of the particular agency, 2) call for interpretation of common law . . . [3] are affected substantially by consti-

124. Id.
125. See text accompanying notes 102-116 *supra*.
129. 4 *Davis's Treatise*, *supra* note 107, § 30.01.
tutional considerations . . . and [4] bring into question judge-made law previously developed in the course of statutory interpretation.180

Clearly, a decision by the Register in reference to obscenity would entail all four of these problems. Given, then, administrative law reasons as well as constitutional law reasons181 for full judicial review, the Register's authority to determine obscenity could not be unlimited.

**Constitutional Demands**

If the Register were to decide to deny registration on the ground of obscenity, it would appear that he must determine obscenity only in conformity with the constitutional definition of obscenity.182 This follows from the Supreme Court's use of such a definition in dealing with the Postmaster General's decisions under the obscenity-mailing statute183 and from lower court decisions urging that postal statutes and pertinent case law be imported to guide the Register's decisions regarding obscenity.184 "The Khan and Cain cases show a clear tendency on the part of the courts to apply what may be called the 'general law' of obscenity."185

The series of recent Supreme Court decisions beginning with Roth and presently ending with Hamling v. United States186 reflect an attempt to flesh in a workable constitutionally-based definition of obscenity sufficient to distinguish protected speech from the unprotected. Throughout the definitional development one thing at least has been clear: obscenity is outside the area of constitutionally protected speech or press. Unclear, *inter alia*, has been the dimensions of the definition.

In *Miller*, Mr. Chief Justice Burger, speaking finally for a majority

---

130. *Id.* § 30.07 at 232.
131. See text accompanying notes 117-130 *supra* (concerning scope of review in obscenity cases) and text accompanying notes 132-149 *infra* (concerning the complex and unclear constitutional test of obscenity).
of five attempted to quiet the confusion which the search for a definition of obscenity since Roth had engendered. Defendant had been convicted under a California statute making the knowing dissemination of obscene matter a misdemeanor. The Supreme Court upheld the conviction, listing several requisites to a constitutionally permissible judgment of obscenity: 1) the sexual conduct thought to be obscene must be specifically defined in the applicable statute; 2) the definition must be limited to certain guidelines;137 3) the appeal to prurient interest may be determined by the local community standard. To draw support for this third guideline, the court made these comments:

Under a national Constitution, fundamental First Amendment limitations on the power of the States do not vary from community to community, but this does not mean that there are, or should, or can be fixed national standards of what appeals to prurient interest or is patently offensive. . . . Our nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 states in a single formulation. . . .138 People in different states vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity.139

In a companion case,140 the court said that determinations of obscenity under federal statutes were to follow the same guidelines as those applicable to state statutes under Miller. "[D]uty to authoritatively construe federal statutes where a serious doubt of constitutionality is raised [is vested in the Supreme Court] . . . . If and when such a doubt is raised . . . we are prepared to construe . . . terms [like "obscenity" and "lewdness"] as limiting regulated material to patently offensive representations . . . of . . . 'hard core sexual conduct.' "141

In 1974, in Hamling v. United States,142 in reference to Post Office legislation, 18 U.S.C. § 1461, such a doubt was raised and such a construction adopted. Speaking for a majority of the Court, Mr. Justice Rehn-
quist said: "as indicated, we were prepared to construe the generic terms in 18 U.S.C. § 1462 to be limited to the sort of patently offensive representations or descriptions of that specific 'hard core' sexual conduct given as examples in Miller v. California. We now so construe the companion provision in 18 U.S.C. § 1461."\(^{143}\)

Hamling suggests that federal legislation may be permitted much more general language than state legislation. The absence in copyright legislation of specific descriptions of sexual conduct whose embodiment in a proffered work is to be proscribed apparently would not block discretionary denial of copyright registration on the ground of obscenity. Nevertheless, the appearance of the word "obscene," "lewd" or the like in copyright legislation would seem to be indispensable, though a liberal perspective on permissible sources of administrative authority coupled with a restrictive perspective on judicial review would perhaps permit action under a properly worded regulation.

Even if administrative authority to adjudicate obscenity is somehow demonstrated, a substantial hurdle to denial of copyright registration on the ground of obscenity exists in application of the definition of obscenity. In determining obscenity in accord with the constitutional requirements laid down in Miller, from which community should the Register draw his standard? From which community's perspective is the Register to view allegedly obscene material: the District of Columbia, the state in which the material was written, the state in which it was published or the states in which it will be disseminated? While Mr. Justice Brennan, in his dissenting opinion in Hamling said that the proper standard of decency for determining obscenity under federal legislation is a national one,\(^{144}\) the majority opinion expressly rejected any requirement of a national standard. Although a trial court's instructional reference to a national standard may be permissible, Mr. Justice Rehnquist said that, in making the required determination, "a juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes."\(^{145}\) Miller and Hamling suggest that the Register would not be obliged to use the eyes of a national viewing audience, but those cases do not make it clear that, as a "national" juror, he could not do so. Nor do they make clear which local community's eyes may be used should the Register choose not to apply a national standard.

\(^{143}\) Id. at 114.
Application of the obscenity definition involves further complications. The context in which the questionable material surfaces presumably is still to be considered in determining obscenity. Circumstances of production, sale and publicity are relevant to determining whether the publication and sale are constitutionally protected.\textsuperscript{146} "Evidence of pandering may be probative with respect to the nature of the material in question."\textsuperscript{147} Whether the material is foisted on unwilling viewers\textsuperscript{148} and whether the material is exposed to minors,\textsuperscript{149} are factors bearing on the determination. A constitutionally acceptable finding of obscenity may, then, entail a consideration of factors external to the material itself. A proper determination of obscenity may demand the Register to take evidence and hear arguments.

The nature of an obscenity determination, involving a careful and sensitive consideration of intricate evidentiary and legal questions, may demand some form of hearing in accordance with due process or the Administrative Procedure Act (APA).\textsuperscript{150} This conclusion has been reached in connection with Post Office action against allegedly obscene publications.\textsuperscript{151} \textit{Walker v. Popenoe}\textsuperscript{152} was the first Post Office obscenity case and is usually cited for the initiation of this view.\textsuperscript{153} In \textit{Door
v. Donaldson, after a Post Office hearing on the question of obscenity which did not conform to the APA, the court of appeals remanded for procedures which would so conform, indicating that obscenity cases are not within the exceptionable class of proceedings. The federal district court in Sunshine Book Co. v. Summerfield approved of the hearing procedure undertaken by the Postmaster General and agreed with his determination of obscenity. The Supreme Court's per curiam reversal on authority of Roth would appear to invalidate only the determination of obscenity and not the approval of the hearing procedure.

When adjudicative facts are in question and when the party involved has a sufficient interest or right at stake in the governmental determination, Professor Davis has urged that the party should be entitled to meet, cross-examine and rebut the evidence. This rule is supported by Wong Yong Sung v. McGrath in which the Supreme Court said that administrative hearings in deportation cases must conform to the requirements of the APA and by the per curiam reversal of Cates v. Haderlein wherein the lower court had said the Postmaster General need not provide the complainant with an APA fair hearing prior to issuance of a fraud order. In a recent decision, United States v. Alleghany-Ludlum Steel Corporation, the Supreme Court impliedly supported the general rule. In Alleghany, the Court stated that where the proceedings under review are an exercise of rule-making authority, rather than adjudicative authority, the hearing procedures of APA sections 556 and 557 are not applicable.

A troublesome exception to the general rule dictates that the interest at stake must be a right and not a privilege. "One has no right to a government gratuity," and therefore one without a right should not be entitled to a hearing. A corollary to this rule is that

154. 195 2d 764 (D.C. Cir. 1952).
155. 5 U.S.C. § 552(a)(3) (1970) excepts "proceedings in which decisions rest solely on inspection, tests, or elections" from the otherwise necessary hearing procedure.
158. See text accompanying notes 117-130 supra.
159. The determination of obscenity deals with adjudicative facts, "[r]oughly the kind of facts that go to a jury in a jury case." DAVIS'S TEXT, supra note 103, at 160.
160. Id.
162. 342 U.S. 804 (1951) (mem.).
164. Id. at 746.
165. See DAVIS'S TEXT, supra note 103, at 168.
166. Id. at 176.
where there is no right, judicial review is not allowed. Since full judicial review is arguably incident to the administrative determination of obscenity, a right of some kind would seem to be involved.

Case law suggests that reviewing courts deem a copyright to be in the nature of a privilege. Professor Davis has noted, however, that in recent cases, for hearing purposes, licenses and passports have taken on the mantle of rights. Even if registration of a claim to copyright is viewed as a privilege rather than a right, Professor Davis' comments concerning rights and privileges strongly suggest that the practically bankrupt distinction would not be invoked to deny a hearing when adjudicative, constitutionally-sensitive facts are at issue.

Practical Limitations

Arguably mandatory constitutional limitations would impose complex and burdensome limitations on the daily operations of the Copyright Office. "At the very least, a policy of refusing to grant certificates for works which meet the express statutory requirements set forth in the Copyright Act [but which are for other reasons objectionable] could impose a substantial burden upon the Copyright Office to examine with utmost care works for which certificates of registration are requested." The office employs only a few examiners to screen many daily applications. A decision to deny registration on the ground of obscenity would require close, unbiased scrutiny through as yet unidentified eyes and would slow the operation perhaps to a standstill. Increased bureaucratic "red tape" could be devastating. This prospect undoubtedly predicated the present wise policy not to deny registration on the ground of obscenity.

Policy Considerations

In addition to the lack of substantial convincing authority for the proposition that obscenity is outside the realm of copyrightable subject matter or that the Register is empowered to deny copyright on the ground of obscenity, several policy considerations suggest that the Register should not have the power he is currently believed to have.

167. See id.
169. Davis's Text, supra note 103, at 186.
171. In 1958, the Register informed the Attorney General that thirty-five examiners screened more than 1000 applications each day. See id. at 402.
The determination of obscenity can better be made in the courtroom. The Copyright Office has informally indicated that its current position on the obscenity issue is in part based on its own belief that the courtroom is the proper forum to fully and fairly determine obscenity.172 The line between obscenity and protected speech is finely drawn,173 the test of obscenity is complex in application, demanding evidence and argument, and the determination of obscenity must "scrupulously embody the most vigorous procedural safeguards."174 These considerations led one court carefully to scrutinize and overrule the Postmaster General's decision that a novel, *Lady Chatterly's Lover*, was obscene.175 One writer has argued176 that the public would be more appropriately protected against obscenity through proper use of censorship laws than through courtroom denial of infringement relief. In any event, the difficulties involved in making a constitutionally adequate determination of obscenity suggest that the courtroom rather than the Copyright Office is the appropriate forum for the determination. The flexible nature of obscenity (one which permits varying determinations from place-to-place and time-to-time) amplifies the difficulties involved in determining obscenity and surely reinforces the suggestion favoring the courtroom.

Denial of Registration could work to discourage the development of the Arts. At least one commentator has argued that denial of registration will increase the circulation of material to the public, by removing the right to sue for unauthorized publication and dissemination of copied material.177 This view, however, ignores the potentially discouraging effect a stated policy of denial on the ground of obscenity would have on authors, publishers and promoters of works inhabiting the hazy border between obscenity and protected speech. Where an administrative procedure contains a potentially deterring effect on the exercise of freedom of expression, the Supreme Court has held such procedure invalid, unless attended with adequate judicial superintend-
Admittedly, those cases dealt with deterrence of dissemination rather than deterrence of creation and are perhaps on that basis distinguishable. It would seem, nevertheless, that Copyright Office policies which discourage creation and publication fail to pursue the constitutional justification for the grant of power to Congress to enact Copyright legislation: to promote the progress of science and the useful arts.179

Denial of registration would make the Copyright Office a federal censor. The United States Attorney General has indicated that “for policy reasons, it may not be thought appropriate for the Register to undertake to be a conservator of public morals.”160 It would seem, today, ill-advised to multiply severalfold the amount of administrative “red tape” which must attend a policy of denying registration on the ground of obscenity. Furthermore, as another observer noted,

[it] is sound to restrict the exercise of [the authority to deny registration] to copyright claims which have not fulfilled the procedural requirements or do not appear to be valid under the express terms of the Statute. To grant the Register broader authority than this would be granting him . . . a power of censorship.181

The Supreme Court has said the power of censorship “is so abhorrent to our traditions that a purpose to grant it should not be easily inferred.”182

The power to censor—a power which retards the growth of man and society—is embedded in the history and policy of oppressive governments. Conversely, freedom of expression remains indispensable to the intellectual and moral development of a free society. One mark


179. The United States Supreme Court has restated frequently a traditional conviction that the Copyright clause of the Constitution empowers Congress and those on whom Congress bestows appropriate authority to benefit the public by encouraging individual creative efforts. "As employed [by Constitutional draftsmen], the term 'to promote' is synonymous with the words 'to encourage' or 'to induce' . . . . [T]o encourage people to devote themselves to intellectual and artistic creation, Congress may guarantee authors and inventors a reward in the form of [a limited monopoly]." Goldstein v. California, 412 U.S. 546 at 555 (1973). Similarly, the Court previously stated: "[t]he economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and the Useful Arts.'" Maser v. Stein, 347 U.S. 201 at 219 (1954).


of a healthy free society is sharp governmental appreciation for the limited appropriate time, place and manner in which restraints on freedom of expression are permissible. Such appreciation is genuine only when implemented by correlative limited and appropriate policies.

CONCLUSION

Writers have concluded that the Register has authority to deny registration of a claim to copyright on the ground of obscenity. A rigorous examination, however, indicates that he may not have the authority he is currently believed to have or that, if he does, the scope of his authority to deal with obscenity is unclear and in any event so limited that its exercise would be impractical and perhaps contrary to sound policy.

There is no express, direct support for the conclusion concerning the Register's authority. The arguments favoring the existence of such authority are drawn by implication from the Constitution, the Copyright Act, the Copyright Office Regulations and case law.

Case law proffered impliedly to support existence of the Register's authority is usually understood to hold obscene material outside the realm of copyrightable subject matter. That reading, however, may not be accurate. Cases do reveal that courts of equity deny injunctive relief to a claimant who brings to court allegedly infringed obscene material. In each of those cases, denial has been based on one or more of three theories. The "general moral principles" theory is rooted in the power of the equity court, as a court of public conscience, to deny relief to a claimant having "unclean hands." The "property" theory is based on nineteenth century English decisions divesting any claim to property in material whose very existence offends the law. A modified version of this theory merely posits that any property interest claimed in obscenity is an unprotectable interest. The "constitutional" theory supposes that the Federal Constitution, properly construed, limits copyright to works which tend to "promote the progress of science and the useful arts." Since obscenity has no such tendency, by the language of the Constitution copyright cannot inhere in obscene material.

Careful reading of the "general moral principles" theory and the modified version of the "property" theory suggests support only for a proposition concerning the power of a court of equity. Although the hard form "property" theory and the "constitutional" theory suggest that obscenity is not proper subject matter for copyright, the hard form "property" theory appears only in Stockdale and support for the "con-
stitutional" theory arguably can be confined to an implication in Bul- 
lard and dicta in Martinetti and Barnes. In contrast to a proposition 
concerning the power of an equity court to deny requested injunctive 
relief, which proposition is supported by all three theories, there ap-
ppears only tenuous support for a general proposition that obscenity is 
uncopyrightable.

Clearly obscenity is not protected by the first amendment and, 
where found, may be restricted. A court of equity, properly consider-
ing the facts in relation to the constitutional and statutory tests of ob-
scenity, may refuse to protect obscenity from copyright infringement. 
It is not clear, however, that obscenity is outside the realm of copyright-
able subject matter. Even if case law is read to declare that obscenity 
is outside that realm, cases denying infringement relief where obscenity 
is at bar cannot be read, except by further strained implication, to sup-
port a proposition that the Register of Copyrights has administrative 
authority to deny registration of a claim to copyright on the ground of 
obscenity.

From an administrative law standpoint, the source as well as the 
scope of the Register's authority in reference to obscenity is unclear. 
Neither the Constitution nor the Copyright Act expressly grants author-
ity to deny registration of a claim to copyright on the ground of obscen-
ity. Implications drawn from case law, the Regulations, the Copyright 
Act and the Constitution are at best ambiguous and arguably do not 
give the Register authority to deal with obscenity. Cases reveal that 
the Register does have some discretionary authority to deny registration 
of claims where tendered works fall outside the realm of copyrightable 
subject matter. There appears to be an important difference, however 
between obscenity and material in reference to which the Register's 
discretionary denial of registration has met court approval. Denial has 
been approved for material deficient in quantity or ineligible for classi-
ification within the statutorily enumerated categories of copyrightable 
works. Obscenity, however, suffers qualitatively, lacking either artistic 
excellence or popular approval.

Whether the determination of obscenity is one of fact, law or 
mixed fact and law, and whether the Register has discretionary func-
tions broad enough to include power to determine obscenity and deny 
registration of claims to copyright in obscenity are questions which re-
main undecided. The complex and sensitive nature of the constitu-
tional determination of obscenity as well as the practical administrative 
difficulties inherent in such a determination at the Copyright Office,
therefore, militate against the existence of discretionary authority to deny registration on the ground of obscenity, notwithstanding the presence of general rule-making power and some implicit discretionary functions in the Copyright Act. Authority, particularly authority of a federal officer to restrict freedom of expression, should not be inferred lightly and should be based on more than case law implications.

Arguments favoring the existence of the Register's authority to deal with obscenity, then, rely in part on the conclusion that obscenity is not proper subject matter for copyright and in part on an analogy to other discretionary powers vested in the Register. A rigorous examination of the parts relied on, however, reveals the weakness of each and amplifies the weakness in the conglomerate argument.

If the Register does not have the authority in question, it would seem that he is not free to establish and change Copyright Office policy concerning that authority. Conversely, if, as is currently believed, he does have authority to deny registration on the ground of obscenity, then he is free to establish and alter policy as he sees fit. Were the Register to reverse his current policy not to deny registration on the ground of obscenity, numerous limitations would attach to the exercise of his new authority.

The Miller case suggested that the determination of obscenity could be made only under a properly worded statute. The Copyright Act seemingly would require revision to include at least the word "obscene," "lewd" or the like, if not more specific language detailing proscribed expressions. A liberal perspective on permissible sources of administrative authority coupled with a restrictive perspective on judicial review, however, would perhaps enable determination of obscenity under a properly worded regulation.

The intricate and as yet ambiguous constitutional test of obscenity apparently would apply to the Register's determination, requiring careful, unbiased evaluation of the material itself. Since the determination of obscenity involves adjudicative constitutionally-sensitive facts, the Register most likely would have to take evidence and hear arguments in a detailed trial-type hearing. It is not clear whether a national notion of obscenity or a local notion would control the Register's decision. If a national notion were not employed, it is similarly unclear which locality would provide the notion of obscenity: that in which the work was authored, that in which it was published or that of those in which it was disseminated. In any event, relevant circumstances concerning sale and display also would need to be considered.
Judicial review would follow his determination, dictated either by his stature as an administrative agent or because the determination involves sensitive first amendment concerns. The standard of judicial review and the weight to be given the Register's decision is undetermined. Arguably, mandatory and complete review would be necessary, rather than review and reversal only where there appears a clearly erroneous administrative decision.

Ambiguity and complexity inherent in the constitutional limitations suggest that a change in policy would be unwise and impractical. An already overburdened agency could not readily provide the careful screening necessary to accurately identify obscenity, nor could it provide the mechanism for a full and fair hearing without significantly reducing office efficiency.

Finally, several policy considerations warrant articulation. The nature of the determination of obscenity and the nature of the Copyright Office operation together recommend the courtroom as the only appropriate forum for decisions concerning disposition of obscene material. A stated Copyright Office policy of denial on the ground of obscenity might discourage creative efforts and retard the development of the arts. In view of long-standing American tradition against restrictions on freedom of expression and current sentiment against substantial increases of administrative "red tape," Copyright Office posture as federal censor would be ill-advised. Coupled with administrative and constitutional limitations necessarily incident to authority which could discourage and restrain freedom of expression, these policy considerations forcefully suggest that the Register should not have, if indeed he does have, authority to deny registration on the ground of obscenity.