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THE PROBLEM WITH CONGRESS AND COPYRIGHT LAW: FORGETTING THE PAST AND IGNORING THE PUBLIC INTEREST

Craig W. Dallon*

I. INTRODUCTION

The bedrock of copyright law in the United States is found in the United States Constitution, Article I, section 8, which states in relevant part that “[t]he Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”¹ Although the term “copyright” is never used, this provision of the Constitution² is commonly known as the Copyright Clause.³ Since the ratification of the Constitution, the Copy-

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1. U.S. CONST. art. I, § 8, cl.8.

2. *Id.*

3. The Copyright Clause is also referred to as the Intellectual Property Clause because it is applicable to both copyrights and patents. *See, e.g.*, *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111, 1137 (N.D. Cal. 2002) (referring to Intellectual Property Clause); *Infodeck, Inc. v. Meredith-Webb Printing Co.*, 830 F. Supp. 614, 622 n.8 (N.D. Ga. 1993) (referring to Intellectual Property Clause); Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119, 1120 & n.2 (2000) (adopting the term “Intellectual Property Clause”). Cases and other sources involving patents often refer to the same clause as the Patent Clause. *See, e.g.*, *Traffix Devices, Inc. v. Marketing Displays, Inc.*, 532 U.S. 23, 35, (2001) (not reaching the Patent Clause issue); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 635-37 & n.4 (1999) (discussing and quoting the Patent Clause). The clause is also referred to as the “Patent and Copyright Clause.” *See* Karl Fenning, *The Origin of the Patent and Copyright Clause of the Constitution*, 17 GEO. L.J. 109, 111 (1928) (referring to the clause as the “Patent and Copyright Clause”); Tyler T. Ochoa, *Patent and Copyright Term Extension and the Constitution: A Historical Perspective*, 49 J. COPYRIGHT SOC’Y 19, 21 (2001) (referring

right Clause has been the basis of Congress's power to enact copyright laws protecting the rights of authors⁴ in their works. Congress has exercised this power in a series of major copyright laws beginning with the Copyright Act of 1790, followed by the respective Acts of 1831, 1870, 1909, and 1976.⁵ The current copyright law is the Copyright Act of 1976 ("the 1976 Act").⁶ In 1998, Congress amended the 1976 Act when it passed the Sonny Bono Copyright Term Extension Act ("CTEA"), which extended the terms of existing and future copyrights by twenty years.⁷ The CTEA has provoked significant litigation, culminating in Supreme Court review⁸ and extensive scholarly discussion concerning the purpose of copyright law and the power of Congress under the Copyright Clause.⁹

Through the centuries, copyright law has developed and adapted to changing conditions. In particular, new technology has driven changes and advancement in copyright law. The invention of the printing press in the fifteenth century

to the clause as the "Patent and Copyright Clause").

4. "Authors" as used here and in many other places in this Article, carries the broad meaning applied by the current Copyright Act. The Copyright Act defines "works of authorship" to include, among other things, literary works, musical works, pictorial works, and motion pictures. Copyright Act of 1976, 17 U.S.C. § 102 (2000).

5. See Copyright Act of May 31, 1790, ch. 15, 1 Stat. 124 (1848); Copyright Act of Feb. 3, 1831, ch. 16, 4 Stat. 436 (1831); Copyright Act of Jul. 8, 1870, ch. 230, 16 Stat. 198 (1871); Copyright Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075 (1909); Copyright Act of 1976, 17 U.S.C. §§ 101-1332 (2000). Through the years there have been many other amendments to these major copyright laws.

6. Copyright Act of 1976, 17 U.S.C. §§ 101-1332 (2000). The 1976 Copyright Act now includes numerous amendments since its original enactment in 1976.

7. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (amending scattered sections of 17 U.S.C.).

8. See *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

9. See, e.g., Michael H. Davis, *Extending Copyright and the Constitution: "Have I Stayed Too Long?"* 52 FLA. L. REV. 989 (2000) (arguing that CTEA's retroactive extension violates the Copyright Clause); Orrin G. Hatch & Thomas R. Lee, *"To Promote the Progress of Science:" The Copyright Clause and Congress's Power to Extend Copyrights*, 16 HARV. J.L. & TECH. 1 (2002) (arguing that CTEA is constitutional); Heald & Sherry, *supra* note 3, at 1168-76 (arguing that CTEA is inconsistent with the principles underlying the Intellectual Property Clause); Ochoa, *supra* note 3, at 19 (arguing that CTEA's indiscriminate retroactive extension of existing copyrights is unconstitutional); Edward C. Walterscheid, *To Promote the Progress of Science and Useful Arts: The Anatomy of a Congressional Power*, 43 IDEA 1 (2002) (discussing the meaning of the Copyright Clause and the limitation it imposes on congressional power).

literally put in motion the machinery that precipitated copyright protection.¹⁰ Later, invention of the photograph, piano roll, motion picture, voice recording, radio, television, copy machine, video tape, computer, and the Internet each raised new issues which forced reconsideration and adaptation of copyright principles. Peer-to-peer file sharing, CDs, DVDs, Internet streaming, and distance learning continue to challenge copyright principles.

Notwithstanding these advances in today's rapidly changing technological environment, the original purposes of the Copyright Clause remain relevant today; the Framers' original intentions define the reach of the clause, and the original purposes continue to make good sense.

As Congress and the judiciary tackle new issues in copyright law, they should reflect upon the scope of Congress's authority as embodied in the Copyright Clause, bearing in mind the values and purposes which led to inclusion of the clause in the Constitution. When it passed the CTEA in 1998, Congress either misunderstood or deliberately brushed aside the primary rationale for copyright protection—the promotion of the public good. Instead, Congress embraced a natural law-based, property right rationale.¹¹

The utilitarian, or public benefit, rationale of copyright law (the “public benefit rationale”) suggests that copyright protection exists to encourage the creation of works and public access to those works.¹² According to this rationale, copyright law provides an incentive, in the form of a limited monopoly, for authors to create works.¹³ This limited monopoly allows authors an opportunity to obtain adequate remuneration for their works. The incentive is balanced against the public's need for access to the work. Ultimately, after the limited monopoly has provided an adequate incentive, the mo-

10. See 1 HERBERT BROOM & EDWARD A. HADLEY, COMMENTARIES ON THE LAWS OF ENGLAND 794 (1875) (noting that before the era of printing the necessity for copyright protection “was less, if at all, felt”).

11. See *infra* Part V.C. (discussing the rationale for enacting CTEA).

12. For an explanation of this utilitarian view of copyright, see Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517, 517-18 (1990). See also Jane C. Ginsburg et al., *The Constitutional-ity of Copyright Term Extension: How Long Is Too Long?*, 18 CARDOZO ARTS & ENT. L.J. 651, 675-76, 696 (2000) (referring to and discussing the “instrumentalist” or “incentive” rationale).

13. See Yen, *supra* note 12, at 517-18 (discussing the economic incentive theory of copyright).

nopoly ends; the work enters the “public domain” and is freely available for public use. Thus, copyright is a grant or privilege created by statute, which can then be altered and limited by statute.¹⁴

The competing theory of copyright law is a natural law-based property theory (“property right rationale”).¹⁵ Under this view, by virtue of being the creator of a work, the author has an inherent ownership right in the work. This view is often cloaked in a fairness argument. Because the author created the work, it is only fair to afford the author control over the work. Copyright is a recognition of this ownership or property right without regard to incentives or public benefits. To be sure, this natural law property right rationale has a long pedigree and has influenced many lawmakers and jurists.¹⁶ Nonetheless, the property right rationale traditionally has been subordinate to the public benefit purpose manifest in the express words of the Copyright Clause itself.¹⁷

In an effort to elucidate the rationale underlying the Copyright Clause, Part II of this article looks back at the historical roots of copyright prior to the Statute of Anne in 1710. The article acknowledges glimmers of copyright law emanating from the Roman Empire, recognizes the impact of the invention of the printing press on the development of copyright law, and reviews the role of the Stationers’ Company and the stationers’ copyright. Part III discusses the Statute of Anne and the failed struggle for recognition of a perpetual common law copyright that followed, while Part IV considers copyright as it was conceived and developed in the United States. Part V discusses the passage of the CTEA, and demonstrates that Congress was influenced by the property right rationale at the expense of the public interest.

14. See Dennis Harney, Note, *Mickey Mousing the Copyright Clause of the U.S. Constitution: Eldred v. Reno*, 27 U. DAYTON L. REV. 291, 308 (2002) (discussing generally the utilitarian theory and the limited grant of copyright).

15. For an explanation of this natural law view of copyright, see Yen, *supra* note 12, at 522-24.

16. See *infra* notes 242-64, 347-48 and accompanying text (discussing early support for property right rationale).

17. See *generally infra* notes 367-452 and accompanying text (discussing recognition of public benefit rationale).

II. LOOKING BACK TO THE HISTORICAL ROOTS OF COPYRIGHT LAW

A. *Hints of Copyright Before the Printing Press*

1. *Roman Law Antecedents*

Although the roots of American copyright law can be traced back to England and the Statute of Anne enacted in 1710, the history of copyright law began much earlier. Roman law neither recognized nor protected copyright interests,¹⁸ but did recognize the foundational building blocks of modern copyright law.¹⁹

One such building block found in Roman law is manifested in the understanding of ownership rights. According to Roman law, ownership of property could be obtained through accession (*accessio*),²⁰ where two things with independent existence were combined into one.²¹ By accession, the “accessory thing” would merge into the “principal thing,” and the owner of the principal would be the owner of the single merged “principal thing.”²²

An illustration of accession provided by Roman jurists involved writing on someone else’s parchment or paper or

18. See Russ VerSteeg, *The Roman Law Roots of Copyright*, 59 MD. L. REV. 522, 523 (2000) (“[I]t is virtually certain that the ancient Romans did not have a general law of copyright”); see also JOHN CROOK, *LAW AND LIFE OF ROME* 207 (1967) (“There was no law of patent or copyright, no protection for property in ideas.”); Brandt Matthews, *The Evolution of Copyright*, 5 POL. SCI. Q. 583, 586 (1890) (“In Rome . . . we find no trace of copyright or of anything like it.”).

19. See VerSteeg, *supra* note 18, at 530-53 (discussing Roman law recognition of principles underlying copyright law such as intangible personal property, property dedicated to public use, types of works of authorship, transfers of intangibles, and joint authorship).

20. See 2 CHARLES PHINEAS SHERMAN, *ROMAN LAW IN THE MODERN WORLD* 202 (1917) (listing six modes of acquiring ownership of single things).

21. See *id.* at 207 (stating that “accession occurs when a thing previously having an independent existence becomes an actual part of another thing”).

22. See W.W. BUCKLAND, *A TEXT-BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN* 210 (1921) (discussing accession). The test for which thing was the “principal thing” was based on the relative importance of the objects, but sometimes was also based on value. See SHERMAN, *supra* note 20, at 209 (stating that “generally the less important is to be considered the accessory thing, and the more important the principal thing”); MAX RADIN, *HANDBOOK OF ROMAN LAW* § 130, at 349 (1927) (stating that the test was based on importance, but sometimes was based merely on value); BUCKLAND, *supra*, at 210 (preferring an identity test over relative value test).

painting on someone else's canvas or wood.²³ *The Institutes of Justinian* discusses the following examples:

Writing, again, even though it be in gold lettering, accedes to the paper or vellum in the same way that buildings accede to the land or the seeds planted therein. Thus, if Titius write a song or narrative on your paper or vellum, not Titius but you will be regarded as the owner thereof. . . . If one person paint on another's board, there are some who think that the board accedes to the picture while others hold that the picture, whatever it be, accedes to the board. To us, however, it appears preferable that the board accede to the painting: for it is absurd that a painting by Apelles²⁴ or Parrhasius²⁵ should, by accession, become part of a cheap board.²⁶

These explanations do not address the existence or ownership of an author's copyright but instead appear to be limited to the necessary issue of ultimate ownership of the object in which a work is fixed. The discussion is significant, however, because it demonstrates the Roman law understanding that authors and artists have, at least initially, property right in their works separate from the objects in which those works are fixed.²⁷ It further demonstrates that those rights, in the case of an artist, may be so significant that they are superior to the rights of the owner of the canvas or wood on which the painting is fixed.²⁸ This distinction between an author's

23. Professor Sherman identified this form of accession as "adjunction." SHERMAN, *supra* note 20, at 209-10.

24. Apelles was a celebrated Greek painter who lived around 330 B.C. THE COLUMBIA ENCYCLOPEDIA 128 (2000). None of his works survived. *Id.*

25. Parrhasius was also a famous Greek painter who lived around 400 B.C. *Id.* at 2154. None of his works survived. *Id.*

26. J. INST. 2.1.33-34 (JAC Thomas trans., 1975) (footnotes added).

27. See VerSteeg, *supra* note 18, at 537 (stating that the Romans appreciated "the concept that there is a significant distinction between an underlying artistic work and the physical object in which that work is embodied"). Admittedly, there is ambiguity in the discussion as viewed in our modern context. It appears that the Roman scholars were focused in part on the ownership of the physical materials actually placed on the paper rather than the intangible value to the words themselves as suggested by the remark "though it be in gold lettering." J. INST., *supra* note 26, at 2.1.33. But it is equally apparent that the scholars had in mind more than merely the physical materials added, as evidenced by the reference to the value of paintings by famous Greek painters. See *id.* at 2.1.34 (stating "for it is absurd that a painting by Apelles or Parrhasius should, by accession, become part of a cheap board").

28. Justinian's Institute appears to apply a value test to paintings. See RADIN, *supra* note 22, at 351 (stating that in case of paintings on wood, value

rights in a work of authorship and an owner's rights in the object in which the work is fixed is a fundamental principle of copyright law.²⁹

The Romans recognized the value of an author's manuscript, and, in at least some cases, booksellers paid authors for their works.³⁰ Wealthy people and booksellers had trained slaves or hired copyists who transcribed manuscripts to create copies for sale.³¹ In his *Commentaries on the Law of England*, William Blackstone confirms that "the sale of literary copies, for the purposes of recital or multiplication, is cer-

was the test). The value of the artist's work may exceed the value of the wood on which it was placed so that the wood should belong to the artist. See BUCKLAND, *supra* note 22, at 211. Roman law considered the good faith of the parties and provided compensation for the party whose property was acceded. See J. INST., *supra* note 26, at 2.1.33-34 (considering good faith of writer and painter, acknowledging right to compensation); 2 SHERMAN, *supra* note 20, at 209 ("But the person ignorantly uniting another's property to his own must compensate the owner of the property so adjoined; but if he did this with evil intent, he is liable for theft.").

29. See Copyright Act of 1976, 17 U.S.C. § 202 (2000) (distinguishing ownership of copyright from ownership of material object); *Stephens v. Cady*, 55 U.S. 528, 530 (1852) (holding that copyright exists separately from the object in which it is fixed); *Pushman v. N.Y. Graphic Soc'y*, 39 N.E.2d 249, 250-51 (N.Y. 1942) (reaffirming "that the ownership of the painting itself does not necessarily carry with it the common law copyright;" copyright was "a different and independent right from the usual right of ownership of an article of personal property").

30. According to George Putnam, "under the Roman Empire authors were in the habit of transferring to booksellers, for such consideration as they could obtain, the right to duplicate and to sell their works, and that, under the trade usages, they were protected in so doing." George Haven Putnam, *Literary Property: An Historical Sketch*, in CYCLOPEDIA OF POLITICAL SCIENCE (Mason & Lalor eds., 1884), reprinted in THE QUESTION OF COPYRIGHT 35, 40 (3d ed. 1904); accord RICHARD ROGERS BOWKER, COPYRIGHT: ITS HISTORY AND ITS LAWS 8 (1921) (speaking of Roman times, concluding "it is probable that some kind of payment was made to authors"); HARRY Y. GAMBLE, BOOKS AND READERS IN THE EARLY CHURCH: A HISTORY OF EARLY CHRISTIAN TEXTS 87 (1995) (discussing Roman times, stating that in cases where the author was paid, payment was probably a flat fee); cf. PHILIP WITTENBERG, THE PROTECTION OF LITERARY PROPERTY 5 (rev. ed. 1978) ("There were books in a steady stream and the booksellers and publishers copied whatever they wished without so much as a by-your-leave to the author; there were some cases where out of moral consideration, or perhaps because the author withheld his manuscript, the publisher paid a price.").

31. See GAMBLE, *supra* note 30, at 85 (discussing use of trained slaves and professional scribes). WITTENBERG, *supra* note 30, at 4 (discussing a mass publishing business with a large number of trained slaves who took dictation from a reader and could produce a thousand copies of a small volume in a day); Putnam, *supra* note 30, at 39.

tainly as antient [sic] as the times of Terence,³² Martial,³³ and Statius.^{34,35} Still, there was no copyright as such and no protection against piracy.³⁶ At best, an author received some compensation for the original manuscript, but once the manuscript was sold or given away, it could be freely copied without any limits placed by the author and without any compensation to the author.³⁷

2. Jewish Law Tradition: Copying Texts and Right of Attribution

Like Roman law, Jewish law also had some basic principles that foreshadowed the later development of copyright law. Jewish law endorsed and even commanded the faithful reproduction of scriptural and other texts.³⁸ This principle is significant for two reasons. First, it permitted and encouraged the copying of texts,³⁹ which required recognition of what

32. Terence was a Roman writer of comedies who lived from about 195 B.C. to 159 B.C. See THE COLUMBIA ENCYCLOPEDIA, *supra* note 24, at 2814; see also Putnam, *supra* note 30, at 39 (documenting sales of two of Terence's works).

33. Martial was a Roman epigrammatic poet who lived from about 40 A.D. to 104 A.D. See THE COLUMBIA ENCYCLOPEDIA, *supra* note 24, at 1766; see also Putnam, *supra* note 30, at 39 (discussing Martial's relationship with his publishers and complaining about the high prices the bookseller charged for his work *Xenii*).

34. Statius was an esteemed Latin poet who lived from about 45 A.D. to 96 A.D. See THE COLUMBIA ENCYCLOPEDIA, *supra* note 24, at 2707; see also Putnam, *supra* note 30, at 40 (noting report "that Statius would have starved if he had not succeeded in selling to the actor Paris his tragedy of *Agave*").

35. See 2 WILLIAM BLACKSTONE, COMMENTARIES 406 (2d ed. 1767) (footnotes added).

36. See WITTENBERG, *supra* note 30, at 5 (noting no protection against piracy and "no notion of copyright").

37. See GAMBLE, *supra* note 30, at 83 ("No author in antiquity had a significant financial interest in the sale of what he or she wrote, for there was no arrangement whereby profits accrued to an author through the enterprise of publishers and booksellers."); *id.* at 84-85 (discussing how copies were in turn copied, beyond the control of the author).

38. See David Nimmer, *Adams and Bits: Of Jewish Kings and Copyrights*, 71 S. CAL. L. REV. 219, 231 (1998) (discussing Torah and citing Deut. 17:18-20); Samuel J. Petuchowski, *Toward a Conceptual Basis for the Protection of Literary Product in a Post-Printing Era: Precedents in Jewish Law*, 3 U. BALT. INTELL. PROP. L.J. 47, 48-49 (1994) (noting that following the first century and the dispersal of much of the Palestinian Jewish community, "[t]he study of written texts thus became one of the foundations of cultural survival," and "the Rabbis actually encouraged the primary infringing activity of today's copyright regimes, namely, copying").

39. See Petuchowski, *supra* note 38, at 48-49 (stating that Rabbis encouraged copying).

now might be called the “public domain.”⁴⁰ This copying was necessary to facilitate broad dissemination of Jewish law and tradition for the benefit of the people.⁴¹ Second, Jewish law required accuracy for the reproduction of texts.⁴² Jewish law enjoys a strong tradition of protecting the moral rights of authors including the right to protect the integrity of an author’s work.⁴³ These moral rights included the right of attribution. At least as early as 70 A.D., Jewish law required that credit be given when using words or ideas of others.⁴⁴

3. *The Legend of St. Columba in the Sixth Century*

After the decline and fall of the Roman Empire in the fifth century,⁴⁵ bookmaking and the preservation of literature fell largely upon various monasteries throughout Europe.⁴⁶ From this period comes the earliest account of what might be considered a copyright dispute, a dispute in Ireland between

40. According to one source, at least prior to the invention of the printing press in the fifteenth century, “Jewish law did not recognize property rights in literary works. All works belonged in the public domain.” Matthew I. Kozinets, *Copyright and Jewish Law: The Dilemma of Change*, 1 U.C. DAVIS J. INT’L L. & POL’Y 83, 84 (1995).

41. See Petuchowski, *supra* note 38 at 49 (stating that “copying was the essence of the transmittal of knowledge”).

42. See Nimmer, *supra* note 38, at 231-32 (noting reverence for the scriptures has resulted in preservation of the exact text through the ages).

43. See *id.* at 231 (noting the moral right of the author to protect the integrity of her work).

44. See J. David Bleich, *Current Responsa, Decisions of Bate Din and Rabbinical Literature*, 5 JEWISH L. ANN. 65, 71-72 (1985) (discussing the need to give credit for the insights of scholars); Victor Hazan, *The Origins of Copyright Law in Ancient Jewish Law*, 18 BULL. COPYRIGHT SOC’Y 23, 25 (1971) (stating the rule as “reporting a thing in the name of him who said it’ and not saying things told by somebody else as if those same things were said by yourself”). Failure to give proper credit was viewed as “stealing of words.” Hazan, *supra*, at 25.

45. See HANS JULIUS WOLFF, *ROMAN LAW: AN HISTORICAL INTRODUCTION* 21 (1978) (noting permanent division of the empire in 395 A.D., and the fall of the Western Empire and Rome in 476 A.D.).

46. GEORGE HAVEN PUTNAM, *BOOKS AND THEIR MAKERS DURING THE MIDDLE AGES* 11 (1962) (1896-97) (noting that monasteries preserved classic literature that escaped the devastation of Italy). According to Putnam, “For a period of more than six centuries, the safety of the literary heritage of Europe . . . depended upon the scribes of a few dozen scattered monasteries.” *Id.*; see also EDWARD SAMUELS, *THE ILLUSTRATED STORY OF COPYRIGHT* 11 (2000) (“From about A.D. 500 to 1500, the primary keeper and reproducer of books was the church, using the labor of thousands of monks . . .”); N.F. BLAKE, *CAXTON: ENGLAND’S FIRST PUBLISHER* 156 (1975) (“In the early Middle Ages the provision of manuscripts was to all intents and purposes a monastic monopoly.”).

Saint Columba⁴⁷ and Saint Finnian⁴⁸ circa 560 A.D.⁴⁹ Details of the dispute vary and have been embellished,⁵⁰ but the basic story is this: the Irish monk Columba visited his former teacher Finnian at a monastery. While at the monastery, Columba secretly and without permission copied a psalter⁵¹ owned by Finnian.⁵² Finnian discovered Columba's deed and demanded the copy. Columba refused and claimed that he

47. St. Columba, also known as Columcille, lived from 521 to 597 A.D. THE COLUMBIA ENCYCLOPEDIA, *supra* note 24, at 604; *see also* PADRAIC COLUM, THE LEGEND OF SAINT COLUMBA 4 (1935) (stating that Saint Columba's name was "Crimhaun," but he was called "Colum-cille," which means "Columba" in Latin). He is one of three patron saints of the Irish. *See* THE COLUMBIA ENCYCLOPEDIA, *supra* note 24, at 604.

48. Saint Finnian was known as Finnian of Moville. *See* LUCY MENZIES, SAINT COLUMBA OF IONA: A STUDY OF HIS LIFE, HIS TIMES, & HIS INFLUENCE 22 (fac. reprint 1992) (1920). He lived from 495-589 A.D. and founded the monastery of Druim Fionn. THE CATHOLIC ENCYCLOPEDIA, THE CATHOLIC ENCYCLOPEDIA DICTIONARY 367 (1941). He was also known as Finnbar. *See* 3 THE COUNT DE MONTALEMBERT, THE MONKS OF THE WEST: FROM ST. BENEDICT TO ST. BERNARD 108 & n.1 (1867).

49. One of the earliest accounts of this story is from MANUS O'DONNELL, LIFE OF ST. COLUMBA (1532), relevant parts *reprinted in* H.J. LAWLOR, *The Cathach of St. Columba*, in 33 PROCEEDINGS OF THE ROYAL IRISH ACADEMY 292-98 § C (1916).

50. At this distance it is difficult to state with certainty how much of the story is factual.

51. The psalter was a version of certain psalms with interpretive headings. *See* Jeremy Phillips, *St. Columba the Copyright Infringer*, 7 EUR. INTEL. PROP. REV. 350, 352 (1985) (stating the copy of the psalter, as it exists today, covers psalms 31 to 106 and appears to be a copy of a translation by St. Jerome); LAWLOR, *supra* note 49, at 245-92 § C (describing Cathach in detail).

52. One of the more interesting versions of the story purports that Columba made the copy secretly, at night, and that the light necessary for the job radiated from Columba's left hand while he wrote with his right hand. *See* COUNT DE MONTALEMBERT, *supra* note 48, at 119. Others have it that it was his right hand which blazed with light. *See* MENZIES, *supra* note 48, at 23 (claiming fingers on his right hand shone like candles); MANUS O'DONNELL, THE LIFE OF COLUM CILLE 97 (Brian Lacey ed., 1998) (original in Gaelic written in 1532) (stating that five fingers on Columba's right hand blazed like bright lamps). The story also claims that "[a] curious wanderer, passing the church, was attracted by the singular light, and looked in through the keyhole, and while his face was pressed against the door his eye was suddenly torn out by a crane which was roosting in the church." PUTNAM, *supra* note 46, at 46; *accord* MENZIES, *supra* note 48, at 24. In other accounts the "curious wanderer" is a youth sent by Finnian. *See* O'DONNELL, *supra*, at 97. In a happy ending for the boy, Finnian is said to have blessed and healed the eye. *See* O'DONNELL, *supra*, at 97. Another account claims that Columba used a candle brought to him by his pet crane. This account further reports that the crane attacked Finnian on the knee, and struck another person with its beak below the eye opening a gash. *See* COLUM, *supra* note 47, at 70-72.

owned the copy.⁵³ Allegedly, the case was brought before the King of Ireland, King Dermott,⁵⁴ who found for Finnian. King Dermott pronounced the now famous judgment, "To every cow her calf, and consequently to every book its copy."⁵⁵ Partly in response to this dispute, Columba precipitated a civil war which ultimately resulted in defeat of the King.⁵⁶ The alleged copy of the psalter became famous and is known as "Cathach" meaning "fighter" or "battler."⁵⁷ The Cathach is among the earliest surviving Irish manuscripts and is in the custody of the Royal Irish Academy in Dublin.⁵⁸ Assuming the story of Saint Columba and the psalter has a factual basis,⁵⁹ it

53. One account of the story, in what sounds something like a fair use argument, reports Columba's position as follows:

"But I hold," said Colum Cille, "that Finnian's book has not decreased in value because of the transcript I made from it; also that it is not right to extinguish the divine things it contained, or to prevent me or anybody else from copying it, or reading it, or circulating it throughout the provinces. I further maintain that if I benefited by its transcription, which I desired to be for the general good, provided no injury accrued to Finnian or his book thereby, it was quite permissible for me to copy it!"

MENZIES, *supra* note 48, at 25; *accord* O'DONNELL, *supra* note 52, at 99 (describing the story in similar language).

54. There are a number of variations and spellings of this name including Diarmid, *see* COUNT DE MONTALEMBERT, *supra* note 48, at 119 (referring to King Diarmid or Dermott), and Diarmait, *see* ADOMNAN OF IONA, LIFE OF ST COLUMBA 296 n.157 (Richard Sharpe trans., 1995) (stating the complete name, Diarmait Mac Cerbaill and discussing the history and existence of the alleged king).

55. *See* COUNT DE MONTALEMBERT, *supra* note 48, at 121-22; *accord* MENZIES, *supra* note 48, at 25 ("To every cow her calf, to every book its transcript.").

56. COUNT DE MONTALEMBERT, *supra* note 48, at 122-26 (discussing the civil war and Columba's part in it).

57. *See* COUNT DE MONTALEMBERT, *supra* note 48, at 126-27, 127 n.1 (discussing Cathach); *see also* ADOMNAN OF IONA, *supra* note 54, at 284-85 n.125 (noting that Cathach *may* be a genuine copy made by Columba and citing support). Some question exists as to whether the Cathach was actually Columba's work. *See* CHRISTOPHER DE HAMEL, A HISTORY OF ILLUMINATED MANUSCRIPTS 19-20 (1986) (stating that Cathach "used to be" associated with the legend of Columba and Finnian, and dating the manuscript back to the seventh century).

58. *See* PETER HARBISON, PILGRIMAGE IN IRELAND 158 (1992) (discussing the Cathach); DE HAMEL, *supra* note 57, at 19-20 (discussing the Cathach and providing an illustration of an excerpt from the manuscript); PETER HARBISON ET AL., IRISH ART AND ARCHITECTURE: FROM PREHISTORY TO THE PRESENT 42-43 (1978) (discussing Cathach and providing illustrations of excerpts); Phillips, *supra* note 51, at 352 (discussing the fact that the Cathach consists of 58 leaves covering Psalms 31 to 106); LAWLOR, *supra* note 49, at 243-45 (discussing the discovery and history of Cathach).

59. *See* Phillips, *supra* note 51, at 352 (concluding that there is some evi-

supports the idea that there were limits on the right to reproduce a manuscript. Even if King Dermott's ruling was an isolated decision and not driven by any generally accepted legal principles, it demonstrates that people recognized the issue posed by copying a book without permission. Even if the story is completely fictional, the dated history and content of the story itself demonstrate that long before modern copyright protection, at least some people understood that possession of a book did not necessarily entitle the possessor to freely copy it.⁶⁰

In particular, two aspects of the dispute are worth considering. First, according to most versions of the story, Columba was given access to the manuscript (not for copying, but for reading);⁶¹ thus, there was no issue of theft of the manuscript itself. Additionally, there was no record of any physical damage to the manuscript. This brings the copyright issue into focus—did one in rightful possession⁶² of a manuscript have the right to copy it without permission of the manuscript's owner? King Dermott answered no; the copy was an extension of the original.

Second, there was no question concerning authors' rights. Finnian was the owner of the psalter but was not its author.⁶³ In fact, given the practice of the times and the nature of the psalter as primarily based on scriptural works, Finnian's psalter itself was almost certainly a copy of another manuscript. The failure to acknowledge or consider authors' rights is consistent with early development of copyright law generally. Rights of authors, at best, took a backseat. Rights of owners of manuscripts, publishers, or booksellers were the only concern. The story of Columba is significant not only because it hints at copyright protection, but also because it and the broader accounts of Columba's life confirms the develop-

dence that at least part of the story is true).

60. Manus O'Donnell wrote about the story in his work, *THE LIFE OF COLUM CILLE*, which was completed in 1532, and was based upon folk traditions and various written works. See O'DONNELL, *supra* note 52, at 97-98 (reporting the story in 1532); *id.* at 7 (discussing the history of O'Donnell's work).

61. See MENZIES, *supra* note 48, at 23 (stating that Finnian gave Columba access to the manuscript).

62. Columba's access may not have risen to the level of possession, but at a minimum it was rightful access to the manuscript.

63. See MENZIES, *supra* note 48, at 23 (stating that Finnian had recently returned from Rome and Europe bringing with him precious books).

ment of literature and bookmaking in monasteries during these early centuries.⁶⁴

B. Invention of the Printing Press in the Fifteenth Century

Technology has long driven development of copyright law. As those who have experienced the major technological advances of the twentieth century can appreciate, advances that make the copying and distribution of works easier have important copyright implications. In ancient times, writings were made on clay tablets,⁶⁵ stone,⁶⁶ metal plates,⁶⁷ wood,⁶⁸ papyrus,⁶⁹ animal skins,⁷⁰ and parchment.⁷¹ Suitable materials were often expensive and scarce,⁷² and writing on these mate-

64. ADOMNAN OF IONA, *supra* note 54, at 284 n.125 (noting the importance of copying of texts at Columba's monastery and noting that copying was almost a daily occupation for Columba). According to the Count de Montalembert, "Columbia had a passion for fine manuscripts He went everywhere in search of volumes, which he could borrow or copy, often experiencing refusals which he resented bitterly." COUNT OF MONTALEMBERT, *supra* note 48, at 117-18.

65. See ALAN MILLARD, *READING AND WRITING IN THE TIME OF JESUS 22-23* (2001) (stating that the earliest known documents are clay tablets).

66. See *id.* at 23 (noting limited use of stone); see also, e.g., The Master of Balliol, Introduction, in *THE LEGACY OF ISRAEL* xiii (Edwyn Bevan & Charles Singer eds., 1927) (discussing of inscription on Moabite stone dating back to 850 B.C.). *Id.* at 1 (showing an illustration of the Moabite stone).

67. See PAUL R. CHEESMAN, *ANCIENT WRITING ON METAL PLATES 47-77* (1985) (discussing writings on lead, bronze, copper, and gold plates dating back hundreds of years B.C.); see also, e.g., Edwyn Bevan, Hellenistic Judaism, in *THE LEGACY OF ISRAEL*, *supra* note 66, at 68 (noting Jewish writings and illustrations on gold plates from early Christian centuries).

68. See THOMAS FRANCIS CARTER, *THE INVENTION OF PRINTING IN CHINA AND ITS SPREAD WESTWARD 3-4* (2d ed. 1955) (noting that the Chinese used bamboo and wood); GAMBLE, *supra* note 30, at 50 (noting that Greeks and Romans used wood tablets).

69. See GAMBLE, *supra* note 30, at 44 (discussing the use of papyrus in Greco-Roman antiquity). Papyrus was a type of paper made from papyrus plant grown in southern Europe and northern Africa. WEBSTER'S II NEW COLLEGE DICTIONARY 795 (1995). The word "paper" comes from the word "papyrus." See *id.* at 794.

70. See GAMBLE, *supra* note 30, at 45-46 ("Animal skins . . . had been used from great antiquity for writing."); *id.* (noting that Jews used animal skins); MILLARD, *supra* note 65, at 25-26 (discussing the use of leather and parchment for writing).

71. See MILLARD, *supra* note 65, at 25-26 (discussing the use of leather and parchment); GAMBLE, *supra* note 30, at 45-46 (discussing the history and manufacture of parchment). Parchment was made from animal skins. *Id.*

72. Papyrus had to be imported to Europe from Egypt. See MILLARD, *supra* note 65, at 25 (discussing Egyptian exports of papyrus to Europe and stating that "although the papyrus reed grew in other places, there is no sign that the writing material was manufactured outside Egypt"). Parchment and leather

rials could be difficult and time consuming. Transporting and preserving these writings could also be difficult. Under these conditions, the logistics of copying writings served as barriers to large scale copying and distribution of writings. The development of paper⁷³ and improvements in ink⁷⁴ made copying easier,⁷⁵ but it was the invention of the printing press with moveable type⁷⁶ that really prompted the development of copyright protection.⁷⁷

The moveable type printing press facilitated efficient, mass duplication of a single manuscript.⁷⁸ The importance of the printing press can hardly be overstated. With multiple copies and decreased costs associated with printing, literature became more accessible.⁷⁹ Printing also doubtlessly saved many works from extinction. Printing not only made possible the mass production of books, but also assured their accuracy. One scholar, Elizabeth Eisenstein, explained the problems associated with copying manuscripts by hand:

had to be carefully prepared in a complex process by stretching and smoothing. See GAMBLE, *supra* note 30, at 46.

73. See LEONARDAS VYTAUTAS GERULAITIS, PRINTING AND PUBLISHING IN FIFTEENTH-CENTURY VENICE 9-10 (1976) (discussing the need for paper and early paper production in Europe).

74. See *id.* at 15-16 (discussing the development of ink suitable for printing).

75. See *id.* at 12 (noting that "books in great numbers and variety would be unfeasible without paper because other printing stock is too expensive or bulky").

76. Many centuries prior to the invention of the printing press with moveable type, dating back prior to 770 A.D., the Chinese developed block printing. See CARTER, *supra* note 68, at 37-42 (discussing early beginnings of block printing). Block printing involved characters or illustrations carved onto wooden blocks which were then covered with ink. See DENIS TWITCHETT, PRINTING AND PUBLISHING IN MEDIEVAL CHINA 13, 68-73 (1983) (discussing wood block printing in China).

77. See 1 BROOM & HADLEY, *supra* note 10, at 794.

78. Elizabeth Eisenstein explains: "In 1483, the Ripoli Press charged three florins per quinterno for setting up and printing Ficino's translation of Plato's *Dialogues*. A scribe might have charged one florin per quintero for duplicating the same work. The Ripoli Press produced 1,025 copies; the scribe would have turned out one." ELIZABETH L. EISENSTEIN, THE PRINTING REVOLUTION IN EARLY MODERN EUROPE 16 (1983). The size of each edition of a work would vary. A typical edition might be several hundred copies, but some consisted of several thousand copies. See H.S. BENNETT, ENGLISH BOOKS & READERS 1475 TO 1557, at 224-28 (1952) (reporting 3,000 volumes of an edition of the New Testament in 1525, but concluding that ordinary works generally would be no more than 600-700 copies).

79. See GERULAITIS, *supra* note 73, at 9-10 (noting that competition among printers and decreased prices made books more accessible to the public and fueled demand).

In view of the proliferation of “unique” texts and of the accumulation of variants, it is doubtful whether one should refer to “identical copies” being “multiplied” before print. This point is especially important when considering technical literature. The difficulty of making even one “identical” copy of a significant technical work was such that the task could not be trusted to any hired hands. Men of learning had to engage in “slavish copying” of tables, diagrams, and unfamiliar terms.⁸⁰

Freed from the need to engage in “slavish copying,” scholars could then spend their time more productively, in reflection, research, or writing.⁸¹

As early as the 1430s, Johan Gutenberg, a goldsmith, began work on the development of the printing press.⁸² By about 1450, Gutenberg had developed the printing press in Mainz, Germany.⁸³ The first known substantial work published⁸⁴ using Gutenberg’s printing press is the now-famous forty-two-line Bible, known as the Gutenberg Bible or the Mazarin⁸⁵ Bible,⁸⁶ published in 1455 or early 1456.⁸⁷ Printing

80. EISENSTEIN, *supra* note 78, at 17.

81. *Id.*

82. An exact chronology of the development of the printing press is not known. See BLAKE, *supra* note 46, at 3 (“It is not possible to date this invention exactly, partly because as there was no patent law then the inventors wanted to keep the details of the process a secret.”). Blake speculates that Gutenberg may have already begun his experiments with printing by 1430. *Id.*; see also GERULAITIS, *supra* note 73, at 15 (stating that the printing process was known by 1439). Several scholars date development of the printing press to the period of 1440 to 1450. See *id.* at 3-4 (discussing Gutenberg and the invention of the printing press); PUTNAM, *supra* note 46, at 358-60 (noting the existence of a completed press became known in 1450, and work may have begun ten or more years earlier). Most of what is known about Gutenberg’s efforts during this period is taken from legal documents from two lawsuits involving Gutenberg. See BLAKE, *supra* note 46, at 3-4 (discussing 1439 and 1455 lawsuits).

83. PUTNAM, *supra* note 46, at 358-60 (noting that the existence of Gutenberg’s press became known in 1450).

84. There may have been some shorter works printed prior to the Bible, but the evidence on this point is inconclusive. See BLAKE, *supra* note 46, at 4-5 (recognizing that the Bible may not have been the first work published, “but it was almost certainly the first extensive work to be completed”).

85. Mazarin was a seventeenth century French cardinal and prime minister of France whose library contained a copy of the Gutenberg Bible. See 1 HENRY HALLAM, INTRODUCTION TO THE LITERATURE OF EUROPE 152 (4th ed. 1854) (noting the rediscovery of the Gutenberg Bible in Cardinal Mazarin’s library); NORMA LEVARIE, THE ART & HISTORY OF BOOKS 77 (1982) (discussing Mazarin Bible); see also THE CATHOLIC ENCYCLOPEDIA, *supra* note 48, at 616 (identifying Mazarin).

86. One source speculates that there were about two hundred copies

press technology spread rapidly all over Europe,⁸⁸ first to other parts of Germany during the 1460s, then to Italy in about 1465, and to France in the same decade.⁸⁹ During the 1470s it spread to most of the rest of Europe, from Spain to Poland.⁹⁰ The printing press arrived in England in 1476, and William Caxton became the first English printer.⁹¹

During the period following the introduction of the printing press, the businesses of publishing and bookselling took on increased importance. Prior to the printing press, there were book production and sales,⁹² but on a more limited scale.⁹³ Due to the printing press, printers, publishers, booksellers, and related businesses⁹⁴ sprang up all over Europe,

printed. LEVARIE, *supra* note 85, at 77. According to Levarie, there are twelve vellum copies and thirty-six paper copies still in existence. *Id.*

87. See BLAKE, *supra* note 46, at 4 (stating that the Bible was published in late 1455 or early 1456); LEVARIE, *supra* note 85, at 77 (stating that the Bible must have been printed at least a year prior to August 1456). Unfortunately for Gutenberg, his financial backer, Fust, foreclosed on a debt owed by Gutenberg and took away his press in 1455. Gutenberg's assistant, Peter Schoeffer, stayed on and continued to work for Fust. See BLAKE, *supra* note 46, at 4-5 (stating that the 42-line Bible was "substantially the work of Gutenberg" but Gutenberg was prevented from benefiting financially from it).

88. See EISENSTEIN, *supra* note 78, at 14-15 (reproducing maps showing locations in Europe where printing was carried on for periods up to 1500).

89. See BLAKE, *supra* note 46, at 9-10 (discussing the spread of printing throughout Germany, Italy, France and other European countries during the 1460s); 1 HALLAM, *supra* note 85, at 157-60 (discussing the early printers in Europe).

90. See BLAKE, *supra* note 46, at 11.

91. For a history of William Caxton and the beginning of printing in England, see generally BENNETT, *supra* note 78, at 1-18; BLAKE, *supra* note 46, at 1-212; N.F. BLAKE, CAXTON AND HIS WORLD 13-239 (1969).

92. Greece had a modest commercial book trade in the fourth century B.C. See GAMBLE, *supra* note 30, at 85. Rome had a commercial book trade by about the first century A.D. See *id.* at 86 (identifying certain Roman book dealers by name). Atticus, a wealthy Roman and close friend of Cicero, was known as a famous book maker. Some have suggested that he was in the bookmaking business, see WITTENBERG, *supra* note 30, at 4 (discussing Atticus's mass publishing business), but others have discounted this suggestion, see GAMBLE, *supra* note 30, at 86 (acknowledging that Atticus distributed books and had well-trained slaves to copy texts, but maintaining that he was not a commercial book dealer). In England during the fourteenth century, individuals involved in the book trade formed a Brotherhood of Manuscript Producers. See WITTENBERG, *supra* note 30, at 9-10 (noting the founding of the Brotherhood of Manuscript Producers, and the founding of the Craft of Writers of Text-Letters in about 1403).

93. See GAMBLE, *supra* note 30, at 86-88 (describing the book trade in the Roman empire as limited in scale and stating that "[t]he commercial market for any book must have been extremely limited").

94. In addition to the publishers with the printing presses, there were not only the booksellers, but also those involved in the manufacture and sale of ink,

and they became an important part of their local economies.⁹⁵ Some publishing houses were substantial operations. One early printer, Anthoni Koberger of Nuremberg, by 1509 reportedly had about twenty-four presses and employed more than one hundred workers.⁹⁶ Many early printers and publishers were also retail booksellers.⁹⁷

C. *Special Privileges Granted to Printers*

Printers often wielded significant influence in their communities.⁹⁸ By nature of the business, they tended to be educated and well connected.⁹⁹ To be a successful printer, one had to be able to read, possess substantial business acumen, and have substantial financial backing to afford the capital investment required to obtain and maintain a printing press and run a business.¹⁰⁰

These printers, the equivalent of our modern-day publishers, from very early on had the ear of government leaders, and they used their position to obtain special privileges to protect their interests. These grants of special privileges may be viewed as the first copyrights. Significantly, these privileges primarily applied to publishers rather than authors. The efforts and investments of publishers brought the works to the public, and the publishers were considered the owners

paper, and equipment required for book making. *Id.*

95. See EISENSTEIN, *supra* note 78, at 12 (“Unknown anywhere in Europe before the mid-fifteenth century, printers’ workshops would be found in every important municipal center by 1500.”); *id.* at 13-15 (reproducing maps showing locations in Europe where printing was carried on for periods up to 1500).

96. PUTNAM, *supra* note 46, at 149-50.

97. See HELLMUT LEHMANN-HAUPT, PETER SCHOEFFER OF GERNESHEIM AND MAINZ 85 (1950) (noting that Schoeffer, like other early printers, also sold his own books).

98. See, e.g., PUTNAM, *supra* note 46, at 411 (stating early printer Nicolas Jenson received from the Pope the honorary title of Count Palatine in 1479).

99. See, e.g., BLAKE, *supra* note 46, at 2 (stating that Gutenberg was a goldsmith of a patrician family); *id.* at 17 (stating that William Caxton, prior to becoming a printer, “was clearly an influential and possibly a wealthy merchant”); PUTNAM, *supra* note 46, at 417-18 (noting that the famous Italian printer Aldus Manutius (1450-1515) was a scholar of Latin and Greek and a tutor of princess’s sons); 2 *id.* at 156 (stating that a full mastery of Latin “was, in fact, a first requirement for any publisher of scholarly literature”); *id.* at 178 (characterizing printer Johann Froben of Basel (1460-1528) as a scholar in Latin, Greek, and Hebrew).

100. See EISENSTEIN, *supra* note 78, at 23, 26 (describing the master printer and others in the printing shop).

of any rights to the works.¹⁰¹ This was particularly true during the early days of printing when many works were classics whose authors were long since gone.¹⁰²

The problem of "piracy" of a work arose very early and was a significant concern for printers and publishers. After the work of editing and setting a book, a second printer could quickly copy the book, without the expense or risk involved in purchasing the manuscript, preparing the layout, editing it, or marketing it.¹⁰³ This allowed the second printer to undersell the original publisher. Gutenberg's successors, Fust and Schoeffer of Mainz, allegedly pirated an edition from Mentelin of Stasburg,¹⁰⁴ and Mentelin may have pirated an earlier edition of a different work by Fust and Schoeffer.¹⁰⁵ The early Italian publisher Aldus Manutius, who published from 1495 to 1515, also had to deal with competition for pirated copies of his works.¹⁰⁶ In England, in 1533, the printer Wynkyn de Worde (Caxton's assistant and successor)¹⁰⁷ complained of piracy of his works.¹⁰⁸

101. See PUTNAM, *supra* note 46, at 15-16 (noting that publishers claim ownership of works).

102. See *id.* at 16 (stating that printed literature of the time was largely old-time classics).

103. See CYPRIAN BLAGDEN, *THE STATIONERS' COMPANY: A HISTORY, 1403-1959*, 32 (1960) (noting that early English printers "were quite ready to profit by the enterprise of others," by taking advantage of the original printer's trouble and expenses of preparing the work).

104. Fred W. Householder, *The First Pirate*, in 24 *THE LIBRARY* 30, 35 & n.1 (F.C. Francis ed., 1944) (discussing Paulus de Sancta Maria's *Scrutinium Scripturarum* with editions dated 1471 and 1478).

105. 24 *Id.* at 30-46 (discussing whether Fust and Schoeffer pirated Mentelin's edition or visa versa; concluding Fust's edition of St. Augustine's *de Doctrina Christiana* was first).

106. According to George Putnam:

Another serious difficulty with which Aldus had to contend was the competition of the piratical copies of his editions which promptly appeared in Cologne, Tübingen, Lyons, and . . . Florence. The most serious interference with his undertakings appears to have come from the printers of Lyons, who . . . speedily won for their city notoriety as the centre of piratical publishing.

PUTNAM, *supra* note 46, at 433.

107. See BLAKE, *supra* note 91, at 81 (stating de Worde was Caxton's assistant and successor).

108. "In 1533 appeared the first complaint of piracy, that of Wynken de Wordi, who obtained the King's privilege for his second edition of Witinton's Grammar, because Peter Trevers had reprinted it from the edition of 1523." BOWKER, *supra* note 30, at 21; accord Matthews, *supra* note 18, at 589 (discussing Wynken de Wordi). The accepted spelling of de Worde's name is Wynkyn de Worde, but it is sometimes seen spelled as "Wynken" and occasionally as "de

Some printers relied upon “courtesy of the trade” or express agreements to protect their interests.¹⁰⁹ To protect themselves from what they considered to be unfair competition, others sought special protection from government authorities. The protection usually came in the form of specific privileges extended to particular publishers for particular works and usually for limited times.

The first of many privileges was granted by the Senate of Venice in 1469, to the printer John of Speyer, who received the exclusive right to all printing in Venice for five years.¹¹⁰ This complete monopoly was not a typical privilege, and it did not last long; John died in 1470, and with his death the monopoly ended.¹¹¹ Later privileges were granted to authors, publishers, translators, or editors for specific works or types of works.¹¹² In some cases printers sought and received privileges that identified specific authors but not specific works.¹¹³

In some cases, authors, rather than the printers, received the privilege.¹¹⁴ Perhaps the earliest privilege to an author was granted in Venice to Marcus Antonius Sabellicus¹¹⁵ on September 1, 1486, for his work on the history of Venice. The privilege stated:

The history of our city, written by the very learned Marcus Antonius Sabellicus from Rome, deserves for its eloquence and historical veracity to come into full public view. There-

Wordi.”

109. BOWKER, *supra* note 30, at 10 (referring to the early printer Koberger who relied on “courtesy of the trade,” and indeed made an agreement in 1495 with Kessler of Basel to respect each other’s rights”).

110. See BOWKER, *supra* note 30, at 13 (discussing the privilege granted to John Speyer); HORATIO F. BROWN, *THE VENETIAN PRINTING PRESS 1469-1800*, at 52 (reprint 1969) (1891) (discussing the privilege granted to John Speyer); GERULAITIS, *supra* note 73, at 20-21 (discussing the privilege granted to John Speyer). Speyer is also seen as Spira or Spire.

111. GERULAITIS, *supra* note 73, at 20-21.

112. For an excellent discussion of the various types of privileges granted in Venice, see GERULAITIS, *supra* note 73, at 31-43. See also BROWN, *supra* note 110, at 52-55 (identifying and discussing five kinds of privileges).

113. See GERULAITIS, *supra* note 73, at 45 (“It had become customary for a printer to obtain as many privileges as possible, often not even specifying titles but only authors.”).

114. See BOWKER, *supra* note 30, at 10, 13 (noting instances of privileges granted to Antonio Sabellico in 1486 and Peter of Ravenna in 1491); *id.* at 14 (discussing protections granted by Venice in the early sixteenth century and stating that “[c]opyrights to authors became frequent”).

115. Horatio Brown identifies Sabellicus by his Italian name “Marc’ Antonio Sabellico,” rather than his Latin name. BROWN, *supra* note 110, at 53.

fore we, the undersigned noble Councillors, have debated and decreed that the aforementioned work . . . can be entrusted to some expert printer to print . . . furthermore, we shall not permit anyone other than him to have the said work printed, under penalty of the displeasure of the most serene Signoria and a [a fine] of 500 ducats . . .¹¹⁶

Significantly, the rulers of Venice state their rationale for granting the privilege—to encourage this worthy work “to come into full public view.”¹¹⁷ Because the work was a history of Venice, in the eyes of the rulers, Sabellicus’s work was particularly important for the public good. But other works too would benefit the public, and Venice sought to encourage them.¹¹⁸

That Venice in these early years began to recognize authors’ rights in their literary works is further demonstrated by the privilege granted to Daniele Barbaro in 1493, when the College (or Cabinet) of Venice granted a privilege to him for a work written by his brother, Hermolao, who had subsequently died.¹¹⁹ Daniele, as his brother’s heir, was granted the ten-year privilege.¹²⁰ Barbaro’s privilege is noteworthy because it indicates that an author’s successor could be entitled to a privilege. Other parts of Europe also adopted the practice of granting privileges.¹²¹

From the point of view of printers and authors, there was an immediate economic need for a privilege. One concern was the need to recoup the expense of production of a given edition and provide a reasonable return. Gabriel and his partners petitioned for a privilege in 1497, stating that they had

116. VENICE: A DOCUMENTARY HISTORY, 1450-1630 371 (David Chambers et al. eds., 1992) (brackets in original) (translation from Latin found in ASV COLLEGIO, NOTATORIO, reg. 13, ff. 118v, 145r); see also BROWN, *supra* note 110, at 53 (discussing the privilege granted to Marc Antonio Sabellico).

117. VENICE: A DOCUMENTARY HISTORY, *supra* note 116, at 371.

118. See *id.* at 372 (stating that in the 1497 petition for privilege, there was a desire to print in Greek and Latin “for the general good, honour and reputation of our most splendid Republic”) (quoting R. Fulin, *Documenti per servire alla storia della stampa veneziana*, 23 ARCHIVIO VENETO 131 (1882)); see also Putnam, *supra* note 30, at 35, 44 (concluding that motive for grant of privileges in Italy was to “induc[e] printers . . . to undertake certain literary enterprises which were believed to be of importance to the community”).

119. BROWN, *supra* note 110, at 53.

120. *Id.*

121. See BLAGDEN, *supra* note 103, at 32 (stating that the first privilege obtained in Paris was in 1507); Matthews, *supra* note 18, at 589 (stating that the first privilege obtained in Germany was in 1501).

“spent a great deal of money in this admirable and most useful enterprise [efforts to bring Greek and Latin texts to print], and, because the debt [was] heavier than their own resources [could] bear,” they needed a privilege.¹²² The need to limit unfair piracy was another related concern. Gabriel and his partners further complained that “there may be many who, through hatred or jealousy, will use any means to injure the said company or crush it entirely.”¹²³ Therefore, they asked for “the special favour of a monopoly” for their new technique (a patent), and a prohibition against publication of four Greek works¹²⁴ “on pain of forfeiting all copies and paying a fine of 1 ducat per volume.”¹²⁵ The petitioners concluded by virtue of the privilege they could pay their debts and “would also gain some advantage from their labour and experiment, and would not be ruined for having made the attempt.”¹²⁶

“Pirated” copies that might “spoil” the market were a concern and were a primary justification for the grant of privileges. The 1496 petition of Bernardino Rasma for a privilege states the case:

For when [a printer-publisher] shall have set himself to produce a book of rare beauty—which entails the absorption of all his capital in it—should his brother merchants come to hear of it, they use every cunning device to steal the proofs of the new work . . . and set to . . . print the book before the original designer of the book can finish his edition, which, when it is ready for issue, finds the market spoiled by the pirated edition.¹²⁷

But the early system of Venetian privileges began to create problems for those they were intended to benefit. Venice granted numerous privileges but some were conflicting or ambiguous. One privilege was granted but identified neither the protected title nor author.¹²⁸ Other privileges were ob-

122. VENICE: A DOCUMENTARY HISTORY, *supra* note 116, at 372 (from the Latin) (quoting R. Fulin, *Documenti per servire alla storia della stampa veneziana*, 23 ARCHIVIO VENETO 131 (1882)).

123. *Id.*

124. These works were *The Letters of Brutus and Phalaris*, *Pollux*, *Philostratus*, and the *Fables of Aesop*. *Id.*

125. *Id.*

126. *Id.*

127. BROWN, *supra* note 110, at 55-56.

128. See GERULAITIS, *supra* note 73, at 45 (identifying the privilege given to Stefano Vosonio).

tained in bad faith—where the privilege holder had no intention of publishing the work, but rather intended to extract payment for the rights, or simply intended to prevent others from publishing the work.¹²⁹ Horatio Brown explained:

By no means all the works for which privileges were demanded, issued from the press. For when the custom of asking for privileges took firm hold on the printing and publishing trade, there was a rush of printer-publishers to secure copyrights in a great number of books which they had small prospect of ever setting up in type,¹³⁰

The number and nature of privileges resulted in both obstacles to printing¹³¹ and the risk of unintentional infringement.¹³²

In 1517, the Senate of Venice attempted to address this problem with an enactment that should be credited as the first copyright statute.¹³³ The statute eliminated all prior privileges and placed all works already published in the public domain.¹³⁴ The enactment limited future protection to new works or works not yet printed, and a privilege would only be allowed after a two-thirds vote in the Senate.¹³⁵ Grants of prior privileges were, in essence, a series of private acts to address needs of specific individuals; the 1517 law was the first public copyright law of general application.

In 1533, Venice passed broader copyright laws.¹³⁶ These

129. See PUTNAM, *supra* note 46, at 360. These “bad faith” privileges bring to mind the 1990s modern practice of cybersquatters who attempted to reserve internet domain names using well known trademarks or celebrity names in an effort to extract payments from the trademark owners or celebrities who would later want to use those domain names. See, e.g., *Intermatic, Inc. v. Toeppen*, 947 F. Supp. 1227 (N.D. Ill. 1996) (noting that the defendant had registered 240 internet domain names with the intent of reselling or licensing their use by entities who did business under those names; defendant’s registered domain names included *deltaairlines.com*, *eddiebauer.com*, *unionpacific.com*); see also *Sporty’s Farm L.L.C. v. Sportsman’s Market, Inc.*, 202 F.3d 489 (2d Cir. 2000) (finding violation of the Anticybersquatting Consumer Protection Act and ordering release of interest in domain name).

130. BROWN, *supra* note 110, at 54.

131. *Id.* at 74 (noting that “[t]he trade was throttled”).

132. See GERULAITIS, *supra* note 73, at 45 (noting danger of unwittingly infringing).

133. See BROWN, *supra* note 110, at 207 (including a copy of the statute of August 1, 1517 in original Latin).

134. BROWN, *supra* note 110, at 74; PUTNAM, *supra* note 46, at 360.

135. BROWN, *supra* note 110, at 74.

136. See *id.* at 75-76 (discussing the law of 1517); *id.* at 208-09 (reproducing the language of the 1517 law); PUTNAM, *supra* note 46, at 360-61 (discussing the

early Venetian privileges and enactments were concerned primarily with protecting and regulating printers;¹³⁷ the interests of authors were not at issue. Printers printed works without any concern for the author's wishes.¹³⁸ In about 1544, Venice began to afford greater consideration to rights of authors and began to require evidence of the author's consent in order to obtain the privilege to print a work.¹³⁹

The number of privileges granted under these laws in a particular year varied, but the numbers were not insignificant. The highest number of works for which privileges were granted in a single year was 117 in 1561.¹⁴⁰

It is not surprising that Venice would be the early leader in the development of copyright law. During the late fifteenth century and the sixteenth century, Venice was a leading publishing center.¹⁴¹ One hundred fifty-five printers established themselves in Venice during the period of 1472 to 1500;¹⁴² these printers produced as many as 4,500 different editions through the year 1500.¹⁴³ Venice also became an important

1533 law). Richard Bowker characterizes the 1533 law as "the first real copyright code." BOWKER, *supra* note 30, at 15.

137. The laws were largely for regulation of the printing trade. The 1517 law was to remove "a mass of obstruction" to printers to allow development of publishing in Venice. PUTNAM, *supra* note 46, at 360. The 1526 law was a censorship law requiring review and approval by two censors before a book could be printed. *Id.* Among other things, the 1533 law imposed price controls on the books to be published. *Id.* at 361. A 1543 law addressed the problem of poor quality books and required use of quality paper. *Id.* at 361-62.

138. *See id.* at 363.

During the half century in which their business had been carried on, the printer-publishers in Venice (in common with those of the rest of Europe) were in the habit of ignoring literary proprietorship altogether, and were accustomed to print any work they pleased, even in direct opposition to the wishes of the author.

Id.; accord BROWN, *supra* note 110, at 79 (discussing Venetian printers).

139. BROWN, *supra* note 110, at 79; PUTNAM, *supra* note 46, at 363.

140. BROWN, *supra* note 110, at 236-40 (listing numbers of works identified in privileges granted by year); PUTNAM, *supra* note 46, at 370.

141. CHARLES YRIARTE, *VENICE: ITS HISTORY—ART—INDUSTRIES AND MODERN LIFE* 319 (F.J. Sitwell trans., 1896) ("Venice remained for more than two centuries the great centre of printing; her book trade was immense."); see GERULAITIS, *supra* note 73, at 19 (claiming Venice was "the world's first center for printing").

142. YRIARTE, *supra* note 141, at 316; cf. GARRY WILLS, *VENICE: LION CITY* 308 (2001) (stating that there were 150 presses operating by 1500).

143. GERULAITIS, *supra* note 73, at 11; WILLS, *supra* note 142, at 308; see also *VENICE: A DOCUMENTARY HISTORY*, *supra* note 116, at 369 ("Venice produced roughly a sixth of all the books printed in Europe before 1500 . . .").

center for printing music.¹⁴⁴

Privileges were not issued solely by civil governments. Jewish law concurrently developed its own system of printing privileges. In 1550, an Italian rabbi extended protection to an edition of Maimonides's Code, until the first issue sold out.¹⁴⁵ Protection amounted to a ban against infringing or against purchasing an infringing work at the peril of excommunication.¹⁴⁶ The rabbis perceived the need to balance the interest in broad dissemination and availability of works against the necessity that publishers make a profit and recoup the costs of publication. The result was the equivalent of copyright protection for a limited duration to allow a publisher to recoup the costs of printing.¹⁴⁷ The term would be an estimate of the time necessary to sell out the first edition; today the term generally lasts from ten to twenty-five years.¹⁴⁸ Some limited copyright protection was viewed as a necessary means to encourage production of works to benefit the public.¹⁴⁹ In addition, the Popes also conferred special privileges upon printers.¹⁵⁰

144. YRIARTE, *supra* note 141, at 319; *see also* VENICE: A DOCUMENTARY HISTORY, *supra* note 116, at 369 (stating "Venice excelled in the printing of music").

145. *See* Bleich, *supra* note 44, at 73 (giving specifics of the case). The earliest known ban against reprinting was in 1518. Arthur J. Silverstein, *Copyright in Jewish Law*, 4 PERF. ARTS REV. 33, 34 (1973) (giving specifics of the case); *see also id.* at 35-36 (discussing the 1518 ban).

146. *See* Silverstein, *supra* note 145, at 42 (discussing enforcement of the ban against reprinting).

147. According to J. David Bleich: "it became common practice for an author or a prospective publisher to protect himself against financial loss by approaching a rabbinic authority and securing a formal *herem* or ban against publication of the same work by any other party for a stipulated period of time." Bleich, *supra* note 44, at 74; *see also* Kozinets, *supra* note 40, at 89-92 (discussing balancing of the public interest and the publisher's interest, and the resulting rule of limited duration protection).

148. Kozinets, *supra* note 40, at 94. Notice of the protection and the term of protection are included in the front of a book. *See* Bleich, *supra* note 44, at 74 ("The text of this ban was then customarily published in the prefatory section of the book.").

149. *See* Silverstein, *supra* note 145, at 40 ("The main motivation in seeking legal theories to justify copyright protection was the desire to encourage the publication and reproduction of religious works.").

150. *See* BOWKER, *supra* note 30, at 17 (noting privileges given by Leo X in early sixteenth century; infringement was punishable by excommunication); PUTNAM, *supra* note 46, at 433 (noting privileges given by the Pope to Aldus). Putnam concluded that these papal privileges were difficult to enforce and "proved of very little service." *Id.*

D. The Development of Early English Copyright Law: Royal Privileges and the Stationers' Copyright

1. Grant of Royal Privileges to Printers

The history of English copyright began with royal privileges and was followed shortly thereafter with the development of a private contractual copyright under the auspices of the Stationers' Company. The Crown granted printing privileges first through warrants, beginning in 1518, and thereafter, beginning in about 1539, by both warrants and letters patents.¹⁵¹ Some privileges were specific to particular works; others covered a category of works or all works of a particular printer.¹⁵² Privileges granted by warrant tended to last for a shorter duration than did privileges granted by letters patent, and warrants were specific to individual printers.¹⁵³ In contrast, privileges granted by letters patents (sometimes referred to as printing patents) usually covered classes of books such as Bibles, psalters, or law books¹⁵⁴ and could be assigned or inherited.¹⁵⁵ In perhaps the earliest example of a royal privilege, the Royal Printer Richard Pynson in 1518 received a printing privilege for a term of two years for a speech.¹⁵⁶

151. See HARRY RANSOM, *THE FIRST COPYRIGHT STATUTE 25-26* (1956) (discussing privileges and letters patents). John Feather points to a 1504 royal grant to William Faques as King's Printer with the right to print various royal documents as the first privilege granted in England. JOHN FEATHER, *PUBLISHING, PIRACY AND POLITICS: AN HISTORICAL STUDY OF COPYRIGHT IN BRITAIN* 11 (1994).

152. See Arthur W. Reed, *The Regulation of the Book Trade Before the Proclamation of 1538*, 15 *TRANSACTIONS OF BIBLIOGRAPHICAL SOC'Y* 157, 173-75, 181 (1917-19) (discussing types of privileges and giving examples).

153. See RANSOM, *supra* note 151, at 25-26.

154. 2 *A TRANSCRIPT OF THE REGISTERS OF THE COMPANY OF STATIONERS OF LONDON; 1554-1640 A.D.* 60-63 (Edward Arber, ed., 1967) (1875) (reproducing texts of three letters patents, the first for primers and psalters, the second for "the Cosmographically glasse," and the third for an English Bible with annotations) [hereinafter Arber].

155. See RANSOM, *supra* note 151, at 25-26. "As time went on, the distinction between the printing privilege granted by warrant and the rights conveyed by letters patent became indistinct. The term 'privilege' was used to include the printing patent, and 'privileged printers' more often than not referred to patentees." *Id.* at 27. For further discussion of printing patents see LYMAN RAY PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* 78-113 (1968).

156. See BOWKER, *supra* note 30, at 19 (stating that the first printing privilege was granted to Pynson in 1518 for a term of two years); RANSOM, *supra* note 151, at 25 (stating that the first privileges in 1518 were grants to Rastell and Pynson); Reed, *supra* note 152, at 173-75 (discussing privileges given to

Whether in the form of a warrant or printers patent, these royal privileges had the effect of granting the holder of the privilege the exclusive right to publish a work within the scope of the privilege for the term stated.¹⁵⁷ These privileges are recognized by some as the earliest forms of copyright in England and are therefore the direct ancestors of American copyrights.

The printers sought these privileges for the same financial reasons the Venetian printers sought them—economics.¹⁵⁸ In one commentary from 1582, the report's author commented that the number of printers had greatly increased so that printers were "driven through necessity" to contract for low prices and "were most times small gainers, and often losers."¹⁵⁹ These hardships forced printers to seek privileges to assure profitability and stability.¹⁶⁰

Rastell and Pynson).

157. One letters patent to William Seres dated June 3, 1559 is a good example. With standardized modern spelling, it states in part:

We be pleased to give this grant and by this presents for us our heirs and Successors do . . . give and grant full power and authority privilege and license unto our said loving Subject **william Seres** and to his assigns for and during the term of his natural life to imprint or cause to be imprinted as well all manner of *books of private prayers* usually and commonly called or taken for *primers* as also of *Psalters* both in great volumes and in small in Latin or English which now be or at any time hereafter, shall be set forth and permitted Any other privilege or any other order heretofore granted or taken to the contrary notwithstanding Straightly inhibiting and forbidding all other our Subjects to print utter or sell or cause to be printed uttered or sold any other *book* or *books of private prayers primers* or *psalters* than such as shall be the said **William Seres** or his assigns printed or caused to be printed according to the true meaning of this our present privilege upon pain of forfeiture of all such books as they shall imprint utter or sell contrary to the meaning hereof. Wherefor we will command all our officers and subjects as they tender our favor and will avoid our displeasure that they and every of them if need require do aide and assist the said **William Seres** and his assigns in the due execution of this our license[.]

2 Arber, *supra* note 154, at 60-61 (capitalization, italics, and bolding in original).

158. See *supra* notes 115-20 and accompanying text.

159. See 1 Arber, *supra* note 154, at 114 (quoting Christopher Barker's Report in December 1582 in the Stationers' Company books) (spelling standardized).

160.

These considerations have enforced printers to procure grants from her Majesty of some certain Copies, for the better maintenance of furniture, Correctors, and other workmen, who cannot suddenly be provided, nor suddenly put away: and if they should must of necessity, either want necessary living, or print books, pamphlets, and other trifles, more dangerous than profitable.

There may have been several motivations for monarchs to grant royal privileges, both in England and in other parts of Europe. First, the English crown and other European governments operated on a system of patronage and rewards. The crown could reward its royal subjects with a valuable right. In exchange, presumably, the crown could expect continued or increased loyalty.¹⁶¹ Second, the crown became increasingly concerned about the dangers of printing. Printers had the means to produce and broadly disseminate views that might be critical of the crown or the government, potentially undermining the crown's credibility and shaping public attitudes about the crown. Royal privileges may have been a means of encouraging loyalty from printers and, to an extent, controlling the content of what was printed. Finally, notwithstanding the potential threat posed by printers, the crown may have wanted to encourage the development of the young publishing industry to the benefit of the public. Printing and its ability to spread knowledge and encourage advances were part of a developing, vibrant nation.¹⁶² Seen in this light, some measure of protection to ensure a reasonable return for printers must have been appealing to the crown.

2. *A Private Contractual Copyright—The Stationers' Copyright*

Even before the printing press, craftsmen involved in the bookmaking and bookselling trades organized in England to protect their interests. In 1357, there was a craft guild for scribes (those who copied text) and limners (those who illustrated manuscripts) in London, referred to as the Brotherhood of Manuscript Producers.¹⁶³ Later, in 1403, a guild for

1 Arber, *supra* note 154, at 115 (spelling standardized).

161. See MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 17 (1993) (discussing privileges as rewards to worthy individuals).

162. A document from the Stationers' Company to Parliament in 1643 made the argument for valuing the press:

Sheweth, That the Mystery and Art of Printing is of publike and great Importance, and ought to be held worthy of extraordinary regard and consideration, in all well-govern'd States. . . . And in *Europe* the more civill and knowing each Countrey is, the more carefully they provide for the prosperity of this ingenius Craft . . . for as Learning must needs make us favour Printing, so Printing is a great means to advance Learning amongst us.

1 Arber, *supra* note 154, at 584.

163. See BLAGDEN, *supra* note 103, at 22 (discussing 1357 guild);

scriveners, limners, bookbinders, and booksellers was created.¹⁶⁴ Those involved in the book trade, particularly printers and booksellers, became known as “stationers,”¹⁶⁵ and by about 1510, a voluntary association, or “Brotherhood of the Stationers,” was formed.¹⁶⁶ This Brotherhood of Stationers became officially recognized by a royal charter granted on May 4, 1557,¹⁶⁷ and was known as the Stationers’ Company or the Company of Stationers.

The Stationers’ Company was significant because its charter granted its members a near monopoly on printing in England. The charter stated:

Besides we will, grant, ordain, and appoint for ourselves and the successors of us the foresaid Queen that no person within this our realm of England or the dominions of the same shall practise or exercise . . . the art or mistery of printing any book or any thing for sale or traffic within this our realm of England or the dominions of the same, unless the same person at the time of his foresaid printing is or shall be one of the community of the foresaid mistery or art of Stationery of the foresaid City, or has therefore a licence of us . . . by the letters patent of us or the heirs or successors of us the foresaid Queen.¹⁶⁸

Under the charter, the Stationers’ Company was empowered to establish “ordinances, provisions and statutes” to govern

WITTENBERG, *supra* note 30, at 9 (noting the founding of the Brotherhood of Manuscript Producers in 1357).

164. See 1 Arber, *supra* note 154, at xxiii (reproducing text of the 1403 petition and grant); BLAGDEN, *supra* note 103, at 22-23 (discussing the 1403 guild); WITTENBERG, *supra* note 30, at 10 (noting the founding in 1403 of the Craft of Writers of Text-Letters).

165. The name “stationers” probably comes from the fact that early booksellers sold manuscripts from stationary booths. BLAGDEN, *supra* note 103, at 21-22.

166. See 1 Arber, *supra* note 154, at xix-xx (discussing the roots of the Stationers’ Company); see also BLAGDEN, *supra* note 103, at 28 (noting that the stationers first proposed their charter in 1542). Some suggest that the Company can be traced directly back to the 1403 guild. 3 JOHN NICHOLS, LITERARY ANECDOTES OF THE EIGHTEENTH CENTURY 545 (London, printed by author 1812) (citing a memorial presented by the Company in 1645 wherein it represents its existence for 240 years); 1 Arber, *supra* note 154, at xxii (quoting Nichols).

167. See 1 Arber, *supra* note 154, at xxviii-xxxii (reproducing the text and translation of the charter); BLAGDEN, *supra* note 103, at 19 (discussing the charter).

168. 1 Arber, *supra* note 154, at xxx-xxxii (spelling in original).

its members.¹⁶⁹ The monopoly, combined with the power to govern its members, essentially allowed the Company to set the rules for printing and publication.

With this authority, the Company established internal rules that amounted to private copyrights. Before a work could be published by a member of the Company, the “copy” had to be entered in the register book of the Company by a member of the Company.¹⁷⁰ The “copy,” used in this context, meant the original manuscript to be duplicated.¹⁷¹ “Copy” or “cotype” also came to mean the property interest signifying the right to print resulting from entry in the Company’s register or in short, the copyright itself.¹⁷² As early as July 1555, even prior to the Company’s charter, there is an entry in the Company’s books ordering Mr. Wallye to pay a fine for the offense of “conselying of the pryntyng of a *breafe Cronacle* contrarey to our ordenances before he Ded presente the Cotype to the wardyns.”¹⁷³ Once registered by one member of the Company, no other member could publish the same work without the permission of the member who registered the copy.¹⁷⁴ The re-

169. 1 *id.* at xxx (reproducing language of the charter, stating that the Company “for the good and sound rule and government” of the group could establish “ordinances, provisions and statutes whenever it shall seem to them to be oportune and fit”).

170. See 1 *id.* at 22, 26 (reproducing the Company rules and ordinances requiring registration of copy prior to printing); see also, *e.g.*, 1 *id.* at 74-79 (listing the entries of “all suche cotypes as be lycensed to be prynted” from July 1557 to July 1558).

171. See, *e.g.*, RICHARD BURN & JOHN BURN, A NEW LAW DICTIONARY: INTENDED FOR GENERAL USE AS WELL AS FOR GENTLEMEN OF THE PROFESSION 180 (London, printed by authors 1792) (defining copy as “the transcript of an original writing”); 3 THE OXFORD ENGLISH DICTIONARY 915 (2d ed. 1989) (defining copy as “[t]he original writing, work of art, etc. from which a copy is made” or “[m]anuscript (or printed) matter prepared for printing”).

172. See *id.* (identifying “property in ‘copy’ as copyright”); see also, *e.g.*, 1 Arber, *supra* note 154, at 199, 211 (listing receipts for “cotypes” and recording “[r]eveyd of gyles godhed for the Cotypes as foloweth”).

173. 1 Arber, *supra* note 154, at 45; see also, *e.g.*, 1 *id.* at 70 (noting payment of a fine in 1557 for printing a book without a license from the wardens); see also 1 *id.* at 71 (noting the payment of a fine in 1558 for printing a ballad without a license). Arber states that the Company’s first book containing entries predating charter of the Company is likely evidence that earlier entries predating the charter were copied over from an earlier account book kept by the Brotherhood. 1 *id.* at 33.

174. Rules of the Company stated that “by ancient Usage of this Company, when any Book or Copy is duly Entered in the Register Book of this Company, to any Member or Members of this Company, such Person to whom such Entry is made, is, and always hath been reputed and taken to be Proprietor of such

cords of the Company reflect that disputes over the right to publication arose and were resolved internally,¹⁷⁵ and in many cases resulted in fines against the offender.¹⁷⁶ Before members could bring any legal action, company ordinances from 1678 required members with disputes over the printing or sale of any work to bring their complaints to the Company to be heard and resolved.¹⁷⁷ Failure to bring a dispute to the Company before filing an action resulted in a fine which was to be paid to the Company.¹⁷⁸

Company membership consisted of printers, bookbinders, booksellers, suppliers of paper, and a few others associated with the book trade,¹⁷⁹ but did not include authors. Some printers also sold the books they printed to the public and hence were both printers and booksellers. Of those occupations in the Stationers' Company, initially the printers were the most powerful, and they controlled the organization.¹⁸⁰ From the stationers' point of view, the Company was necessary for three reasons: first, to protect their trade from poor workmanship; second, to minimize unprofessional practices; and third, notwithstanding protestations to the contrary, to limit competition. Finally, the stationers expressed concern that nonmembers of the Company were unqualified, ill trained, and likely to produce poor quality work.¹⁸¹ This same argument was sometimes urged by the early Venetian printers to justify grants of privileges to themselves.¹⁸²

Book or Copy, and ought to have the sole Printing thereof." 1 *id.* at 22. These rules were printed in 1682, but as the language indicated, the registration and publication system was the longstanding practice in the Company. *Id.* (describing the system as "ancient Usage of this Company"). Apparently, no copy of the early ordinances and rules has survived. 1 Arber, *supra* note 154, at 3 ("All the earlier manuscript Ordinances appear to have perished.").

175. See 1 *id.* at 14 (citing the 1678 ordinance).

176. See, e.g., 1 *id.* at 23 (citing a 1681 ordinance fixing a penalty for publishing another's copy); 1 *id.* at 184 (noting a fine in 1561 for printing "*the booke of husboundry beyng master Totteles*").

177. See 1 *id.* at 14 (providing language of the 1678 ordinance).

178. See 1 *id.* (identifying a fine of ten pounds).

179. See BLAGDEN, *supra* note 103, at 34.

180. See *id.* at 40 (stating that printers "dominated" the Company during its first century of existence).

181. See 1 Arber, *supra* note 154, at 247 (complaining of an unskilled printer who exhibited disordered behavior).

182. In one petition for a privilege, the author wrote that "by the culpable negligence and ignorance of printers the texts of editions become every day more corrupt, which thing is a dishonour and a public injury to this glorious city." BROWN, *supra* note 110, at 56.

In one letter expressing concern over the establishment of a proposed press at Cambridge University, the wardens¹⁸³ of the Company expressed their concern over the “disordered behavior of printers” generally and in particular the “unskillful” master of the specific printing house.¹⁸⁴ They further expressed concern over “the apprentices and other youths that shall be brought up in that faculty there shall not be under our government, and so careless of their behavior.”¹⁸⁵ In a second letter concerning the same subject, the author explains that he granted a warrant to wardens of the Company “to search and to stay” what purported to be University of Cambridge presses, in part on the report that the owner was “utterly ignorant in printing” and fear that work would be done “by servants . . . of the worst quality.”¹⁸⁶ Perhaps ironically, members of the Company were prohibited from training anyone except their own sons or bound apprentices of lawfully authorized printers.¹⁸⁷ As evidence of rules addressing quality, there is an entry in the Company’s register dating back to December 1557, recording receipt of a fine assessed against a member for binding books “in shepes lether / contrary to our ordenaunces.”¹⁸⁸

The stationers were also concerned about what they considered unprofessional conduct that needed to be regulated. According to a letter sent by the wardens of the Company in 1578, the Company was organized to address “the disorders in printing . . . to the end we might restrain many evils which would have happened in the said profession,” and further notes the Company’s “endless toil to withstand the lewd attempts of many in our profession.”¹⁸⁹ The letter does not provide a complete explanation of what the “many evils and lewd

183. See JOHN FEATHER, *A HISTORY OF BRITISH PUBLISHING* 35 (1988). The Company had an Upper Warden and an Under Warden who were elected officers of the Company. *Id.*

184. 1 Arber, *supra* note 154, at 247 (quoting Company Wardens’ letter to the Bishop of London, dated May 1583) (spelling standardized).

185. 1 *id.* (quoting Company Wardens’ letter to the Bishop of London, dated May 1583) (spelling standardized).

186. 1 *id.* at 246 (quoting a John London letter to the Bishop of London, dated May 1583) (spelling standardized).

187. 1 *id.* at 16 (quoting the rules of the Company from 1678).

188. 1 *id.* at 70; see also, e.g., 1 *id.* at 100 (recording fines for binding books in “shepes lether”); 1 Arber, *supra* note 154, at 158 (recording a fine for binding a book in parchment contrary to orders of the Company).

189. 1 *id.* at 247 (spelling standardized).

attempts” actually were; however, it is clear from other Company records that, among other things,¹⁹⁰ the Company was concerned about the publication of objectionable content¹⁹¹ and pirated editions of other printers’ works.

Queen Mary I clearly granted the 1557 charter to control the content being printed. The first paragraph of the charter itself states the following purposes:

Know ye that we, considering and manifestly perceiving that certain seditious and heretical books rhymes and treatises are daily published and printed by divers scandalous malicious schismatical and heretical persons, not only moving our subjects and lieges to sedition and disobedience against us, our crown and dignity, but also to renew and move very great and detestable heresies against the faith and sound catholic doctrine of Holy Mother Church, and wishing to provide a suitable remedy in this behalf¹⁹²

The charter granted the Company the power to search printing and bookselling establishments, to seize illegally printed books, and to imprison violators.¹⁹³

The issue of “pirated” editions of works was a problem for printers in England.¹⁹⁴ A printer relied upon sales of his work to recoup his costs and make the enterprise profitable. If another printer published the same work and placed the books on the market before the earlier edition sold out, sales of the original edition might be diminished. Moreover, the second printer’s preparation and printing costs could be substantially

190. Other “evil” conduct apparently included staying open on special holidays and on Sundays, *see, e.g.*, 1 *id.* at 94, 124 (noting fines levied for staying open and selling books on “festival day” and other fines levied for staying open on Sundays), quarreling, *see* 1 *id.* at 100 (noting fine for contentious words over conveyance of a copy), and for keeping a foreigner, *see* 1 *id.* at 101 (noting fine in part “for keypyng of a forren[er]”) (alteration in original); 1 *id.* at 123 (noting a fine for maintaining a foreigner without presenting him according to the Company’s ordinances).

191. *See* 1 Arber, *supra* note 154, at 26 (noting that the Company’s ordinance is an attempt to prevent printing of “[t]reasonable, [s]editious, and [s]candalous” materials); 1 *id.* at 247 (referring to dangers posed by some printers to the state and religion).

192. 1 *id.* at xxviii (quoting an English translation of the charter).

193. *See* 1 *id.* at xxxi (outlining the powers the charter granted the Company).

194. *See* BLAGDEN, *supra* note 103, at 32 (discussing the problem of pirated works by providing examples of printers such as Redman, Pynson, and Caxton).

reduced by virtue of the first edition.¹⁹⁵ A royal commission, recognizing the potential economic impact of an unregulated book trade, reported in 1583 “that the nature of boke and printing is such, as it is not meete, nor can be without their vndoeinges of all sides, that sondrie men shold print one boke.”¹⁹⁶ This concern was addressed by the Company which prohibited its members from printing a work when another member had registered the work on the Company’s register.¹⁹⁷ The Company’s earliest records show numerous fines for printing the works of other printers without permission.¹⁹⁸

A third purpose for the Company was an anticompetitive one. Members of the Company wanted to control the industry and impose their own standards; they knew that stiff, unregulated competition was hurting their businesses. The Company, with its nearly exclusive arrangement and rules, could impose some stability by minimizing the proliferation of printers and imposing standards on the competition. In a letter dated 1583 to the Bishop of London, the Company wardens urged against the establishment of a new printing house at the University of Cambridge. They argued that such a press was “now less requisite than ever heretofore it was by reason of the abundance of [p]rinters already in [L]ondon.”¹⁹⁹ In a subsequent letter written by the Bishop of London, he refers to the need to control the press, and he directs that orders “should be devised and taken for restraining the excessive number of printing presses.”²⁰⁰

These early private copyrights could be transferred by sale,²⁰¹ gift, or inheritance.²⁰² The Company records document

195. *Id.*

196. *Id.* at 42 (citing State Papers Domestic Elizabeth, vol. 161, no. 1(c) July 18, 1583).

197. See 1 Arber, *supra* note 154, at 22 (noting that in the Company’s ordinances from 1681, the holder of a registered copy has the sole right to print the work).

198. See 1 *id.* at 101 (noting a fine for printing “a nother mans Copye by waye of Desceate [deceit]”); 1 *id.* at 184 (noting a fine for printing “*the booke of husbandry beyng master Totteles*”); 1 *id.* at 239 (noting a fine for “pryntinge of other mens copyes”).

199. See 1 *id.* at 247 (spelling standardized).

200. See 1 *id.* at 246 (quoting the June 1583 letter).

201. See BLAGDEN, *supra* note 103, at 44 (“[B]uying and selling of copies became a frequent practice . . .”).

202. See FEATHER, *supra* note 151, at 18 (recognizing transfers by purchase, inheritance and gift).

numerous instances of assignments of these early copyrights.²⁰³ These private copyrights were of unlimited duration, although the Company allowed publication of works out of print with payment of royalties to the owner of the copyright.²⁰⁴

Through the ensuing years, the Company exercised its powers and, with the willing assistance of the courts of the Star Chamber, conducted searches and seizures of unauthorized presses and publications.²⁰⁵ During the sixteenth and early seventeenth centuries, the Star Chamber courts²⁰⁶ were charged with enforcing the censorship laws. The Star Chamber's decrees enjoyed the force of law, and its deliberations and proceedings were conducted in secret, originally in a chamber with stars painted on the ceiling (hence the name Star Chamber). The Star Chamber, by its decrees of 1586 and 1637, reaffirmed the Company's powers and required the registration of works in the Company's books prior to publication.²⁰⁷ These decrees are among the earliest English copyright laws. Professor Lyman Ray Patterson identifies the Star Chamber Decrees of 1586 and 1637, the Ordinances of 1643 and 1649, and the Licensing Act of 1662 as copyright acts predating the Statute of Anne in 1710.²⁰⁸

203. See, e.g., 2 Arber, *supra* note 154, at 309, 325 (noting the 1577 recording of a copy by Bamford and its later assignment to Jones); 2 *id.* at 312, 351 (noting the 1577 recording of a copy by Juggle and the later 1579 entry reflecting a sale to Jennings).

204. See 2 *id.* at 43, para. 5 (reproducing the text of the Company's order of about 1588).

205. See 2 Arber, *supra* note 154, at 807-12 (providing the text of the Star Chamber decree of June 23, 1586, which affirmed the Company's powers to search and seize); NICHOLS, *supra* note 166, at 572 (noting an attempted search by the Company of an "unruly" printer's printing house and its subsequent complaint to the Court); *id.* at 573 (noting that in 1586, the Star Chamber affirmed the Company's powers to search bookbinders shops and printing offices for unlawful or heretical books).

206. The court of the Star Chamber was "[a] court, chiefly of criminal jurisdiction, developed in the 15th c. from the judicial sittings of the King's Council in the Star Chamber at Westminster." 16 THE OXFORD ENGLISH DICTIONARY 529 (2d ed. 1989); see also PATTERSON, *supra* note 155, at 235 (discussing the "Court of Star Chamber").

207. See 2 Arber, *supra* note 154, at 810 (prohibiting in the 1586 Decree the printing of works not allowed by Queen or printing "contrary to any allowed ordinance set won for the good governance of the Company of Stationers") (English standardized); 4 *id.* at 529-30 (prohibiting in the 1637 Decree, the printing of works unless lawfully licensed and entered into the register book of the Company of Stationers).

208. PATTERSON, *supra* note 155, at 12; see also Lyman Ray Patterson, *The*

Thus, the Company, with the assistance of the Star Chamber courts, achieved its goal of controlling the book trade. By the same means, the government, with the help of the Company, censored the press and limited dissemination of objectionable materials.²⁰⁹ By the seventeenth century, however, the Company's monopoly power and unholy alliance with the Star Chamber courts became a political liability for the Company. In 1640, Parliament abolished the unpopular Star Chamber,²¹⁰ but the Company continued to enjoy monopoly power over the printing and book industries under a series of ordinances and the Licensing Act of 1662.²¹¹ The Licensing Act required that all books be entered on the Company's register,²¹² and books could not be printed without the consent of the copyright owner.²¹³ Under the Act, anyone building new printing presses or printing establishments had to give notice to the Company.²¹⁴ The Company also retained the power to search establishments and seize offending materials under the Act.²¹⁵

The Licensing Act enjoyed a series of renewals until

Statute of Anne: Copyright Misconstrued, 3 HARV. J. ON LEGIS. 223, 227-28 (1966). Professor Patterson suggests that the ambiguous Star Chamber Decree of 1566 might actually qualify as the first copyright act in England. Patterson, *supra*, at 227-28 n.18. *But see* Howard B. Abrams, *The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright*, 29 WAYNE L. REV. 1119, 1138 n.50 (1983) (disagreeing with Patterson and characterizing the Statute of Anne as the first copyright statute since it was the first statute expressly premised on author's rights).

209. *See* BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 3 (1966) (describing the "fellowship" where the stationers in exchange for trade advantages played the part of "literary constables" for the Queen).

210. 16 Car. I, c. 10 (1640). The Act passed in 1640 abolished the Star Chamber. *Id.*

211. The Licensing Act is also sometimes referred to as the Printing Act. *See* LORD KING, THE LIFE AND LETTERS OF JOHN LOCKE 204 (Garland Publishers 1972) (1884) (referring to the Printing Act); THE CORRESPONDENCE OF JOHN LOCKE AND EDWARD CLARKE 366-67 (Benjamin Rand ed., 1927) (referring to the "Act for printing").

212. The statute stated: "That no private person or persons whatsoever shall at any time hereafter print or cause to be printed any [b]ook or [p]amphlet whatsoever unless the same [b]ook and [p]amphlet . . . be first entered in the Book of the Register of the Company of Stationers of London . . ." 14 Car. II. c. 33 (1662) (spelling standardized) (capitalization altered). The statute provided for some exceptions.

213. *Id.*; *see also* Patterson, *supra* note 208, at 234 (noting that the Act required consent of the copyright owner).

214. 14 Car. II c. 33 (1662).

215. *Id.*

1694, when Parliament refused to renew the Act.²¹⁶ This refusal was based in part on resentment of the bookselling monopoly that a few publishers had effectively obtained through control of the Company and purchase of major copyrights.²¹⁷ The House of Commons, in refusing to renew the Act, observed that the stationers were “impowered to hinder the printing [of] all innocent and useful Books; and have an Opportunity to enter a Title for themselves, and their Friends, for what belongs to, and is the Labour and Right of, others.”²¹⁸ Moreover, the House of Commons objected to the Company’s powers to block book imports which drove up prices and limited access to valuable books,²¹⁹ and objected to provisions allowing searches of “all mens houses” “any time either by day or night” upon suspicion “that there [were] unlicensed books there.”²²⁰ Finally, the House of Commons objected to the open-ended censorship provision which prohibited offensive books without defining which books qualified as offensive.²²¹

The famous English philosopher John Locke, whose writings later strongly influenced the framers of the Constitution, was an important force in the defeat of the Licensing Act.²²² He opposed the Act and the stationers’ perpetual copyrights. He strongly disliked the Stationers’ Company and characterized the members as “dull wretches,”²²³ “lazy,” and “ignorant.”²²⁴ His objections were multifaceted, but his primary concern was for free expression²²⁵ and public access to works.

216. See Patterson, *supra* note 208, at 238 n.72 (discussing the lapse of the Licensing Act in 1694); ROSE, *supra* note 161, at 33 (stating that the Act expired on May 3, 1695).

217. See L. RAY PATTERSON & STANLEY W. LINDBERG, *THE NATURE OF COPYRIGHT: A LAW OF USERS’ RIGHTS* 27 (1991).

218. 11 H.C. JOUR. 306 (point 3) (1695) (spelling standardized).

219. *Id.* (points 6-8).

220. *Id.* (point 16) (capitalization altered).

221. *Id.* (point 15).

222. See ROSE, *supra* note 161, at 32 (discussing Locke’s efforts to defeat the Act); see also Mark Rose, *Nine-Tenths of the Law: The English Copyright Debates and the Rhetoric of the Public Domain*, 66 LAW & CONTEMP. PROBS. 75, 78-79 (2003) (questioning whether the drafters of the Statute of Anne and later jurists were aware of Locke’s views on copyrights).

223. KING, *supra* note 211, at 204 (citing Locke’s comments on the Licensing or Printing Act in 1694).

224. *Id.* at 207 (providing Locke’s comments on the Licensing or Printing Act in 1694); THE CORRESPONDENCE OF JOHN LOCKE AND EDWARD CLARKE 366-67 (Benjamin Rand ed., 1927) (reprinting a letter to a member of parliament dated Jan. 2, 1692 decrying “ignorant and lazy stationers”).

225. See KING, *supra* note 211, at 203 (commenting on censorship provisions,

He objected “[t]hat any person or company should have patents for the sole printing of ancient authors is very unreasonable and injurious to learning.”²²⁶ Locke complained that under the Act, the Stationers’ Company seized high quality imported books of classical authors, denying scholars the benefit of them unless they paid a fee.²²⁷ Locke argued, at least as to classical authors,

I demand whether, if another act for printing should be made, it be not reasonable that nobody should have any peculiar right in any book which has been in print fifty years, but any one as well as another might have the liberty to print it; for by such titles as these, which lie dormant, and hinder others, many good books come quite to be lost.²²⁸

Locke opposed perpetual copyrights as both harmful and unreasonable, remarking, “of [t]his I am sure, it is very absurd and ridiculous that any one now living should pretend to have a propriety in, or a power to dispose of the propriety of any copy or writings of authors who lived before printing was known or used in Europe.”²²⁹ Locke also advocated limited duration copyrights for works of modern authors, and suggested that “it may be reasonable to limit their property to a certain number of years after the death of the author, or the first printing of the book, as, suppose, fifty or seventy years.”²³⁰

The Company lobbied for many years to regain its monopoly powers and trade restrictions but was ultimately unsuccessful.²³¹ Although the Company did not succeed in recovering its former powers, its efforts resulted in the passage of the Statute of Anne in 1710, which imposed some regula-

noting that under the Act “it is impossible any book should pass but just what suits their [the censors’] humours”; *id.* (“I know not why a man should not have liberty to print whatever he would speak . . .”).

226. *Id.* at 208; ROSE, *supra* note 161, at 33.

227. KING, *supra* note 211, at 204-05.

228. *Id.* at 205.

229. *Id.* at 208-09; see also THE CORRESPONDENCE OF JOHN LOCKE AND EDWARD CLARKE 366-67 (Benjamin Rand ed., 1927) (reprinting a 1692, letter to Edward Clarke, a close friend and member of Parliament, criticizing the stationers’ monopoly on ancient authors).

230. KING, *supra* note 211, at 208.

231. See PATTERSON, *supra* note 155, at 138-42 (discussing the Company’s efforts to obtain new legislation); RANSOM, *supra* note 151, at 89-92 (discussing efforts to obtain new legislation during the period from 1694 to 1710).

tion on the book printing and selling trade and extended the term of existing copyrights for twenty-one years.

III. STATUTE OF ANNE

A. *An Act for the Encouragement of Learning*

The Statute of Anne, enacted in 1710,²³² is often referred to as the first English copyright statute²³³ and is the direct progenitor of American copyright law. The Statute of Anne differed from the Star Chamber Decrees, Ordinances of the Interregnum, and the Licensing Act in that it was neither a censorship law nor defined by efforts to impose censorship—it was a trade regulation law.

The failure to include censorship provisions in the Statute likely was not a concern for the stationers. In the past, they had used the government's desire to impose censorship to achieve their own objectives of monopoly control and preservation of valuable copyrights. The stationers were concerned about these objectives of monopoly power and the protection of valuable copyrights when they lobbied for a new statute to replace the Licensing Act. On December 12, 1709, in submitting their bill to the House of Commons, the booksellers and printers complained that "diverse Persons have of late invaded the Properties of others, by reprinting several Books, without the Consent, and to the great Injury, of the Proprietors, even to their utter Ruin, and the Discouragement of all Writers in any useful Part of Learning."²³⁴

In the political climate of the times, censorship was un-

232. The Statute of Anne is sometimes referred to as the Act of 1709. Under the old calendar, the new year in England began March 25 rather than January 1. The Act was enacted in what at the time was considered 1709, but is now considered 1710. See PATTERSON, *supra* note 155, at 3 n.3 (discussing the enactment and change to the calendar); PATTERSON & LINDBERG, *supra* note 208, at 249 n.22 (discussing the enactment and change to the calendar). The Act was generally effective April 10, 1710 (though one provision was effective March 25, 1710). See Statute of Anne, 8 Ann., c. 19 §§ I, IV, V (1710) (Eng.).

233. See Abrams, *supra* note 208, at 1138 & n.50 (characterizing the Statute of Anne as the first copyright statute). As noted earlier, this characterization is not strictly correct. See *supra* note 208 and accompanying text. The earlier English copyright enactments are most likely discounted because their copyright aspects were subservient to their primary censorship objectives, see PATTERSON, *supra* note 155, at 143, and because prior laws did not recognize copyright as an author's right, see Abrams, *supra* note 208, at 1138 n.50.

234. 16 H.C. JOUR. 240 (1709) (spelling standardized).

popular with Parliament and would no longer serve as a vehicle for the Company's control.²³⁵ The stationers then began to advocate the need for new protections unrelated to censorship relying in part on the interests of authors as a justification.²³⁶ The stationers, however, did not by any means attempt to hide their own self-interest in advocating for new protections; they wanted to protect what they considered to be their property rights in valuable "Copies" which they had acquired from authors.²³⁷

The Statute itself had one stated overarching purpose: the encouragement of learning. In its title the statute identifies both the purpose and the means of achieving that purpose, describing it as: "An act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned."²³⁸ In order to achieve the stated goal of encouragement of learning, the Statute had to address two problems; first, the injury caused by infringers who pirated works, and second, the anticompetitive monopolies of the publishers and booksellers. The Statute of Anne itself specifically identified the first of these problems in its introductory lines:

Whereas printers, booksellers, and other persons have of late frequently taken the liberty of printing, reprinting, and publishing, or causing to be printed, reprinted, and published, books and other writings, without the consent of the authors or proprietors of such books and writings, to their very great detriment, and too often to the ruin of them and their families: for preventing therefore such

235. See ROSE, *supra* note 161, at 31-32 (discussing the rise of sentiment against censorship).

236. Professor Benjamin Kaplan stated his opinion of the stationers position: "I think it nearer the truth to say that publishers saw the tactical advantage of putting forward authors' interests together with their own . . ." BENJAMIN KAPLAN, *AN UNHURRIED VIEW OF COPYRIGHT* 8 (1966); see also PATTERSON & LINDBERG, *supra* note 217, at 27-28 (discussing a ploy to use authors' interests).

237. When the stationers presented their bill—the basis for the Statute of Anne—to the House of Commons in 1709, they advocated for it by explaining:

it has been the constant usage, for the Writers of Books, to sell their Copies to Booksellers, or Printers, to the end they might hold those Copies as their Property, and enjoy the Profit of making, and vending, Impressions of them; . . . And praying, that Leave may be given to bring in a Bill for securing to them the Property of Books, bought and obtained by them.

16 H.C. JOUR. 240 (1709) (spelling standardized).

238. Statute of Anne, 8 Ann., c. 19 (1710) (Eng.) (spelling standardized).

practices for the future, and for the encouragement of learned men to compose and write useful books²³⁹

The second of these problems, the anticompetitive monopolies, is not specifically identified in the Statute but is directly addressed by its provisions.²⁴⁰

To attack the problem of piracy of works, the Statute of Anne adopted a philosophical shift from the prior stationers' copyright to the author's statutory copyright. Mark Rose, in his book *Authors and Owners: The Invention of Copyrights*, explains the situation of authors prior to the Statute of Anne:

In the seventeenth century, then, there may have been some feeling that authors should have the right to control the first publication of their writings. But in England at any rate no clearly defined set of authorial rights existed, and English authors had no obvious form of redress if books were published without their permission.²⁴¹

Just prior to the adoption of the Statute of Anne, prominent writers like Daniel Defoe²⁴² and Joseph Addison²⁴³ urged this philosophical embrace of authors' rights.²⁴⁴ Defoe advocated for statutory protection of authors' rights.²⁴⁵ In his view, an author's book or writing was his property. "A Book is an Author's Property, 'tis the Child or his Inventions, the Brat of his Brain; if he sells his Property, it then becomes the Right of the Purchaser"²⁴⁶ Defoe lamented the problem of literary piracy and concluded that an act of Parliament was needed "so Property of Copies may be secur'd to Laborious Students, to the Encouragement of Letters and all useful

239. *Id.*

240. See *infra* notes 274-82 and accompanying text (discussing how the Statute of Anne addressed monopolies).

241. ROSE, *supra* note 161, at 25.

242. Defoe was a prominent English writer who is known as the father of modern journalism. See THE COLUMBIA ENCYCLOPEDIA, *supra* note 24, at 20 (noting that Defoe's works included ROBINSON CRUSOE).

243. Addison was a writer and statesman who held a seat in Parliament from 1708 until his death in 1719. *Id.* at 20.

244. See ROSE, *supra* note 161, at 35-41 (discussing Addison and Defoe's writings urging recognition and protection of authors' property rights).

245. See FACSIMILE TEXT SOC'Y, 6 DEFOE'S REVIEW 363 (1938) (reprinting original document dated Nov. 3, 1709 that argued for a law to protect authors and complaining of failure to pass a bill). Defoe also understood the need for protection of editors as well. See *id.* at 404 (reprint of original dated Nov. 26, 1709) (urging a law "encouraging Learning, Arts, and Industry, by securing the Property of Books to the Authors or Editors of them").

246. *Id.* at 515 (reprinting original document dated Feb. 2, 1710).

Studies.²⁴⁷ Concerning one effort prior to the Statute of Anne to secure protection for copyrights, in a letter dated March 25, 1707, Defoe wrote to Secretary of State Robert Harley:²⁴⁸ "I hear the Bill for Secureing the Right of printed Coppys is stopt. I beg of you Sir in your Respect to Encouragemt of Letters and Dilligence in Learning to give it your help."²⁴⁹ Again in 1709, just prior to the adoption of the Statute of Anne, Defoe wrote of the public benefit that would come from protection of authors' rights.²⁵⁰ He claimed that failure to protect authors' rights resulted in "a Discouragement to Industry, a Dishonour to Learning, and a Cheat upon the whole Nation."²⁵¹ Defoe explained that if, because of a lack of copyright protection, authors are unable to make money through sale or publication of their works, then authors have a disincentive to publish, and both the authors and the buying public are cheated.²⁵²

His interest in the protection of authors' rights was quite personal. Defoe complained of "pirate printers" who abridged, corrupted, and reprinted everything he wrote.²⁵³ In 1703, two pirated editions of one of Defoe's works were published and according to Defoe, cost him £1,500.²⁵⁴ Defoe complained that as soon as an author publishes his work, a "raskally [f]ellow" buys it, reprints it, and undersells the original edition.²⁵⁵ He objected that "[t]his is down-right robbing on the High-way,

247. 5 *Id.* at 424 (reprinting original document dated Nov. 8, 1705) (spelling standardized).

248. Robert Harley was Speaker of the House of Commons, Secretary of State, and later Earl of Oxford and Lord Treasurer. *THE LETTERS OF DANIEL DEFOE* vi (George Harris Healey ed., 1969).

249. *Id.* at 212 (reprinting letter 100, dated Mar. 25, 1707).

250. To be certain, Defoe's concern was not merely for the public benefit. He also was concerned about the rights of authors and their families to benefit from their ideas and labors. *See, e.g.*, 6 *FACSIMILE TEXT SOC'Y*, *supra* note 245, at 363 (reprint of original dated Nov. 3, 1709) (discussing defense of property and authors' right to be compensated).

251. *Id.* (spelling standardized).

252. *Id.* at 531-32 (reprinting original document dated Feb. 11, 1710).

253. WILLIAM L. PAYNE, *THE BEST OF DEFOE'S REVIEW: AN ANTHOLOGY* 209 (1951) (quoting 3 *Review*, No. 16, Feb. 5, 1706).

254. *See* PAULA R. BACKSCHEIDER, *DANIEL DEFOE: HIS LIFE* 190-93 (1989) (discussing poem *Jure Divino*).

255. DANIEL DEFOE, *AN ESSAY ON THE REGULATION OF THE PRESS* 27 (Oxford, Blackwell 1704) (Luttrell Reprints No. 7 1948); *accord* 5 *FACSIMILE TEXT SOC'Y*, *supra* note 245, at 424 (reprinting original document dated Nov. 8, 1705) (complaining about "a Pyrate Printer, [who] Reprints his Copy immediately, and Sells it for a quarter of the Price").

or cutting a Purse" and "is a Ruin to Trade, [and] a Discouragement to Learning."²⁵⁶

Defoe argued for the Statute of Anne and applauded its impact.²⁵⁷ In 1712, he made reference to copyrights "which are estates to many families, and to preserve which right from piracy and invasion, a very just and necessary law was made last Parliament, the advantage of which is happily found in many cases since."²⁵⁸

The writer and statesman Joseph Addison²⁵⁹ also called for protection of authors' rights. He lamented that an author "has no Property in what he is willing to produce, but is exposed to Robbery and Want, with this melancholy and just Reflection, That he is the only Man who is not protected by his Country, at the same Time that he best deserves it."²⁶⁰ Addison decried the conduct of literary pirates whom he characterized as "rogues within the law," "miscreants," "wretches," "rascals, plunderers, robbers, [and] highwaymen."²⁶¹ These pirates, he explained, "print any Book, Poem, or Sermon, as soon as it appears in the World, in a smaller Volume, and sell it (as all other Thieves do stolen Goods) at a cheaper Rate."²⁶² In discussing one author, Addison compared the author's brain to other men's land: "His Brain, which is his Estate, had a regular and different Produce as other Men's Land."²⁶³ Addison supported the Statute of Anne and argued for recognition of authors' rights as property to be protected from infringers.²⁶⁴

256. DEFOE, *supra* note 255, at 27. On another occasion, in 1709, Defoe complained of booksellers' conduct: "The Practice is the Shame and Scandal of the present Time—and gives a Liberty to daily Invasions of Property equal in Villany, to robbing a House, or plundering an Hospital." 6 FACSIMILE TEXT SOC'Y, *supra* note 245, at 363 (1938) (reprint of original dated Nov. 3, 1709). On yet another occasion, he complained of "the open Robberies and Depredations of Printers and Pyratic Booksellers." *Id.* at 419 (reprint of original dated Dec. 6, 1709). Upon reading Mr. Defoe's writing about the state of the printing industry, one might exclaim: "Yes, Mr. Defoe, now tell us how you really feel!"

257. See FACSIMILE TEXT SOC'Y, *supra* note 245, at 531 (reprinting of original document dated Feb. 11, 1710) (arguing for the passage of the Statute of Anne).

258. PAYNE, *supra* note 253, at 80 (quoting 3 *Review*, No. 2, Mar. 29, 1711).

259. Addison was a writer and statesman who held a seat in Parliament from 1708 to his death in 1719. THE COLUMBIA ENCYCLOPEDIA, *supra* note 24, at 20.

260. 2 THE TATLER 121-22 (Donald R. Bond ed., 1987) (1709).

261. *Id.* at 120.

262. *Id.*

263. *Id.* at 121.

264. See John Feather, *The Book Trade in Politics: The Making of the Copy-*

The stationers also recognized that protection of authors' copyrights—and by extension their own valuable copyrights—would serve an important public interest. Piracy of literature injured the proprietors of “copies” and resulted in “the Discouragement of all Writers in any useful Part of Learning.”²⁶⁵ The booksellers argued that without protection of copyrights, the book trade would be ruined and the public would suffer accordingly.²⁶⁶

The Statute of Anne is significant for its recognition of copyright as an author's right and for opening up the copyright registration process to nonmembers of the Company.²⁶⁷ The stationers' copyright was primarily a printer's right, and in fact only members of the Company could obtain them. Authors, as such, did not qualify for membership in the Company and technically were not entitled to hold the stationers' copyrights.²⁶⁸ There were isolated instances of authors who received copyrights for their own works and other instances of members of the Company who recorded the copyrights on behalf of non-members of the Company,²⁶⁹ but this avenue was not available to authors as a matter of right. The Statute of Anne changed all that.

Under the Statute, authors of books or other writings not already under existing stationers' copyrights²⁷⁰ and their assignees had “the sole liberty of printing and reprinting” their books and anyone who printed such works or sold infringing books without consent violated the Statute.²⁷¹ Furthermore, the Statute required entry of the title of the protected books in the register book of the Company. The register book was

right Act of 1710, in 8 PUBL'G HISTORY 19, 38 (1980) (noting that “Addison had been involved in the debates on the 1710 Copyright Bill, which he had supported on the grounds that authors ought to be protected”).

265. 16 H.C. JOUR. 240 (1709) (spelling standardized).

266. See Feather, *supra* note 264, at 19, 34 (giving booksellers' arguments in favor of the new bill).

267. PATTERSON, *supra* note 155, at 147 (suggesting that the use of authors' interests was primarily a weapon to attack the stationers' monopoly and was really more a matter of “form than of substance”). He discounts the suggestion that Parliament primarily intended to benefit authors. *Id.* at 145-46.

268. *Id.* at 5.

269. See *id.* at 65-66 (citing examples from the Company's register).

270. Statute of Anne, 8 Ann., c. 19, § I (1710) (Eng.) (allowing owners of existing stationers' copyrights, be they authors, booksellers, printers, or others, to enjoy the exclusive privilege for a term of twenty-one years from the Statute of Anne).

271. *Id.*

required to be available to any person for inspection. If the clerk of the Company refused to make an entry, an author or other owner of the copy could achieve the same result by advertisement in the *Gazette* and the clerk would be fined.²⁷² In a further significant development, the Statute returned a copyright to the author, if living, upon the expiration of the initial fourteen-year term for a second fourteen-year term.²⁷³ By shifting the focus of copyright to authors, and opening the process to authors (and others who might receive copyrights from authors), the Statute of Anne addressed authors' concerns about piracy.

The second problem, that of booksellers' monopoly power, is addressed by the Statute in several ways. First, it opened up ownership and registration of copyrights to nonmembers of the Company.²⁷⁴ Second, it required access to the Company's register book by any person with a legitimate purpose.²⁷⁵ Third, it allowed challenges to unreasonably high prices for books and permitted specified authorities to "reform or redress" the price "according to the best of their judgments."²⁷⁶ Fourth, it required the deposit of nine copies of each work for use in specified national libraries.²⁷⁷ Fifth, it expressly stated that the Statute did not prohibit importation or sale of books in Greek, Latin, or other foreign languages published abroad.²⁷⁸ Finally, it provided that after the initial term of the copyright, the copyright returned to the author for an additional term.²⁷⁹

The Statute also attacked monopolies by limiting the term of copyrights. Existing stationers' copyrights would be enforceable for twenty-one years "and no longer."²⁸⁰ Unpublished books or books composed after the Statute would enjoy a copyright term of fourteen years "and no longer," commenc-

272. *Id.* § III.

273. *Id.* § XI.

274. *Id.* §§ I-III.

275. *Id.* § III.

276. Statute of Anne, 8 Ann., c. 19, § IV (1710) (Eng.). There is no evidence that this price control provision was ever invoked, but perhaps it had a prophylactic effect by discouraging would-be offenders. PATTERSON & LINDBERG, *supra* note 217, at 29. The provisions for price control were abandoned in 1739. *See* 12 Geo. 2, c. 36 (1739).

277. Statute of Anne, 8 Ann., c. 19, § V (1710) (Eng.).

278. *Id.* § VII.

279. *Id.* § XI.

280. *Id.* § I.

ing at first publication,²⁸¹ with an additional fourteen-year term for the author if the author was then living.²⁸² The added emphatic words “and no longer,” make clear the Statute’s intent that copyright terms be finite. The Statute intended ultimately to end existing copyrights, and limit the duration of future copyrights. The limited terms under the Statute contrasted with the perpetual term enjoyed under stationers’ copyrights would free up works for general use in the future.

The important point is this: the Statute of Anne, the ancestor of American copyright law, had as its foremost objective the encouragement of learning—a general public interest—not the private economic interests of authors, printers, or publishers.²⁸³ It did have a secondary interest for the economic security of authors and other proprietors of books and writings, but this secondary concern was driven by the impact that the void of regulation had upon the creation of “useful books.”²⁸⁴

The public benefit objective is indicated by the language of the Statute and by its design. Its title begins that it is “an Act for the Encouragement of Learning.”²⁸⁵ Its statement of purpose announces that it was “for the encouragement of learned men to compose and write useful books.”²⁸⁶ Its term of years and emphatic language “and no longer,”²⁸⁷ limited the term of copyrights. After expiration of the statutory copyright, the work entered the public domain and was available to others.²⁸⁸ Its provisions made copyright available to authors and other proprietors of books and otherwise undermined the stationers’ monopoly.

Removing obstacles to publication served the public pur-

281. *Id.*

282. *Id.* § XI.

283. John Feather discounts the public purpose motive. He concludes that the Statute of Anne “is essentially concerned with the protection of the rights of certain members of the book trade, and to a far lesser extent those of the buyers and readers of books, with a token gesture towards the good of society at large.” FEATHER, *supra* note 151, at 5.

284. Statute of Anne, 8 Ann., c.19, § I (1710) (Eng.).

285. *Id.* (title).

286. *Id.* § I.

287. *Id.*

288. The Statute did not use the term “public domain” or address what happened after the copyright expired, but this is the logical and necessary result of the Statute’s limited term copyrights. *See id.*

pose of generating more works for public use. This was accomplished by opening up the copyright registration process and by requiring open access to the records. The open records helped to avoid innocent infringement and to facilitate obtaining permission to publish from copyright owners, while the Statute's price control provisions, at least in theory,²⁸⁹ protected consumers from price gouging and made works more available to consumers. The deposit requirements for national libraries allowed access to the works by scholars and others. Also, the import provision made clear that, unlike the expired Licensing Act and prior laws, the Statute was not intended to block book imports.

As with virtually all legislation, there may have been other unspoken motives and purposes for the statute in the minds of some of its proponents. Nonetheless, there is no reason to assume that the statute's authors and supporters did not mean what they said nor intend the result that followed. Indeed, many of these public policy concerns—a desire to end monopolies and increase availability of printed works—were also the basis of the rejection of the Licensing Act several years earlier.²⁹⁰

One early source from 1735 reported that the Statute of Anne had the desired public interest results of encouraging learning and economic activity:

By this Act, learned Men have been incited to write and compile many Books, from whence the Publick has not only received the Advantages arising from useful Knowledge, but has laid the Foundation of a Property now become very valuable, and of a Manufacture which employs great Number of Hands, and is attended with many Advantages.²⁹¹

289. There is no evidence that the price control provision was ever invoked. It was ultimately repealed. *See supra* note 276.

290. *See supra* notes 216-30 (discussing reasons for rejection of the Licensing Act and Locke's reasons for opposing renewal of the Licensing Act).

291. FARTHER REASONS HUMBLY OFFERED TO THE CONSIDERATION OF THE HONOURABLE HOUSE OF COMMONS, FOR MAKING MORE EFFECTUAL AN ACT, PASSED IN THE EIGHTH YEAR OF THE REIGN OF HER LATE MAJESTY QUEEN ANNE, INTITLED, AN ACT FOR THE ENCOURAGEMENT OF LEARNING, BY VESTING THE COPIES OF PRINTED BOOKS IN THE AUTHORS OR PURCHASERS OF SUCH COPIES DURING THE TIMES THEREIN MENTIONED 1 (1735) [hereinafter FARTHER REASONS].

B. Common Law Copyright: We Never Knew You

1. The Concept of Common Law Copyright

The stationers and, in particular, those owners of stationers' copyrights found a temporary reprieve in the Statute of Anne, which reaffirmed and extended the terms of valuable extant non-statutory stationers' copyrights for a term of twenty-one years "and no longer."²⁹² After the dust settled and as the new statutory terms for copyrights began to run out, copyright owners (primarily booksellers) continued their battle to extend copyright protection. Their theory was that in addition to the limited-term statutory copyright afforded by the Statute of Anne, authors, and more importantly, their assignees possessed enforceable common law copyrights in perpetuity.

Legal scholars and historians have long debated whether a separate common law copyright, distinct from the Statute of Anne, existed in eighteenth-century England.²⁹³ To get to the bottom of this debate, the meaning of common law copyright must be understood. A common law right is a right based on general or local customs rather than written law. These common law rights were rooted in custom or usage, enforced or "discovered" by common law courts, and revealed in reported judicial decisions.²⁹⁴ According to one nineteenth century treatise on the laws of England, common law rights "receive[d] their binding power, and the force of laws, by long and immemorial usage, and by their universal reception throughout the kingdom."²⁹⁵ The custom giving rise to the common law right must be ancient; "[T]he goodness of a custom depends upon its having been used time out of mind . . . time whereof the memory of man runneth not to the contrary."²⁹⁶

292. Statute of Anne, 8 Ann., c. 19, § I (1710) (Eng.).

293. For a good discussion of the issue by a proponent of the view supporting the existence of common law copyright, see John F. Whicher, *The Ghost of Donaldson v. Beckett: An Inquiry into the Constitutional Distribution of Powers over the Law of Literary Property in the United States—Part I*, 9 BULL. COPYRIGHT SOC'Y 102 (1962).

294. 1 BROOM & HADLEY, *supra* note 10, at 43.

295. *Id.* at 40.

296. *Id.* at 41. *But see* THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 307 (5th ed. 1956) ("In so far as this phrase implies that custom is or ought to be immemorially old it is historically inaccurate" and finding

Common law copyright in the context of this debate is *not* what modern copyright lawyers have typically referred to as common law copyrights. Prior to the 1976 Copyright Act, courts and lawyers recognized common law copyright as the copyright that attached to an author's work at the time of the work's creation but prior to its general publication.²⁹⁷ Statutory copyright did not attach until general publication of the work.²⁹⁸ Exercising their common law copyrights, authors could prevent appropriation or unauthorized publication of their works indefinitely so long as federal statutory copyright protection did not attach.²⁹⁹ The 1976 Copyright Act altered the earlier copyright law scheme and no longer required publication. Instead, federal statutory copyright attached upon creation,³⁰⁰ which required fixation in a tangible medium of expression.³⁰¹ The 1976 Copyright Act specifically preempted common law rights for works that fell within the Act's scope.³⁰² Common law copyright continues to hold a place under the 1976 Act³⁰³ but that place is a small one claiming dominion only over works that remain unfixed.³⁰⁴

Protection for unpublished manuscripts was not the perpetual common law copyright intended by the stationers of the eighteenth century.³⁰⁵ Their concern was perpetual com-

"there was much less insistence upon actual or fictitious antiquity").

297. See, e.g., *Wheaton v. Peters*, 33 U.S. 591, 657 (1834) (noting "that an author, at common law, has a property in his manuscript, and may obtain redress against any one who deprives him of it . . . cannot be doubted"); *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 194 F.3d 1211, 1214 (11th Cir. 1999) (discussing common law copyright under the 1909 Act); *Estate of Hemingway v. Random House*, 244 N.E.2d 250, 254 (N.Y. 1968) (stating that "[c]ommon-law copyright is the term applied to an author's proprietary interest in his literary or artistic creations before they have been made generally available to the public.").

298. See, e.g., *Estate of Martin Luther King, Jr.*, 194 F.3d at 1214.

299. See Copyright Act of 1909 § 2, 35 Stat. 1075, 1076 (1909) (preserving common law remedies for unpublished works).

300. Copyright Act of 1976, 17 U.S.C. § 302(a) (2000).

301. See *id.* §§ 101, 102 (defining creation and works).

302. *Id.* § 301(a).

303. See *id.* § 301(b) (preserving common law remedies in specific circumstances).

304. Examples of unfixed works to which common law copyright might apply would be choreography that is not filmed or notated, an extemporaneous speech, or an unwritten, unrecorded musical composition developed from memory. See H.R. REP. NO. 94-1476, at 131 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5747.

305. See *Wheaton*, 33 U.S. (8 Pet.) at 657 (regarding an author's right to his manuscript, "[T]hat is a very different right from that which asserts a perpetual

mon law copyright affording control of a work beyond publication and beyond the Statute of Anne's provided term.³⁰⁶

2. *Rejection of Common Law Copyright in Great Britain*

Perhaps the first hint of an argument for the existence of common law copyrights came from arguments made by booksellers pressing for legislation in 1710. According to John Feather, the booksellers argued that their version of the copyright bill confirmed common law rights but maintained that common law rights were insufficient.³⁰⁷ In 1735, in an effort to extend the term of the Statute of Anne, sponsors of the Bill argued that before the Statute of Anne, "Authors were deemed to have an absolute Right in their Compositions . . . to be preserved to Themselves and their Assignes," and cited for support the fact that the "eminent Lawyer, the late Lord Chief Justice Coke, [] by his Will devised to his Posterity the Right of Reprinting all the Books which he wrote."³⁰⁸

Professor Howard Abrams argues persuasively that no common law copyright existed prior to the Statute of Anne.³⁰⁹ He contends that no precedent prior to the Statute of Anne recognized common law copyright aside from unreported, uncontested *ex parte* chancery cases granting preliminary injunctions.³¹⁰

In 1769, *Millar v. Taylor* became the first case to face the issue squarely and recognize common law copyright in published works.³¹¹ The issue of perpetual common law copyright had been presented earlier in *Tonson v. Collins*,³¹² but *Tonson* was never decided. At issue in *Tonson* was the defendant's publication of Joseph Addison and Richard Steele's *Spectator*,

and exclusive property in the future publication of the work, after the author shall have published it to the world").

306. See *Millar v. Taylor*, 98 Eng. Rep. 201, 202 (K.B. 1769) (stating arguments of plaintiff that "there is a real property remaining in authors, after publication of their works" and such right "is a common law right, which always has existed, and does still exist").

307. See Feather, *supra* note 264, at 34 (giving booksellers' arguments in favor of the new bill).

308. FARTHER REASONS, *supra* note 291, at 1.

309. See Abrams, *supra* note 208, at 1138-47 (discussing the history of common law copyright).

310. See *id.* at 1142-43.

311. *Millar*, 98 Eng. Rep. at 201.

312. 96 Eng. Rep. 169 (K.B. 1761); *Tonson v. Collins*, 96 Eng. Rep. 180 (K.B. 1762).

first published in 1711.³¹³ The judges refused to proceed with the case after they discovered that the parties had colluded in an effort to obtain precedent supporting common law copyright. Justice Willes in *Millar* explained:

[U]pon certain informations received by the Judges, "that the whole was a collusion; that the defendant was nominal only; and the whole expence [sic] paid by the plaintiff;" they refused to proceed in the cause . . . They thought, this contrivance to get a collusive judgment was an attempt of a dangerous example, and therefore to be discouraged.³¹⁴

In *Tonson v. Collins*, no less than Sir William Blackstone himself argued the case for the plaintiff, and Yates argued for the defendant.³¹⁵

The holding in *Millar v. Taylor* recognized a perpetual common law copyright, but the holding was only a short-lived victory for the proponents of common law copyright. In *Donaldson v. Beckett*, decided just a few years later in 1774, the House of Lords reversed the lower courts and overruled *Millar*.³¹⁶ The ultimate holding and rationale of *Donaldson* is obscure as a result of the appellate process and practices of the time. The case was finally decided by a vote in the House of Lords following non-binding advisory opinions written by eleven judges from the courts of Common Pleas, Exchequer, and King's Bench. According to Professor Abrams, the opinions of the judges were erroneously cited in America as controlling, and on top of that, the opinions were misunderstood and misreported.³¹⁷ These American courts and authorities incorrectly understood the opinions to find, based on a 6-5 split, that a perpetual copyright at common law existed but was preempted by the Statute of Anne.³¹⁸ Professor Abrams

313. *Tonson*, 96 Eng. Rep. at 169. Interestingly, Addison during his life had been a supporter of authors' rights and the Statute of Anne. See *supra* notes 259-64 and accompanying text (discussing Addison's support of author's rights and the Statute of Anne).

314. *Millar*, 98 Eng. Rep. at 214.

315. *Tonson*, 96 Eng. Rep. at 180.

316. *Donaldson v. Beckett*, 1 Eng. Rep. 847 (H.L. 1774).

317. Abrams, *supra* note 208, at 1164-71 & n.189.

318. *Id.* at 1164 & n.189; see also *Wheaton*, 33 U.S. at 655-56 (discussing opinions in *Donaldson*); *Am. Tobacco Co. v. Emil Werckmeister*, 207 U.S. 284, 291 (1907) ("[A] majority of the judges, while in favor of the common law right, held the same had been taken away by the statute."); *Sarony v. Burrow-Giles Lithographic Co.*, 17 F. 591, 593 (C.C.S.D.N.Y. 1883) (stating that English

concludes that a majority of the judges supported the existence of common law copyright and *did not* believe that the Statute of Anne preempted the right.³¹⁹ Accounts of the debate in the House of Lords prior to its vote, however, reveal the Lords' strong antipathy to the existence of perpetual common law copyright.³²⁰

Defoe, an author and supporter of the Statute of Anne, did not acknowledge any kind of enforceable recognized common law right that predated the Statute of Anne. In urging the need for a statute he makes clear his view that there was no remedy available in England to authors whose works were pirated. He did not complain about limited but ineffective common law protection; he gave no hint of any existing remedies. In 1709, he wrote concerning "the open Robberies and Depredations of Printers and Pyratic Booksellers":

In a well govern'd Nation as this is, it was never known, that open Robbery should be allow'd . . . without any Punishment When in this Case a Man has his Goods stollen, his Pocket pick'd, his Estate ruin'd, his Prospect of Advantage ravish'd from him, after infinite Labour, Study, and Expence, and has no Remedy, no Justice to fly to—no Court to have Satisfaction in, nor any Method to prevent it³²¹

Blackstone, in his first edition of *Commentaries on the Laws of England* in 1766, acknowledged that there was no "direct determination upon the right of authors at the common law."³²² Citing decisions from chancery courts and legislative recognition of copyrights, Blackstone favored the existence of common law copyright.³²³ His favorable disposition

courts had recognized perpetual common law copyright), *aff'd* 111 U.S. 53 (1884).

319. Abrams, *supra* note 208, at 1166.

320. *See id.* at 1161 ("The text of the Lords' statements reveals, an emphatic and total rejection of the notion of common law copyright."); *id.* at 1161-64 (discussing House of Lords' debate).

321. 6 FACSIMILE TEXT SOC'Y, *supra* note 245, at 419 (reprint of original dated Nov. 3, 1709). *But see* 1 *id.* at 295 (reprint of original dated Nov. 4, 1704) (stating in column entitled "Advice from the Scandal Club" in response to a letter complaining about piracy of a work that the Proprietor should "take his Remedy at Law") (spelling standardized).

322. 2 WILLIAM BLACKSTONE, ESQ., COMMENTARIES ON THE LAWS OF ENGLAND 406 (Oxford, Clarendon Press 1766).

323. *Id.* at 407 ("But much may be gathered from the frequent injunctions of the court of chancery, prohibiting the invasion of this property"; "Much may also be collected from the several legislative recognitions of copy-

was no surprise because Blackstone was legal counsel for the plaintiffs in both *Tonson* and *Millar*, in which he argued for the existence of common law copyright.³²⁴ By the time the *Donaldson* decision was rendered, Blackstone was a justice on the Court of Common Pleas, and he issued an opinion supporting the existence of common law copyright.³²⁵ In later editions of the *Commentaries*, Blackstone acknowledged the holdings in *Millar* and *Donaldson*.³²⁶

Whatever may have been the case prior to the Statute of Anne, after the 1774 ruling of the House of Lords in *Donaldson v. Beckett*, it was settled that the Statute of Anne had preempted such a common law right, if it ever had existed.³²⁷

IV. UNDERSTANDING OF COPYRIGHT IN THE UNITED STATES DURING THE EIGHTEENTH CENTURY

A. *The Copyright Clause of the Constitution*

1. *Early State Copyright Laws*

In 1783 in the United States, various states began to pass copyright laws³²⁸ due in large part to the efforts of Noah Webster³²⁹ and other like-minded individuals.³³⁰ The Conti-

rights") (spelling standardized).

324. See *Tonson*, 96 Eng. Rep. at 180; *Millar*, 98 Eng. Rep. at 201.

325. *Donaldson*, 1 Eng. Rep. at 847.

326. See 2 BLACKSTONE, *supra* note 322, at 407 & n.h (citing *Millar* and *Donaldson*).

327. *Donaldson*, 1 Eng. Rep. at 837.

328. See HARRY R. WARFEL, NOAH WEBSTER: SCHOOLMASTER TO AMERICA 54-58 (1936) (discussing Webster's efforts to obtain copyright legislation in various states); *id.* at 58 (arguing that "Webster unquestionably is the father of copyright legislation in America."); Irah Donner, *The Copyright Clause of the U.S. Constitution: Why Did the Framers Include It with Unanimous Approval?*, 36 AM. J. LEGAL HIST. 361, 370-74 (1992) (discussing Webster's efforts to obtain copyright protection). But see BRUCE W. BUGBEE, GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW 110, 123 (1967) (questioning the actual impact of Webster's efforts; concluding that "the share of accomplishment which he claimed for himself shrinks in light of the evidence").

329. See NOAH WEBSTER, LETTERS OF NOAH WEBSTER 1, 5, 8, 57 (Harry R. Warfel ed., 1953) (providing copies of correspondence requesting passage of copyright acts in Connecticut, New York, and Virginia, and summarizing copyright laws passed in the various states). Webster was motivated by a desire to protect his spelling and grammar book, *The Grammatical Institute of the English Language*, known as the "Blue-backed Speller." See, e.g., *id.* at 9 (referring to the *Grammatical Institute* and efforts to obtain copyright protection for it).

mental Congress encouraged the process. In a letter to the President of Congress dated January 10, 1783, Joel Barlow,³³¹ Webster's classmate at Yale, friend and fellow author, urged the Congress to encourage the states to pass copyright legislation.³³² In his letter, Barlow relied upon the public benefit rationale; he maintained that copyright was "a subject in which . . . the interest & honor of the Public is very much concerned."³³³ He referred to the need to provide "encouragement" "to the exertions of genius" to "dignify the manners of a nation."³³⁴ But Barlow also strongly relied upon the property right view. "There is certainly no kind of property . . . so much his own, as the works which a person originates from his creative imagination . . . it is a principle of natural justice that he should be entitled to the profits arising from the sale of his works"³³⁵

The Continental Congress complied with Barlow's request. According to its own record, the Continental Congress was prompted to action by "sundry papers and memorials from different persons."³³⁶ With the active support and participation of James Madison, on May 2, 1783, the Continental Congress adopted a resolution which "recommended" that the individual states enact laws to protect copyrights for not less than fourteen years.³³⁷ James Madison also helped Webster

330. See BUGBEE, *supra* note 328 at 110-11 (attributing adoption of early state copyright laws to efforts of Noah Webster and Joel Barlow).

331. For a biography of Joel Barlow, an early American poet and writer, including information on his friendship with Noah Webster, see generally CHARLES BURR TODD, *LIFE AND LETTERS OF JOEL BARLOW* (London, G.P. Putnam's Sons 1886).

332. NATIONAL ARCHIVES, 4 PAPERS OF THE CONTINENTAL CONGRESS, 1774-1789 at No. 78, folio 369 (1971), *reprinted in part in* BUGBEE, *supra* note 328, at 111-12.

333. *Id.*

334. *Id.* ("Indeed we are not to expect to see any works of considerable magnitude, (which must always be works of time and labor) offered to the Public till [sic] such security is given.")

335. *Id.* (maintaining also a copyright was "a subject in which . . . the interest & honor of the Public is very much concerned").

336. 24 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 326 (Gailard Hunt ed., 1922) [hereinafter CONTINENTAL CONGRESS JOURNALS].

337. See COPYRIGHT OFFICE, COPYRIGHT ENACTMENTS: LAWS PASSED IN THE UNITED STATES SINCE 1783 RELATING TO COPYRIGHT 1-21 (Bulletin No. 3, Rev. 1973) [hereinafter COPYRIGHT ENACTMENTS] (reprinting resolutions); CONTINENTAL CONGRESS JOURNALS, *supra* note 336, at 326-27 (reporting text of resolution from the committee and noting that Madison was one of the three members of the committee reporting the resolution).

obtain passage of copyright legislation in Virginia.³³⁸ Between 1783 and 1786, twelve of the states adopted copyright statutes; only Delaware did not.³³⁹

The terms of the copyrights granted by the states varied. Seven states provided for two fourteen-year terms;³⁴⁰ North Carolina provided for one fourteen-year term;³⁴¹ New Hampshire provided for one twenty-year term;³⁴² and three states provided for one twenty-one-year term.³⁴³ The statutes of Maryland and Pennsylvania were only to become effective after all states had passed similar copyright laws.³⁴⁴ Several states refused to extend protection to citizens of other states if the citizen's home state did not provide similar copyright protections.³⁴⁵ Most of the statutes required registration of the copyright with an appropriate designated state authority.³⁴⁶

The state copyright statutes generally recognized two interests promoted by copyright law: the personal property interest of authors and the public interest of the advancement of learning. The first copyright act in the United States was passed by the state of Connecticut in January 1783 and stated:

Whereas it is perfectly agreeable to the principles of natu-

338. See BUGBEE, *supra* note 328, at 120-21 (noting that Madison, a member of the Virginia House of Delegates, presented the bill and was a member of the committee which drafted and presented the bill, but noting that action on the bill was also attributable to Washington's influence).

339. See generally PATTERSON, *supra* note 155, at 183-92 (discussing states' copyright provisions).

340. These states were Connecticut, Georgia, Maryland, New Jersey, New York, Pennsylvania, and South Carolina. See COPYRIGHT ENACTMENTS, *supra* note 337, at 1-21 (reprinting respective statutes).

341. See *id.* at 15-17.

342. See *id.* at 8.

343. These states were Massachusetts, Rhode Island, and Virginia. See *id.* at 4-5 (discussing Massachusetts); *id.* at 9-10 (discussing Rhode Island); *id.* at 14-15 (discussing Virginia).

344. COPYRIGHT ENACTMENTS, *supra* note 337, at 6 (reprinting the Maryland statute that stated "[t]his act to commence and be in force from and after the time that similar laws shall be passed . . . in all and every of the United States."); *id.* at 11 (reprinting the Pennsylvania statute that stated "this act shall not take place until such time as all and every of the States in the Union shall have passed laws similar to the same").

345. See, e.g., *id.* at 3 (discussing Connecticut).

346. For example, Connecticut, Georgia, New Jersey, New York, North Carolina, and South Carolina required registration with the secretary of state. See *id.* at 2, 7, 13, 16, 17, 20. Maryland required registration with the clerk of the court. *Id.* at 6. Pennsylvania required registration with the prothonotary. *Id.* at 11. Virginia required registration with the clerk of the council. *Id.* at 15.

ral equity and justice, that every author should be secured in receiving the profits that may arise from the sale of his works, and such security may encourage men of learning and genius to publish their writings; which may do honour to their country, and service to mankind.³⁴⁷

Similarly, the preamble to the North Carolina statute acknowledged both interests as follows:

Whereas nothing is more strictly a man's own than the fruit of his study, and it is proper that men should be encouraged to pursue useful knowledge by the hope of reward; and as the security of literary property must greatly tend to encourage genius, to promote useful discoveries, and to the general extension of arts and commerce:

1. *Be it enacted . . .*³⁴⁸

In short, these laws acknowledged that authors had the right to benefit from their creations (the property rationale), but also recognized that protecting this right would advance the public good by encouraging creation of works (the public benefit rationale).

As with so many issues under the Articles of Confederation, the problem with implementing copyright protection on the state level was the resulting lack of uniformity between the various state laws with the attendant risks of eviscerating the value of the copyrights. James Madison wrote in *The*

347. *Id.* at 1. The New York and Georgia statutes followed closely the Connecticut statute and contain very similar language. See *id.* at 17 (discussing Georgia.); *id.* at 19 (discussing New York).

348. *Id.* at 15. The preamble to the Massachusetts statute used substantially different language but acknowledged the same interests.

Whereas the improvement of knowledge, the progress of civilization, the public weal of the community, and the advancement of human happiness, greatly depend on the efforts of learned and ingenious persons in the various arts and sciences: As the principal encouragement such persons can have to make great and beneficial exertions of this nature, must exist in the legal security of the fruits of their study and industry to themselves; and as such security is one of the natural rights of all men, there being no property more peculiarly a man's own than that which is produced by the labour of his mind.

Therefore, to encourage learned and ingenious persons to write useful books for the benefit of mankind:

Be it enacted . . .

Id. at 4; accord *id.* at 8 (discussing New Hampshire); *id.* at 9 (discussing Rhode Island). For statutes using different language but to the same effect, see *id.* at 5 (discussing Maryland); *id.* at 6 (discussing New Jersey); *id.* at 10 (discussing Pennsylvania).

Federalist No. 43 that the Copyright Clause was necessary because the “states cannot separately make effectual provision” for copyright protection.³⁴⁹ In the words of Justice Story:

It was beneficial to all parties, that the national government should possess this power; to authors . . . because, otherwise, they would be subjected to the varying laws and systems of the different states on this subject, which would impair, and might even destroy the value of their rights³⁵⁰

2. *The Copyright Clause—To Promote the Progress of Science*

Against the backdrop of the state copyright laws and concern for the need of uniform laws, the framers in 1787 included in the Constitution Article I, section 8, which states in relevant part that “[t]he Congress shall have Power . . . To Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”³⁵¹ This language was unanimously approved without debate at the Constitutional Convention.

Relatively little is known about the details of how the particular language was drafted or came to be included in the

349. THE FEDERALIST NO. 43, 222 (James Madison) (George W. Carey & James McClellan eds., 2001). The need for uniformity was recognized by the framers, *id.*, and states in the process of ratifying the Constitution. See 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 415 (Merrill Jensen, ed. 1976) (stating that the copyright power “could only with effect be exercised by the Congress”) (quoting Thomas McKean in debates of the Pennsylvania Convention, Nov. 28, 1787); 3 *id.* at 525 (citing Roger Sherman, *A Citizen of New Haven*, CONN. COURANT, Jan. 7, 1788) (stating that the Copyright Clause among others “appears to be necessary for the common benefit of the states and could not be effectually provided for by the particular states”). In the debates over ratification before the Pennsylvania Convention, Thomas McKean explained the problem:

For, sir, the laws of the respective [s]tates could only operate within their respective boundaries, and therefore, a work which had cost the author his whole life to complete, when published in one state, however it might there be secured, could easily be carried into another state in which a republication would be accompanied with neither penalty nor punishment—a circumstance manifestly injurious to the author in particular, and to the cause of science in general.

2 *id.* at 415.

350. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 402, § 1147 (Colorado, Fred B. Rothman & Co. 1991) (1833).

351. U.S. CONST. art. I, § 8, cl. 8.

Constitution, but there is no doubt that James Madison played an important—if not the most important—role in its drafting and inclusion.³⁵² By the time of the framing of the Constitution, Madison was no stranger to copyright law. Noah Webster first met Madison in 1782 and suggested the idea of copyright legislation.³⁵³ At that meeting, Webster presented his manuscript of *A Grammatical Institute of the English Language* to Madison for his review, and Madison approved of the idea for copyright legislation.³⁵⁴ In 1783, Madison, as a member of Congress, was part of the three-member committee whose report brought the resolution calling for state copyright protection.³⁵⁵ Shortly thereafter, in 1785, Madison actively participated in drafting and passing copyright legislation in the Virginia Legislature.³⁵⁶

352. Charles Pinckney of South Carolina may deserve particular credit for first suggesting the power to issue patents. EDWARD C. WALTERSCHEID, *THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE* 103 (2002) (concluding that Pinckney may have been the first to propose patent power); *see also id.* at 82 (suggesting substantial credit goes to Pinckney for the intellectual property clause). Others have been more skeptical of his role. *See* Fenning, *supra* note 3, at 109-13 (stating that contrary to some suggestions, the clause was not originally included in Pinckney's South Carolina plan and arguing that Madison is entitled to as much credit as Pinckney). According to Walterscheid, Madison's role was more "in the context of protecting the rights of authors rather than those of inventors." WALTERSCHEID, *supra*, at 103. Bugbee concludes that both Madison and Pinckney must be given credit for inclusion of copyright authority. BUGBEE, *supra* note 328, at 127.

353. WARFEL, *supra* note 328, at 55.

354. *Id.*

355. COPYRIGHT ENACTMENTS, *supra* note 337, at 1; CONTINENTAL CONGRESS JOURNALS, *supra* note 336, at 326; IRVING BRANT, *JAMES MADISON: THE NATIONALIST 1780-1787* 370-71 (1948) (noting that Madison helped draft the resolution). The CONTINENTAL CONGRESS JOURNALS states:

The committee, consisting of Mr. [Hugh] Williamson, Mr. [Ralph] Izard and Mr. [James] Madison, to whom were referred sundry papers and memorials from different persons on the subject of literary property, being persuaded that nothing is more properly a man's own than the fruit of his study, and that the protection and security of literary property would greatly tend to encourage genius, to promote useful discoveries and to the general extension of arts and commerce, beg leave to submit the following report

Supra note 336, at 326.

356. *See* WARFEL, *supra* note 328, at 58, 132 (noting Madison's acquaintance with Webster and Madison's assistance in obtaining copyright legislation in Virginia); LETTERS OF NOAH WEBSTER 8-9 (Harry R. Warfel ed., 1953) (noting a letter from Webster to Madison dated July 5, 1784, asking him to introduce copyright legislation in the Virginia Assembly); *id.* at 39 (noting a letter from Webster to Washington, dated Dec. 16, 1785, discussing Webster's trip to Richmond and his success in obtaining copyright legislation in Virginia).

In April 1787, just prior to the Constitutional Convention, Madison commented on the weaknesses of the Confederation and noted, among other things, “the want of uniformity in the laws concerning naturalization and literary property.”³⁵⁷ The Constitutional Convention first met to begin its work on May 14, 1787.³⁵⁸ During the course of the Constitutional Convention, Webster and Madison met socially.³⁵⁹ On August 18, 1787, James Madison proposed that the Constitution grant the legislature power “[t]o secure to literary authors their copyrights for a limited time.”³⁶⁰ On the same day, Charles Pinckney also proposed to include the power “[t]o secure to Authors exclusive rights for a certain time.”³⁶¹ These proposals were initially referred to the Committee of Detail. Later, on August 31, 1787, the Committee of Eleven, which included Madison, was appointed to consider convention items postponed or not yet acted on.³⁶² The Committee of Eleven, on September 5, 1787, reported the language of the Copyright Clause now included in the Constitution, and the language was agreed to unanimously.³⁶³ The Copyright Clause does enjoy some similarity with the Continental Congress’s resolution and the Virginia copyright act, both of which Madison participated in drafting.³⁶⁴ The resolution encouraged states “to secure to the authors . . . the copy

357. Fenning, *supra* note 3, at 113 (quoting 4 STATE DEP’T, DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 128 (1894-1900)); *see* ERANT, *supra* note 355, at 411-12 (noting need for federal power over copyrights); BUGBEE, *supra* note 328, at 125.

358. 1 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at xi (1911). The delegates first met on May 14, 1787, but it was not until May 25, 1787, that sufficient delegates had gathered to actually organize the convention and remain in session.

359. *See* HARLOW GILES UNGER, NOAH WEBSTER: THE LIFE AND TIMES OF AN AMERICAN PATRIOT 130 (1998) (noting frequent visits and dinners with members of the convention including Madison); WARFEL, *supra* note 328, at 165 (noting that Webster had met or dined with numerous members of the Convention including Madison).

360. 2 FARRAND, *supra* note 358, at 325.

361. *Id.*

362. *Id.* at 481.

363. *See id.* at 505, 508-09. According to Madison’s notes the clause was agreed to “nem. con:.” *Id.* at 509 (abbreviating the Latin phrase *nemine contradicente*, meaning “with no one contradicting”); 10 THE OXFORD ENGLISH DICTIONARY 313 (1989).

364. *See* BUGBEE, *supra* note 328, at 126-27 (noting the similarity between the Virginia copyright act and the Continental Congress resolution).

right . . . for a certain time”³⁶⁵ The Virginia legislation was entitled “An Act securing to the authors of literary works an exclusive property therein for a limited time.”³⁶⁶

B. The Public Benefit Rationale for Copyright Protection and the Rejection of Perpetual Common Law Copyright

1. Language and Intent of the Copyright Clause

The Constitution adopted the utilitarian, public benefit rationale for copyright protection over the property right rationale. Some have argued that the use of the word “securing” in the Copyright Clause suggests recognition and confirmation of a preexisting common law right.³⁶⁷ This argument was posed to, and rejected by, the Supreme Court in 1834 in *Wheaton v. Peters*.³⁶⁸ The Court noted that the word referred to inventors as well as authors, and undisputedly inventors had no common law claim.³⁶⁹ “Securing” in the eighteenth century had multiple meanings, including not only to assure or make certain but also to obtain or provide.³⁷⁰

Although there is sparse extrinsic evidence concerning the framers’ understanding of the Copyright Clause or their intent in including the clause, Madison did reveal his understanding of the Copyright Clause. In *The Federalist No. 43*,³⁷¹ published on January 23, 1788, Madison wrote:

The utility of this power will scarcely be questioned. The copy-right of authors has been solemnly adjudged in Great Britain, to be a right at common law. The right to useful inventions, seems with equal reason to belong to the in-

365. COPYRIGHT ENACTMENTS, *supra* note 337, at 1.

366. *Id.* at 14 (capitalization standardized).

367. *See* *Wheaton v. Peters*, 33 U.S. 591, 600-01 (1834) (arguing that “it seems too plain, to admit of argument, that when the constitution authorizes congress to secure an acknowledged pre-existing right, and does not authorize them to grant it; it is an express declaration, that it subsists, and is to subsist, independently of their power”).

368. *Id.* at 660-61.

369. *Id.* at 661.

370. *See* WALTERSCHEID, *supra* note 352, at 212-26 (providing a thorough and thoughtful discussion of the meaning of “securing” in the Copyright Clause). For further discussion of the word “secure” as confirming an existing right, see *Wheaton*, 33 U.S. (8 Pet.) at 681, 691 (Thompson, J., dissenting) (discussing “secure” in the 1783 resolution calling for state copyright legislation and in the 1790 Act).

371. THE FEDERALIST NO. 43, *supra* note 349, at 222.

ventors. The public good fully coincides in both cases with the claims of individuals.³⁷²

Madison's reference to the common law right accepted in Great Britain is confusing because in fact, as noted earlier, the House of Lords in *Donaldson v. Beckett*³⁷³ in 1774 rejected perpetual common law copyright.³⁷⁴ Madison may have been referring to the earlier (overruled) decision in *Millar v. Taylor*³⁷⁵ or may have reflected a misunderstanding of the holding of *Donaldson*, possibly arising from the advisory judicial decisions offered in the case.³⁷⁶ Perhaps Madison was referring to the common law right of first publication.³⁷⁷ In any event, Madison recognized the "utility" of this provision and the harmony of the "public good" with "the claims of individuals."³⁷⁸ Madison's other writings clarify that he did not believe in perpetual common law copyrights rooted in the natural law rights of authors. In a letter, dated October 17, 1788, Madison responded to Thomas Jefferson's objection³⁷⁹ to even the limited monopoly of copyright:

With regard to Monopolies they are justly classed among the greatest nuisances [sic] in Government. But is it clear that as encouragements to literary works and ingenious discoveries, they are not too valuable to be wholly renounced? Would it not suffice to reserve in all cases a right to the public to abolish the privilege at a price to be

372. *Id.*

373. 1 Eng. Rep. 847, 847 (H.L. 1774).

374. *See supra* notes 316-320 and accompanying text (discussing holding of *Donaldson*); *see also* Abrams, *supra* note 208, at 1161 (noting House of Lords' total rejection of common law copyright).

375. 98 Eng. Rep. 201, 201 (K.B. 1769).

376. *See* Abrams, *supra* note 208, at 1177 (discussing THE FEDERALIST NO. 43).

377. Tyler T. Ochoa & Mark Rose, *The Anti-Monopoly Origins of the Patent and Copyright Clause*, 49 J. OF COPYRIGHT SOC'Y 675, 690 (2002). Madison viewed an author's unpublished work as the author's own private property. *See supra* notes 371-72 and accompanying text (quoting Madison on the need for limited monopoly as payment to authors for release of their property to the public).

378. THE FEDERALIST NO. 43, *supra* note 349, at 222.

379. 1 THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON 1776-1826, at 545 (James Morton Smith ed., 1995). Jefferson, in a letter dated July 31, 1788, objected to a limited copyright monopoly: "The saying there shall be no monopolies lessens the incitements to ingenuity, which is spurred on by the hope of a monopoly for a limited time, as of 14 years; but the benefit even of limited monopolies is too doubtful to be opposed to that of their general suppression." *Id.*

specified in the grant of it?³⁸⁰

Madison reluctantly supported the limited monopoly of copyright in order to encourage the creation of literary works. Copyright was a “grant” and a “privilege” bestowed by the government. The words “grant” and “privilege” support a positive law theory of copyright and are inconsistent with an inherent property right theory.³⁸¹

Madison on another occasion characterized copyright as a “grant” when he warned that monopolies “ought to be granted with caution” and stated:

The Constitution of the United States has limited [monopolies] to two cases—the authors of Books, and of useful inventions, in both [of] which they are considered as compensation for a benefit actually gained to the community as a purchase of property which the owners might otherwise withhold from public use. There can be no just objection to temporary monopolies in these cases; but it ought to be temporary because under that limitation a sufficient recompense and encouragement may be given.³⁸²

Madison consistently viewed copyright as a grant of a limited monopoly, which served an important public purpose. This limited monopoly was acceptable because it was for a limited time and not perpetual.³⁸³ This passage also reveals Madison’s recognition that authors had property rights in their works prior to the publication of those works; the monopoly was a purchase of the author’s property to encourage its release to the public. Thomas Jefferson³⁸⁴ in his correspondence

380. *Id.* at 566.

381. See Ochoa & Rose, *supra* note 377, at 692 (arguing that use of “privilege” and “grant” indicate rights bestowed by government not confirmation of existing rights).

382. JAMES MADISON: WRITINGS 756 (Jack N. Rakove ed., 1999) (characterizing “detached memoranda,” possibly dating back to 1819, and entitled “Monopolies. Perpetuities. Corporations. Ecclesiastical Endowments.”); see also *Aspects of Monopoly One Hundred Years Ago*, 128 HARPER’S MAGAZINE 489, 490 (1914) (publishing for the first time Madison’s essay entitled “Monopolies, Perpetuities, Corporations, Ecclesiastical Endowments”).

383. See WALTERSCHEID, *supra* note 352, at 226 (stating that “[p]erpetual monopolies of every sort are forbidden”).

384. Jefferson was not a framer of the Constitution. He was the United States Minister to France at the time and was not available to participate in the Constitutional Convention. See, e.g., Lance Banning, *The Constitutional Convention, in THE FRAMING AND RATIFICATION OF THE CONSTITUTION* 112 (Leonard W. Levy & Dennis J. Mahoney eds., 1987) (noting that Jefferson, who was representing the United States abroad, was not part of the Convention); MAX

with Madison unambiguously expressed his dim view of even limited duration copyrights, which he viewed as monopolies.³⁸⁵

Noah Webster, on the other hand, supported perpetual copyright and adhered to the private property rationale for copyright protection.³⁸⁶ Yet he too understood that there was no recognized perpetual common law copyright in America. In 1783, Webster, in advocating for copyright legislation, acknowledged that no protection existed for copyright interests in the United States. In his request to the legislature of New York, he wrote that copyright legislation was needed “to secure to your petitioner the benefits of his own labors to which he conceives himself solely entitled but which are not protected by the laws that protect every other species of property.”³⁸⁷ Webster understood that he could not rely upon a theory of common law copyright protection for his work.

Later, in 1803, Webster argued that the interest in original literary works should be no different than all other personal property.³⁸⁸ He disagreed with the holding of *Donaldson v. Beckett*, but he understood that his own view was not gen-

BELOFF, THOMAS JEFFERSON AND AMERICAN DEMOCRACY 101 (1949) (noting that Jefferson was the American Minister to France from 1785-1789).

385. See 1 THE REPUBLIC OF LETTERS, *supra* note 379, at 545 (reprint of letter from Washington to Madison, dated July 31, 1788, arguing that benefit of limited copyright monopoly was doubtful). In a letter to Madison concerning the proposed Bill of Rights he argued that it should include language that “Monopolies may be allowed to persons for their own productions in literature and their own inventions in the arts for a term not exceeding ___ years but for no longer term and no other purpose.” *Id.* at 630 (reprinting letter from Jefferson to Madison, dated Aug. 28, 1789); see also WALTERSCHEID, *supra* note 352, at 9 (arguing that “Jefferson didn’t like the [intellectual property] clause at all”).

386. See *infra* note 388.

387. LETTERS OF NOAH WEBSTER 7 (Harry R. Warfel ed., 1953) (Webster’s “Memorial to the Legislature of New York” dated Jan. 18, 1783). Webster’s friend, Joel Barlow, also understood that statutory protection was necessary to protect copyrights. He stated that failure to protect authors was “one of the evils of society, which requires to be removed by positive statutes securing the copy-rights of authors, and in that way protecting a species of property which is otherwise open to every invader.” NATIONAL ARCHIVES, 4 PAPERS OF THE CONTINENTAL CONGRESS, 1774-1789 No. 78, folio 369 (1971).

388. See LETTERS OF NOAH WEBSTER, *supra* note 387, at 254 (Webster’s letter to Simeon Baldwin, Dec. 1803); *id.* at 383-86 (citing Webster’s letter to John Pickering, Dec. 1816, arguing that literary property should be on equal footing with other property and criticizing *Donaldson*); *id.* at 417-20 (discussing Webster’s letter to Daniel Webster, Sept. 30, 1826, criticizing *Donaldson* and calling for legislation “in placing this species of property on the same footing as all other property as to exclusive right and permanence of possession”).

erally accepted.³⁸⁹ He wrote: “Men are strangely influenced by habits of thinking, and *it is a common opinion* that literary composition . . . should be held only for a limited time, while a horse or an acre of land . . . is permanent inheritable estate.”³⁹⁰ Webster understood that the “limited times” language of the Copyright Clause was inconsistent with a natural right property theory of copyright protection. Again in an 1826 letter, he reluctantly admitted that since *Donaldson* “it seems to have been generally admitted that an author has not a permanent and exclusive right to the publication of his original works at common law.”³⁹¹

The legal authorities of the early nineteenth century also recognized the public benefit purpose behind copyright law. Legal scholar and Supreme Court Justice Joseph Story perceived the public benefit of copyright protection as both the inducement to prepare works and the public benefit of “full possession and enjoyment,” “without restraint,” after the expiration of the copyright.³⁹² Story did, however, accept the view that copyright had a common law origin.³⁹³

2. *The Copyright Act of 1790*

The first Congress enacted America’s first national copyright act in 1790.³⁹⁴ The Act, like the Copyright Clause and the Statute of Anne before it, emphasized the public benefit rationale for copyright protection. The Act was entitled: “An Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned.”³⁹⁵ If the property right rationale were controlling, a different title would have been expected. For example, titles such as “An

389. *Id.* at 254.

390. *Id.* (emphasis added).

391. *Id.* at 418 (noting Noah Webster’s letter to Daniel Webster, dated Sept. 30, 1826).

392. STORY, *supra* note 350, at 402, § 558.

393. *Id.* (noting that “[t]he copyright of authors in their works had, before the revolution, been decided in Great Britain to be a common law right”); *see also* 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 306-07 (N.Y., 1826) (noting “[i]t was for some time the prevailing and better opinion in England, that authors had an exclusive copyright at common law, as permanent as the property of an estate”).

394. *See* Act of May 31, 1790, ch. 15, 1 Stat. 124 (1790). The bill was introduced June 23, 1789 and passed May 31, 1790.

395. *Id.*

Act for the protection of authors and proprietors of copies, to secure to them their property in maps, charts, and books” or “An Act for securing property of authors and proprietors of copies in their maps, charts, and books” would be more consistent with a property right rationale. But protecting property rights of authors and their successors was not Congress’s primary objective.

The Copyright Act of 1790 does assume the existence of copyrights prior to the Act. It granted protection to an author who had “not transferred to any other person the copyright” of a map, chart, or book, and to others who had “purchased or legally acquired the copyright of any such map, chart, book or books.”³⁹⁶ This language, as Walterscheid points out, “suggests a perception by Congress that it was not creating a right but rather affirming and protecting an existing right.”³⁹⁷ In *Wheaton v. Peters*, counsel made this argument to the Supreme Court:

The import of the act of congress of 1790 is, that before its enactment, there were legal rights of authorship existing; it provides for existing property, not for property created by the statute. There is nothing for its provision to stand upon, but the common law. The law is not one of grant or bounty; it recognizes existing rights, which it secures.³⁹⁸

The Supreme Court rejected the argument, holding that the reference to subsisting copyrights referred to the common law property right in the manuscript.³⁹⁹ The Court further concluded that Congress, by providing that authors “shall have the sole right and liberty of printing,” was clearly not recognizing an existing right. “Could [Congress] have deemed it necessary to vest a right already vested. Such a presumption is refuted by the words [used]”⁴⁰⁰ These subsisting copy-

396. *Id.*

397. WALTERSCHEID, *supra* note 352, at 219.

398. *Wheaton v. Peters*, 33 U.S. 591, 653 (1834).

399. *Id.* at 661. In rejecting the argument, the Court remarked:

As before stated, an author has, by the common law, a property in his manuscript; and there can be no doubt that the rights of an assignee of such manuscript, would be protected by a court of chancery. This is presumed to be the copyright recognized in the act, and which was intended to be protected by its provisions. And this protection was given, as well to books published under such circumstances, as to manuscript copies.

Id.

400. *Id.*

rights may have been the common law right of first publication as suggested by the Court in *Wheaton*, or it may have referred to copyrights granted under state copyright statutes.⁴⁰¹ Admittedly, it may have referred to perceived common law copyrights.⁴⁰²

3. *Supreme Court Recognition of the Public Benefit Rationale of Copyright*

From early on, the Supreme Court has recognized the public benefit rationale for copyright protection and has rejected a natural law property right rationale and its close relative, perpetual post-publication common law copyright. The landmark copyright case *Wheaton v. Peters*⁴⁰³ laid the groundwork. *Wheaton* involved a dispute over, of all things, twelve volumes of reported United States Supreme Court cases ("Wheaton's Reports").⁴⁰⁴ Henry Wheaton, a Supreme Court reporter, and his copyright successor complained that Richard Peters infringed the plaintiffs' copyright by copying decisions from Wheaton's Reports and including them in his volume "Condensed Reports of Cases in the Supreme Court of the United States."⁴⁰⁵ Defendants in the case argued that the plaintiffs had no valid copyright because the plaintiffs had not complied with the requirements of the copyright statute, and the lower court dismissed the complaint.⁴⁰⁶

Counsel for Wheaton argued that a common law perpetual copyright existed concurrently with statutory copyright.⁴⁰⁷ The Court confirmed that an author has at common law a property interest in an unpublished manuscript, but found that the existence of common law post-publication perpetual copyright in England was "by no means free from doubt."⁴⁰⁸ At a minimum, the Court found that no common law copyright existed in England when Pennsylvania became a colony and doubted that such a concept could have been incorporated

401. See *Eldred v. Reno*, 239 F.3d 372, 379 (D.C. Cir. 2001), *aff'd sub nom.*, *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

402. WALTERSCHEID, *supra* note 352, at 219-20.

403. *Wheaton*, 33 U.S. at 591.

404. *Id.* at 618-19.

405. *Id.* at 593-95.

406. *Id.* at 595.

407. *Id.* at 595-98.

408. *Id.* at 657.

into the laws of Pennsylvania.⁴⁰⁹ In rejecting common law copyright, the Court concluded that “Congress, then, by [the 1790 Act], instead of sanctioning an existing right . . . created it.”⁴¹⁰ The Court held that the plaintiffs’ claim, if any, had to be brought under statutory copyright.⁴¹¹ Over a century later, the Court in *Mazer v. Stein*⁴¹² reaffirmed the holding of *Wheaton* when it held Congress’s statutes create copyright. “It did not exist at common law even though he had a property right in his unpublished work.”⁴¹³

In a long line of cases the Supreme Court has recognized that under the Constitution, the primary objective of copyright protection is not to reward authors but to benefit the public by encouraging the production of works.⁴¹⁴ Lower

409. *Wheaton*, 33 U.S. at 660.

410. *Id.* at 661; *see also id.* at 663 (“This right . . . does not exist at common law—it originated, if at all, under the acts of congress.”). The dissenters in *Wheaton* vigorously disagreed. *See id.* at 668-98.

411. *Id.* at 662; *Sarony v. Burrow-Giles Lithographic Co.*, 111 U.S. 53, 58 (1884) (recognizing the holding of *Donaldson*, that copyright is controlled by statute); *cf. Holmes v. Hurst*, 174 U.S. 82, 85 (1899) (concluding that rights in copyright are determined by the acts of Congress, although rights did exist at common law).

412. 347 U.S. 201 (1954).

413. *Id.* at 214-15; *see also Am. Tobacco Co. v. Emil Werekmeister*, 207 U.S. 284, 291 (1907) (citing *Wheaton* for the proposition that copyright is the creation of federal statute).

414. *See Feist Publications, Inc. v. Rural Telephone Serv. Co.*, 499 U.S. 340, 349-50 (1991) (stating that the primary objective of copyright protection was not to reward authors); *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 524, 526 (1994) (“The primary objective of the Copyright Act is to encourage the production of original literary, artistic, and musical expression for the good of the public.”); *N.Y. Times v. Tasini*, 533 U.S. 483, 496 n.3 (2001) (noting under Copyright Clause encouragement of individual effort is the best way to advance public welfare); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) stating:

The limited scope of the copyright holder’s statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and other arts.

Id.; *see also Mazer*, 374 U.S. at 219 (stating that reward to owners is secondary; “[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”); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948) (“The copyright law . . . makes reward to the owner a secondary consideration.”); *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) (“The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.”); *cf. Campbell v. Acuff-Rose Music, Inc.*,

courts, particularly the influential Second Circuit,⁴¹⁵ have followed the Supreme Court's lead.⁴¹⁶ In the words of Justice Stevens in *Sony Corp. v. Universal City Studios, Inc.*:

The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.⁴¹⁷

The Court acknowledged that the grant of copyright protection to authors is a means to achieve "an important public purpose."⁴¹⁸

The Court's latest pronouncements in *Eldred v. Ashcroft* continue to acknowledge the utilitarian public benefit rationale for copyright protection; "[t]he 'constitutional command,' we have recognized, is that Congress, to the extent it enacts copyright laws at all, create[s] a 'system' that 'promote[s] the Progress of Science.'"⁴¹⁹ In *Eldred*, however, the Court did step back from its prior statements. In a curious footnote, the Court criticized Justice Stevens' citation in his dissent of the Court's own prior cases: "Justice Stevens' characterization of reward to the author as 'a secondary consideration' of copyright law, understates the relationship between such rewards

510 U.S. 569, 579 (1994) (stating that the goal of copyright is "to promote science and the arts").

415. See *Gracen v. Bradford Exch.*, 698 F.2d 300, 305 (7th Cir. 1983) (Posner, J., recognizing the Second Circuit as "the nation's premier copyright court"); Leo J. Raskind, *Assessing the Impact of Feist*, 17 U. DAYTON L. REV. 331, 338 (1992) (recognizing that the Second Circuit historically has dominated developments in copyright law).

416. See, e.g., *Computer Assocs., Int'l v. Altai, Inc.*, 982 F.2d 693, 711 (2d Cir. 1992) ("The interest of copyright law is not in simply conferring a monopoly on industrious persons, but in advancing the public welfare . . ."); *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 980 (2d Cir. 1980) (noting that "the fundamental policy undergirding the copyright laws" is "the encouragement of contributions to recorded knowledge"); *Berlin v. E.C. Publ's, Inc.*, 329 F.2d 541, 543-44 (2d Cir. 1964) (stating "financial reward guaranteed to the copyright holder is but an incident of this general objective, rather than an end in itself").

417. *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

418. *Id.* at 429; accord *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 546 (1985) (quoting *Sony*).

419. *Eldred v. Ashcroft*, 537 U.S. 186, 212 (2003) (quoting *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 6 (1966)).

and the 'Progress of Science.'"⁴²⁰ The Court specifically cites footnote four of Justice Stevens' dissent, a footnote which consists entirely of a quotation to the Court's own opinion in *United States v. Paramount Pictures, Inc.*⁴²¹ Only twelve years earlier in *Feist Publications, Inc. v. Rural Telephone Service Co.*,⁴²² the Court confirmed that "[t]he primary objective of copyright is not to reward the labor of authors, but '[t]o promote the Progress of Science and useful Arts.'"⁴²³ Both *Paramount Pictures* and *Mazer v. Stein* had unambiguously held that "[t]he copyright law . . . makes reward to the owner a secondary consideration."⁴²⁴ Justice Stevens can hardly be faulted for relying on the Court's precedent.

In the same footnote, the Court criticized Justice Breyer's dissenting view "that 'copyright statutes must serve public, not private, ends.'"⁴²⁵ That "assertion," according to the Court "misses the mark," because "[t]he two ends are not mutually exclusive."⁴²⁶ Whether or not Justice Breyer missed the mark, he did correctly state what had theretofore been the law based on the Copyright Clause, the Court's prior cases, and other authorities.⁴²⁷ Even in light of the Court's unhappy footnote, the Court did continue to recognize the public benefit rationale for copyright protection that has consistently been a beacon for its prior cases.⁴²⁸

4. *Congressional Recognition of the Public Benefit Purpose of Copyright*

The Court's view of the purpose of copyright is in harmony with what has historically been Congress's understand-

420. *Id.* at 212 n.18.

421. *Id.*; *id.* at 227 n.4 (Stevens, J., dissenting) (quoting *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948)).

422. 499 U.S. 340 (1991).

423. *Id.* at 349.

424. *Paramount Pictures*, 334 U.S. at 158; *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (quoting *Paramount Pictures*).

425. *Eldred v. Ashcroft*, 537 U.S. at 212 n.18; *id.* at 247 (Breyer, J., dissenting).

426. *Id.* at 212 n.18.

427. *See id.* (citing not only the Court's prior cases but also the House Reports on the 1909 Copyright Act and the 1988 amendments to the 1976 Copyright Act and the views of James Madison in support of his position).

428. *Id.* at 212 (referencing the public purpose basis of copyright with references to the "Progress of Science," "public benefit," "public good," and "public ends").

ing of copyright.⁴²⁹ In a House committee report from 1830, the Committee on the Judiciary urged for copyright legislation lengthening the term of copyright protection. The report argued that “the United States ought to be foremost among nations in encouraging science and literature, by securing the fruits of intellectual labor,” but concluded that the United States was far behind Europe.⁴³⁰ The committee appreciated the connection between strong copyright protection and the production of works; it urged that “[w]e ought to present every reasonable inducement to influence men to consecrate their talents to the advancement of science.”⁴³¹ The report also reflected the influence of the property right rationale for copyright.⁴³² In a confusing run-on sentence, the report stated as fact that “[i]n England, the right of an author to the exclusive and perpetual profits of his book was enjoyed, and never questioned, until it was decided by Parliament . . . that the statute of Anne had abridged the common law right, which it conceded, had existed”⁴³³

As noted earlier, whatever may have been Congress’s impression in 1830, there had been substantial doubt about the

429. It may be unfair to ascribe any single view of copyright to Congress, a large collective body divided into two discrete houses, with hundreds of individual members, and whose membership changes on a regular basis. See Frank H. Easterbrook, *Statutes’ Domains*, 50 CHI. L. REV. 533, 544 (1983) (“Because legislatures comprise many members, they do not have ‘intents’ or ‘designs,’ hidden yet discoverable. Each member may or may not have a design. The body as a whole, however, has only outcomes.”). Nevertheless, attempting to divine congressional intent is basic to judicial review of federal statutes. See, e.g., *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984) (“If a court . . . ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.”) Consideration of committee reports, statements of individual members, and legislative results can provide some sense of what many, if not most, members of Congress did understand concerning the basis of copyright law. See, e.g., *Thornbury v. Gingles*, 478 U.S. 30, 43 n.7 (1986) (“We have repeatedly recognized that the authoritative source for legislative intent lies in the Committee Reports on the bill.”).

430. H.R. REP. NO. 3, at 2 (1830), *reprinted in* U.S. CONG. SERIAL SET 210 (1830).

431. *Id.*; see also 7 REG. DEB. 423 (1831) (statement by Rep. Ellsworth that bill would “enhance the literary character of the country” by providing additional inducements to men of learning and genius).

432. See Ochoa, *supra* note 3, at 31 (noting and documenting the view that members of Congress in 1831 believed copyright was a natural right).

433. H.R. REP. NO. 3, *supra* note 430, at 1-2; see also 7 REG. DEB. 423, *supra* note 431 (statement by Rep. Verplanck that “a right of property existing before the law of copyrights had been made” and arguing that authors enjoy a natural right to their works regardless of the statute).

existence of post-publication common law copyright, and furthermore, the House of Lords in *Donaldson v. Beckett* in fact did not concede its pre-Statute of Anne existence.⁴³⁴ The report also specifically cited the 1769 ruling in *Millar v. Taylor* and confused it with the later ruling in *Donaldson*.⁴³⁵ Furthermore the report leaned to the natural law property view of copyright when it stated that “[u]pon the first principles of proprietorship in property, an author has an exclusive and perpetual right, in preference to any other, to the fruits of his labor.”⁴³⁶ The report did not call for recognition of perpetual copyright but instead only advocated that an initial term of twenty-eight years followed by a renewal term of fourteen years was “not too liberal.”⁴³⁷

Later, Congress acknowledged the holding of *Wheaton* and rejected the natural law property theory of copyright. Both the House and Senate reports for the 1909 Copyright Act provided greater clarity when they stated that copyright under the Constitution “is not based upon any natural right that the author has in his writings . . . but upon the ground that the welfare of the public will be served.”⁴³⁸ The committees took this position notwithstanding visible advocates of the natural law property view and testimony to the committee supporting the natural law property position.⁴³⁹ Significantly, the Senate Committee on Patents apparently experi-

434. See *supra* notes 309-20 and accompanying text (discussing common law copyright and *Donaldson*).

435. H.R. REP. NO. 3, *supra* note 430, at 1-2. The full sentence in the report is:

In England, the right of an author to the exclusive and perpetual profits of his book was enjoyed, and never questioned, until it was decided in Parliament, by a small vote, in the case of Miller [sic] vs. Taylor, in the year 1769, and contrary to a decision of the same case in the King's Bench, that the statute of Ann [sic] had abridged the common law right, which, it was conceded, had existed, instead of merely guarding and securing it by forfeitures for a limited time, as was obviously intended.

Id.

436. *Id.* at 2.

437. *Id.*

438. H.R. REP. NO. 2222, at 7 (1909); S. REP. NO. 1108, at 7 (1909) (incorporating and quoting the House report); *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 580 (1985) (Brennen, J., dissenting) (quoting the House Report for the 1909 Copyright Act).

439. See Ochoa, *supra* note 3, at 33 n.76 (noting the position of the American Copyright League that copyright was a natural right); *id.* at 36 (noting testimony of Edward Everett Hale that copyright was a natural right of the author).

enced a quick conversion. A scarce two years earlier in 1907, the same Senate Committee on Patents concluded that the common law of England recognized that an author “should be entitled to the exclusive right to reproduce and sell for his own profit copies of his literary works,” and continued that music was entitled to the same protection afforded literary works.⁴⁴⁰ Music, literary, and artistic productions “were all intellectual works of an author, things born from the creative powers of the mind, nonexistent before, and natural property by virtue of their creation.”⁴⁴¹ Yet even in this report, in the very next sentence, the committee acknowledged that under the Constitution Congress was empowered to grant copyrights to encourage science and the useful arts.⁴⁴²

In a 1909 floor debate, Representative Currier, Chairman of the House Committee on Patents, stated that “there is no property right in writings” and confirmed that “[t]he courts have held again and again that the composer or the inventor has no natural rights in his writings or discoveries, but such rights as he has are purely statutory rights.”⁴⁴³ The House and Senate reports further stated the respective committees’ understanding that Congress’s power to legislate in the area of copyright was limited by the Copyright Clause.

[T]he spirit of any act which Congress is authorized to pass must be one which will promote the progress of science and the useful arts, and unless it is designed to accomplish this result and is believed, in fact, to accomplish this result, it would be beyond the power of Congress.⁴⁴⁴

At least for the Congress of 1909, the public benefit rationale was controlling.

Moving forward to the passage of the 1976 Copyright Act, the House Report continued to recognize the public benefit rationale for copyright and the need for limited term copyrights. The report observed that since the first United States Copyright Act in 1790, *unpublished* works had been governed by “common law copyright” and *published* works had been gov-

440. S. REP. NO. 6187, at 2-3 (1907).

441. *Id.*

442. *Id.* at 3.

443. 43 CONG. REC. 3765 (1909); *see also id.* at 3766 (noting that copyright is the creation of a new right and may accordingly be limited); *id.* at 3768 (stating that “there is no property right existing in any production . . . except the right that is prescribed by law under the provisions of the Constitution”).

444. H.R. REP. NO. 2222, at 7 (1909); S. REP. NO. 1108, at 7 (1909).

erned by statutory copyrights.⁴⁴⁵ The report argued that adoption of the legislation would "implement the 'limited times' provision of the Constitution" by doing away with perpetual common law copyrights in unpublished works.⁴⁴⁶ Moreover, it confirmed that "limitations on the term of copyright are obviously necessary," but "too short a term harms the author without giving any substantial benefit to the public."⁴⁴⁷

Comments from two Senators important to the passage of the 1976 Copyright Act confirm recognition of the public policy basis for copyright protection. Senator McClellan, chairman of the Senate Judiciary Subcommittee on Patents, Trademarks, and Copyrights, and who worked on the legislation for over a decade,⁴⁴⁸ spoke in favor of the 1976 Act and stated:

The Constitution makes clear that the purpose of protecting the rights of an author is to promote the public interest. But, as stated in the committee report on the Act of 1909—The granting of such exclusive rights . . . confers a benefit upon the public that outweighs the evils of the temporary monopoly.⁴⁴⁹

He further stated that "[t]he Judiciary Committee has tried to resolve each issue by applying the standard of what best promotes the constitutional mandate to encourage and reward authorship."⁴⁵⁰ He also reiterated his words from 1965, when he first began work on a new copyright act, "that [his] sole objective 'was to devise a modern copyright statute that would encourage creativity and protect the interests which the public has.'"⁴⁵¹ Senator Tunney also noted the "constitutional mandate to promote the progress of science and useful arts."⁴⁵²

445. H.R. REP. NO. 94-1476, at 129-30 (1976), *reprinted in* 5 U.S.C.C.A.N. 5659, 5745 (1976).

446. *Id.* at 130.

447. *Id.* at 134.

448. *See* 122 CONG. REC. 33813 (1976) (referring to the long journey of the legislation beginning before McClellan's committee in 1965).

449. *Id.* at 2834.

450. *Id.* at 2835.

451. *Id.* at 33813.

452. *Id.* at 3144 (capitalization standardized).

V. CTEA: IGNORING THE PUBLIC INTEREST

In 1998, Congress passed the Sonny Bono Copyright Term Extension Act ("CTEA").⁴⁵³ The Act amended the Copyright Act of 1976 codified in title 17, by extending the duration of existing and future copyrights by twenty years. The term of copyright for new works generally went from the life of the author plus fifty years, to the life of the author plus seventy years.⁴⁵⁴ The term of copyrights for works made for hire was also increased by twenty years, resulting in a term of the shorter of ninety-five years from publication or 120 years from creation.⁴⁵⁵ Existing copyright terms also were extended by twenty years.⁴⁵⁶ The passage of the CTEA came after three years of consideration and congressional hearings on the matter.⁴⁵⁷

With the passage of the CTEA, one may doubt whether the majority of the members of Congress gave serious consideration to the public benefit rationale supporting copyright protection.⁴⁵⁸ Instead, members' comments and the testimony

453. The short title of the Act is the "Sonny Bono Copyright Term Extension Act." Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, § 101, 112 Stat. 2827 (1998). The Act is also referred to as the Copyright Term Extension Act of 1998 or the CTEA.

454. See Copyright Act of 1976, 17 U.S.C. § 302(a) (2000) (life of author plus seventy years); Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, § 102, 112 Stat. 2827 (1998).

455. See Copyright Act of 1976, 17 U.S.C. § 302(c); Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, § 102, 112 Stat. 2827 (1998).

456. See Copyright Act of 1976, 17 U.S.C. §§ 303-04 (2000) (current codification); Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, § 102, 112 Stat. 2827-28 (1998).

457. In the Senate, Senators Hatch, Feinstein, and Thompson, introduced the Copyright Term Extension Act of 1995, on March 2, 1995. See S. REP. NO. 104-315 (1996). Hearings were held before the Senate and House Committees in 1995 and 1997. *The Copyright Term Extension Act of 1995: Hearing on S. 483 Before the Senate Comm. on the Judiciary*, 104th Cong. (1995) [hereinafter *S. Hearings*]; *Copyright Term, Film Labeling, and Film Preservation Legislation: Hearing Before the Subcomm. on Courts and Intellectual Property of the House Comm. of the Judiciary*, 104th Cong. (1995) [hereinafter *H. Hearings I*]; *Pre-1978 Distribution of Recordings Containing Musical Compositions; Copyright Term Extension; and Copyright Per Program Licenses: Hearing Before the Subcomm. on Courts and Intellectual Property of the House Judiciary Comm.*, 105th Cong. (1997) [hereinafter *H. Hearings II*].

458. The public benefit rationale refers to the traditional utilitarian view and rejects the broader view that the rationale should extend beyond creating incentives for creation of new works. See *S. Hearings*, *supra* note 457, at 16 (stating that "[m]aintaining and enhancing the health of our copyright industries should be viewed as being in the public interest"); Shira Perlmutter, *Participation in*

presented to Congress revealed a property-rights-driven agenda and consideration of economic factors unrelated to the public benefit from the creation of new works and access to existing works.

A. *Arguments for Copyright Extension*

Congress and defenders of the CTEA pointed to four main justifications for the extension. The first and primary justification was the desire to harmonize United States copyright law with European Union copyright law. The second justification—closely related to the first—was the perceived favorable impact the extension would have on United States trade. The third justification was fairness to authors. The fourth justification was the stimulation of new works and preservation of existing, historical works. These bases are set forth in the Senate Report supporting the bill:

The purpose of the bill is to ensure adequate copyright for American works in foreign nations and the continued economic benefits of a healthy surplus balance of trade in the exploitation of copyrighted works. . . . [The twenty year] extension will provide significant trade benefits by substantially harmonizing U.S. copyright law to that of the European Union while ensuring fair compensation for American creators who deserve to benefit fully from the exploitation of their works.⁴⁵⁹

As an apparent afterthought, the Senate Report paid the obligatory homage to the public benefit rationale of copyright and the enhancement of the public domain; “by stimulating the creation of new works, and providing enhanced economic incentives to preserve existing works, such an extension will enhance the long-term volume, vitality, and accessibility of the public domain.”⁴⁶⁰ Senator Hatch, the sponsor of the bill in the Senate, emphasized international trade and fairness to authors as grounds for the bill.⁴⁶¹

In the House, proponents sounded the same themes. According to the Chairman of the House Subcommittee on

the International Copyright System as a Means to Promote the Progress of Science and Useful Arts, 36 LOY. L.A. L. REV. 323 (2002) (arguing that “progress of science” should not be limited to creating incentives for new creation).

459. S. REP. NO. 104-315, at 3.

460. *Id.*

461. *S. Hearings, supra* note 457, at 1-2.

Courts and Intellectual Property, Rep. Howard Coble, “[t]he main reasons for this extension of term are fairness and economics.”⁴⁶²

In *Eldred v. Ashcroft*,⁴⁶³ the Supreme Court held that these justifications provided a rational basis for congressional enactment of the CTEA.⁴⁶⁴ In *Eldred*, the Court considered whether Congress exceeded the scope of its authority under the Copyright Clause by extending existing copyrights by twenty years and whether the Act violated First Amendment free speech guarantees. The Court held that the Constitution authorized Congress to extend the life of an existing copyright and did not violate the limited times requirement of the Constitution. In a show of substantial deference to Congress, the Court held: “[I]t is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause’s objectives.”⁴⁶⁵ The Court agreed with extension proponents that harmonizing United States law with European Union law and providing greater incentives for authors established a rational basis for enacting the CTEA.⁴⁶⁶ Notwithstanding the holding in *Eldred*, the justifications proffered by Congress demand careful consideration.

B. Harmonization with EU Law and Trade Considerations

The first and dominating argument of supporters of the Act was the need to harmonize United States law with European Union law. Senator Feinstein, a cosponsor of the Act, saw the need for harmonization as “[p]erhaps the most compelling reason” for the legislation.⁴⁶⁷ Supporters argued that the United States would risk its leadership role in the area of copyright law if it failed to match the increased term adopted by the EU.⁴⁶⁸

462. *H. Hearings II*, *supra* note 457, at 3; *accord H. Hearings I*, *supra* note 457, at 2 (statement by Rep. Moorhead, subcomm. Chairman: “The main reasons for this extension of term are fairness and economics.”).

463. 537 U.S. 186, 186 (2003).

464. It is not the intent of this article to thoroughly explore or analyze the *Eldred* decision or holding.

465. *Eldred*, 537 U.S. at 212.

466. *See id.*

467. *S. Hearings*, *supra* note 457, at 4.

468. *See H. Hearings II*, *supra* note 457, at 32 (stating that “[w]hile the United States has always been the standard bearer on copyright throughout the world, we have let major trading partners get ahead of us in this one area, the term of copyright”); *id.* at 46 (stating that “it would be unseemly—it would be

The underlying assumption of this argument is that greater copyright protection—in this case a longer term—is always better, and the United States should have the longest term possible.⁴⁶⁹ This assumption ignores the costs of lengthy copyright protection to the public. The harmonization argument is also problematic because in some regards the CTEA actually deharmonized United States law with EU law. The CTEA extended the term of copyrights for works made for hire by twenty years. This actually increased the disparity between the protection afforded in the United States and the protection afforded in the European Union for comparable works.⁴⁷⁰

The primary rationale for harmonization was economic, although it also had a fairness aspect. Proponents emphasized the trade advantages of extension. Under the “rule of the shorter term” in the Berne Convention, “the term of copyright is . . . determined by the law of the country where protection is sought; however, the term of protection need not exceed that established in the country of origin of the work.”⁴⁷¹ Applying this rule, American copyright owners could not claim the benefits of longer copyright terms allowed under European laws. Failure to change American law, according to proponents of the CTEA, would result in loss of payments to Americans from Europeans, exacerbating America’s trade deficit.⁴⁷²

just plain unthinkable—for the United States to lag behind other nations in protecting its copyright industries”).

469. *See, e.g.*, 144 CONG. REC. S12434 (daily ed. Oct. 12, 1998) (stating that “[t]he United States is the world leader in copyright, and should afford the greatest protection for copyrighted works of any nation”).

470. *See H. Hearings II, supra* note 457, at 49-50 (arguing that extending the term for works made for hire would deharmonize the U.S. with everyone else); *see also* J.H. Reichman, *The Duration of Copyright and the Limits of Cultural Policy*, 14 CARDOZO ARTS & ENT. L.J. 625, 633 (1996) (arguing that the extension of term for works made for hire would “unilaterally worsen the existing disparities”).

471. J. Berne Convention for the Protection of Literary and Artistic Works, July 24, 1971, Art. 7 (8). The Berne Convention is the “premier multilateral copyright agreement.” ROGER E. SCHECHTER & JOHN R. THOMAS, *INTELLECTUAL PROPERTY THE LAW OF COPYRIGHTS, PATENTS AND TRADEMARKS* § 12.1 273 (2003). The United States acceded to the Berne Convention in 1989. *See* Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

472. Sen. Hatch pointed to the need “to maintain our international trading position,” and argued that “[a]t a time when we face trade deficits in many other areas, we cannot afford to abandon 20 years’ worth of valuable overseas protec-

These economic motivations drove the adoption of the CTEA. Proponents of the extension made no secret that economics was their foremost consideration. In his testimony and prepared remarks, Jack Valenti, president and chief executive officer of the Motion Picture Association of America, emphasized economic interests. The first sentence of his prepared statement is pointed; “[c]opyright term extension has a simple but compelling enticement: it is very much in America’s economic interests.”⁴⁷³ In fact, Valenti’s statement would have been more accurate had it stated “it is very much in copyright owners’ economic interests.” He does get closer to the mark when he states later that an extension would “magnify the revenue reach of copyright owners.”⁴⁷⁴ All this “magnification,” reportedly would help the United States’ “besieged” marketplace ward off the “avalanche of imports” and respond to a “Europe [that] is girding its economic loins.”⁴⁷⁵ Copyright extension would help the United States reduce the trade deficit and strengthen the movie industry. Think about it. “*Magnify the revenue reach . . .*” It is a nice way of saying “enrich” existing copyright owners, at the expense of consumers and users of copyrighted works.

Even if short-term economic expediency were the controlling factor for copyright law, the harmonization argument ignores the negative consequences to consumers—purchasers and users—of copyrighted works. The impact of extension reaches beyond European consumers of American copyrighted works. American consumers will feel the brunt of the exten-

tion.” *S. Hearings, supra* note 457, at 1-2. Rep. Coble stated that the United States stood to “lose millions of dollars in export revenues” if extension was not passed. *H. Hearings II, supra* note 457, at 3.

473. *S. Hearings, supra* note 457, at 41. Valenti was joined by a host of other witnesses who emphasized their concern for the trade deficit and American exports. *See id.* at 46 (citing the trade deficit and concluding that “[t]here is no benefit in virtually giving away 20 extra years to the world at our expense”); *id.* at 56 (stating that this is a “trade matter [and] an economic issue of vital importance”); *id.* at 57 (statement of Carlos Santana that “I am extremely disturbed by the negative impact we will sustain in our balance of trade”); *id.* at 59 (statement of Mrs. Henry Mancini that extension is in the interest of the American economy and balance of trade). Mr. Hoagy Bix Charmichael, President of AmSong, Inc., in his prepared statement before the House subcommittee claimed that “the impact on the U.S. balance of trade if copyright term extension is not passed will be grave.” *Id.* at 134.

474. *Id.*

475. *Id.*

sion;⁴⁷⁶ extension means that for at least twenty more years, American users will pay more for rights to use those works or in some cases, will continue to be denied the right to use them.

The harmonization argument was also based in part on a fairness argument. In the words of Senator Hatch: "It just makes plain common sense to ensure fair compensation for . . . American creators [b]y so doing, we guarantee that our trading partners do not get a free ride for their use of intellectual property."⁴⁷⁷ The argument emphasized the unfairness of denying American copyright holders the benefit of European laws.⁴⁷⁸ What is unfair about any country applying the term imposed by American copyright law to American copyrights?

C. *Private Property of Authors and "Fairness"*

The fairness argument was not solely tied to the harmonization with foreign law. Regardless of the actions of the EU, proponents found "life of the author plus fifty years" to be too short a time. In support of the CTEA, Senator Hatch pointed to the authors' justifiable expectations that copyrights would be passed to their children and grandchildren, and he concluded that a term of "life plus fifty years" was too short.⁴⁷⁹ Several witnesses decried the unfairness of the term of "life plus fifty years."⁴⁸⁰ They argued that American copy-

476. See William Patry, *The Failure of the American Copyright System: Protecting the Idle Rich*, 72 NOTRE DAME L. REV. 907, 909 (1997) (stating that "United States and not European consumers will pay the lion's share of royalties generated by term extension").

477. *S. Hearings*, *supra* note 457, at 2.

478. See *id.* at 6 (Marybeth Peters, the Register of Copyright, agreeing with Senator Hatch that "justice and fairness [requires] giving American authors the same protection afforded their counterparts in Europe."); see also *id.* at 56 (prepared statement of Bob Dylan, referring to a need of "rectifying the injustice to American creators"); *id.* at 57 (prepared statement of Carlos Santana, finding "it unacceptable that [he] is accorded inferior copyright protection, in the world marketplace"); *id.* at 59 (statement of Mrs. Henry Mancini, finding situation "particularly egregious" that foreign works protected longer).

479. See *id.* at 2; 144 CONG. REC. S12377 (daily ed. Oct. 12, 1998) (statement by Sen. Hatch that extension needed to address "the insufficiency of the U.S. copyright term to provide a fair economic return for authors and their dependents").

480. See *S. Hearings*, *supra* note 457, at 58 (statement of Mrs. Henry Mancini finding it "inconceivable that such works would go into the public domain at a time when our children will most need the support" and calling for

right law was intended to protect authors and two generations of their descendents and that with modern longevity, "life plus fifty years" fell short of this protection.⁴⁸¹

The first problem with the fairness argument is that it is based on a false premise. Contrary to the suggestion of several witnesses,⁴⁸² American copyright law has never attempted to ensure copyright protection to benefit the author and two full generations of the author's descendents. The concept of ensuring protection for an author's grandchildren is literally foreign to American copyright law and ironically was imported from the European Union Directive from 1993.⁴⁸³ Significantly, continental European copyright law has a different theoretical basis than American copyright law; continental European copyright law is premised on the natural law property right theory of copyright rather than a utilitarian public benefit theory.⁴⁸⁴ The natural law or property right theory

the extension "as a matter of justice for creators and their families"); *id.* at 60-61 (statement of Ellen Donaldson, stating that if her family business "is to survive, an extension of term is imperative," and noting that loss of copyrights would be "catastrophic for us"); *id.* at 64-65 (prepared statement of Shana Alexander finding it "monstrously unfair" that intellectual property cannot be handed down indefinitely like other forms of property); *id.* at 65 (prepared statement of E. Randol Schoenberg arguing that extension would "assist the families who are the intended beneficiaries of the copyright term" and bemoaning the "great loss" to his family if his grandfather's works were to pass into the public domain).

481. *See id.* at 44 (statement by Menken that "[the] intent of our copyright laws is to encourage creativity by assuring the creator that his or her works will be protected during the lifetime of the creator and for two generations of his [sic] or her successors"); *id.* at 59 (statement by Ellen Donaldson that "Despite the intent of the 1976 Copyright law and the basic theory of copyright duration—that protection should exist for the life of the author and two succeeding generations—the fact is . . . [the law] no longer afford[s] that protection, due to an increase in life expectancy"); *id.* at 65 (statement by E. Randol Schoenberg, noting a great loss to grandchildren of Arnold Schoenberg if the law is not changed); *H. Hearings II, supra* note 457, at 36 (statement of George Weiss, claiming that Congress previously had extended the copyright term with the intent to protect three generations); *H. Hearings I, supra* note 457, at 234 (statement of Quincy Jones, claiming that the law is supposed to guarantee the protection for the creator and two generations).

482. *See supra* note 481.

483. *See* Council Directive 93/98, 1993 O.J. (L 290/9) whereas clause (5). Professor Karjala unambiguously made this point in his prepared statement to the House Subcommittee on the companion bill. The statement was signed by dozens of copyright professors and also submitted to the Senate Subcommittee. *See S. Hearings, supra* note 457, at 86. In her prepared statement, Marybeth Peters, the Register of Copyright, also acknowledged that United States law had previously focused on protection of the author and one generation. *Id.* at 17.

484. *See, e.g.,* Alexander A. Caviedes, *International Copyright Law: Should*

supports a different balancing of interests than does the public benefit theory and supports very long—even perpetual—copyright terms.⁴⁸⁵

A second problem is that life expectancy increased less than four years from 1976, when Congress had last extended copyright terms, to 1998, when the CTEA took effect.⁴⁸⁶ A four-year increase hardly justified a twenty-year extension.⁴⁸⁷ Longer life expectancies under a copyright term defined by the author's life automatically extend the actual duration of copyrights. For each year longer the author lives, the copyright's term is extended;⁴⁸⁸ longer life expectancies are automatically accounted for under American copyright law. The extended term of the copyright resulting from greater longevity denies the public for a longer period the unrestricted use

the European Union Dictate Its Development, 16 B.U. INT'L L.J. 165, 169 (1998) (stating that the natural law theory "took root on the European continent"); Karl Ruping, *Copyright and an Integrated European Market: Conflicts with Free Movement of Goods, Competition Law, and National Discrimination*, 11 TEMP. INT'L & COMP. L.J. 1, 9 (1997) (noting "fundamental disagreement between common law and civil law traditions" as they relate to copyright, and noting that civil law tradition embraces a natural law concept); Shauna C. Bryce, *Life Plus Seventy: The Extension of Copyright Terms in the European Union and Proposed Legislation in the United States*, 37 HARV. INT'L L.J. 525, 525 (1996) (noting that the EU's adoption of life plus seventy reflected effort to choose a term "that best matched the natural rights philosophy behind European copyright laws").

485. See Reichman, *supra* note 470, at 643 (noting that the natural property right rationale argues for perpetual protection of copyrights).

486. In 1976, when Congress implemented a term of the life of the author plus fifty years, the life expectancy in the United States was approximately 72.8 years. See THE WORLD ALMANAC & BOOK OF FACTS 956 (George E. Delury ed., 1979) (noting the number of years of life expected at birth). In 1998, when the extension was enacted, life expectancy in the United States was about 76.7 years. See U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2002 71, Table No. 91 (122d ed., 2002) (providing estimated life expectancy for 1998).

487. Compare the facts to the statements submitted to Congress. In Stephen Sondheim's statement, he maintained that the CTEA "reflect[ed] the reality that life expectancy has increased by at least 20 years." *S. Hearings, supra* note 457, at 57. George Weiss, President of the Songwriters Guild of America, suggested that "things have changed, even since the last term extension in 1976" because authors are living longer and having children later in life. *H. Hearings II, supra* note 457, at 36.

488. Copyright Act of 1976, 17 U.S.C. § 305 (2000). Under the statute, copyrights expire at the end of the calendar year in which they would otherwise expire. Thus, in some cases, surviving even a few minutes or hours longer resulting in death on January 1, will add an entire year to the copyright term. In other cases living several months longer will not add any time to the copyright term.

of the work which the public domain provides.

A third problem with the argument that extension was required to provide for an author and additional two generations is that the CTEA did not merely extend copyright terms by twenty years for authors who create works—it also extended the term of copyrights for works made for hire.⁴⁸⁹ Works made for hire are those works “prepared by an employee within the scope of his or her employment,” or certain specially ordered or commissioned works which meet the requirements of the Copyright Act.⁴⁹⁰ “Authors” of works made for hire are often business entities or other collective groups which have no families or future generations to support.⁴⁹¹ The “life expectancy” of a business entity has no relevance to the term of copyright. In other cases, individuals who did not create the works may be considered “authors” of works made for hire.⁴⁹² These individuals are essentially purchasers or consumers of copyrighted works. Copyright law does not and should not look after these individuals’ future generations.

The fairness argument is rooted in the property right theory of copyrights. Witnesses and members of Congress argued that authors’ interests in their works, in fairness, should be treated like any other property. In the House Hearings, Congressman Delahunt concluded that copyright extension (along with other aspects of the House bill) boiled down to “a question of fairness.”⁴⁹³ He alleged that “[t]he overarching premise of copyright law is that those who enrich our culture with the fruits of their intellect are no less entitled to be compensated than those who create more tangible products, be they skyscrapers or computers or five-star meals.”⁴⁹⁴ Others echoed similar sentiments. The President and CEO of BMI argued that “it seems only fair that the creators and owners of intellectual property enjoy the same benefits from their

489. See Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, § 102 (b)(3), 112 Stat. 2827 (1998). The Act expanded the term from the earlier of 75 years from first publication or 100 years from its creation, to the earlier of 95 years from first publication or 120 years from its creation.

490. See Copyright Act of 1976, 17 U.S.C. § 101 (defining “work made for hire”).

491. See *id.* § 201 (b) (discussing ownership of copyrights for works made for hire).

492. *Id.*

493. *H. Hearings II, supra* note 457, at 5.

494. *Id.*

life's work as do other property owners. It is only fair that their children and grandchildren should be able to enjoy the fruits of their hard labor and sacrifice."⁴⁹⁵ According to another witness, Michael Weller, the Copyright Term Extension Act was "about one thing: property."⁴⁹⁶ He compared copyright to a quilt left to you by your grandmother. The government comes to your door and says "this quilt has been in your family long enough, now it belongs to the world."⁴⁹⁷

The property right theory of copyright helps explain the comments of some that even the extension to "70 years after death" was too short.⁴⁹⁸ Representative Sonny Bono, a strong advocate for term extension and the namesake for the CTEA, argued that copyrights should extend in perpetuity and be treated like any other asset.⁴⁹⁹ His wife and successor in Congress, Representative Mary Bono, stated bluntly that:

Sonny wanted the term of copyright protection to last forever. I am informed by staff that such a change would violate the Constitution. . . . As you know, there is also Jack Valenti's proposal for term to last forever less one day. Perhaps the Committee may look at that next Congress.⁵⁰⁰

Harmonization with EU law, foreign trade, and private property considerations are valid considerations for Congress,

495. *Id.* at 32 (statement of Frances W. Preston). For comments of other proponents, see *S. Hearings*, *supra* note 457, at 64-65 (prepared statement of Shana Alexander) ("[I]t appears to me monstrously unfair that other recognized forms of property—lands, businesses, and so on—can be handed down indefinitely . . . whereas the value of intellectual property under our present copyright laws arbitrarily is cut off 75 years after it was created."); *id.* at 65 (prepared statement of E. Randol Schoenberg) (arguing "there does not seem to be any sound reason for this disparity in the treatment of intellectual property from other forms of property"); *id.* at 68 (excerpt from *STYLE AND IDEA: SELECTED WRITINGS OF ARNOLD SCHOENBERG* 497 (Leonard Stein ed., 1949), questioning in strong terms "why an author should be deprived of his property only for the advantage of shameless pirates, while every other property could be inherited by the most distant relative for centuries"); 144 CONG. REC. H1457 (daily ed. Mar. 25, 1998) (statement of Rep. Doggett) ("Music is the property of the songwriter who created it.").

496. *H. Hearings I*, *supra* note 457, at 134 (statement of Michael Weller concerning the Copyright Extension Act of 1995).

497. *Id.*

498. *S. Hearings*, *supra* note 457, at 65 (statement of E. Randol Schoenberg); see also *H. Hearings I*, *supra* note 457, at 230 (noting the existence of proponents of perpetual copyright including the Songwriters Guild).

499. *H. Hearings I*, *supra* note 457, at 94 (statement of Rep. Bono) (arguing that copyright should be treated like a house, a car, or a painting).

500. 144 CONG. REC. H9952 (daily ed. Oct. 7, 1998) (statement of Rep. Bono).

but they should not be controlling in the area of copyright. These considerations should be secondary to the public benefit rationale of copyright identified by the Copyright Clause. Unfortunately, Congress focused on these considerations, influenced by the property right rationale, at the expense of the public benefit.

D. Incentive for Creation and Preservation of Works

The final justification offered in support of the CTEA was the necessity of extension to stimulate the creation of new works and preservation of existing, historical works. This argument has the correct focus. Unfortunately, the words ring hollow. The Senate Report, and more generally Congress, incorrectly assumed that term extension would stimulate the creation of new works and create incentives to preserve existing works. Is it genuinely possible that an author would be likely to create more works because those works would enjoy copyright protection for the life of the author plus seventy years rather than the life of the author plus fifty years? Such a conclusion is incredible.⁵⁰¹ Senator Hank Brown explained the question well:

Do you know any creator that would fail to create if the monopoly grant ran out at life-plus-50 years of protection rather than life-plus-70 years? Would Hemingway have produced another work if he were guaranteed another 20 years of copyright protection? Would Wyeth have painted more? Would Sinatra have sang more? This suggestion is ludicrous.⁵⁰²

Most people are concerned about supporting themselves and their families *now* and in the foreseeable future, not about enriching their descendants decades after their own

501. *S. Hearings, supra* note 457, at 71-72. Professor Peter Jaszi articulated this position at the Senate hearings where he testified that "I cannot imagine the instance in which a writer, for example, would be swayed to undertake a project by the mere possibility of 20 more years of posthumous royalties available only in the highly unlikely event that the would retain popularity among generations of readers yet unborn." *Id.* He also concluded that corporations would be unlikely to be influenced by the addition of twenty years. *Id.* at 72. Mary Beth Peters, Register of Copyright and a supporter of the CTEA, acknowledged in her testimony that "it is difficult to see how moving from a term of life-plus-50 to life-plus-70 will encourage authors to write." *Id.* at 6.

502. S. REPORT NO. 104-315 (minority views of Sen. Brown).

deaths.⁵⁰³ Even without extension, authors who are concerned about leaving an inheritance for their descendants continue to have a strong incentive to create in the same way that salaried individuals have an incentive to work and accumulate wealth to pass on to descendants.

Lengthening the term of copyright creates little if any added incentive, particularly considering that most authors do not know the details of copyright terms. Several authors who submitted testimony to Congress in the hearings in connection with the CTEA indicated that they created their works ignorant of the actual term of copyright protection.⁵⁰⁴ One witness, George Weiss, President of the Songwriters Guild of America, implicitly acknowledged that longer copyright term would not have made a difference to him in writing particular works.⁵⁰⁵ Of course, no one could suggest otherwise because *all* authors prior to the extension *in fact did create* their works under a copyright regime that did not provide for life plus seventy years; the shorter copyright terms prior to the enactment of the CTEA provided sufficient incentive for them to create.

Weiss posed a different argument. He suggested that

503. See William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 362 (1989) ("Income prospects that lie twenty-five years in the future have little effect on present decisions, though not zero since people do make provisions for retirement more than twenty-five years in advance. The prospects of royalties in one hundred years, however, would have no effect on most authors' incentives.").

504. Bob Dylan's prepared statement to the Senate Judiciary Committee makes this point.

The impression given to me was that a composer's songs would remain in his or her family and that they would, one day, be the property of the children and their children after them. It never occurred to me that these songs would fall into the public domain while my children are still in the prime of their lives, and while my grandchildren are still teenagers or young adults.

S. Hearings, supra note 457, at 55; see also *id.* at 43 (statement of Alan Menken that when he got into the songwriting business he never doubted that the law "would secure [his] creations not only for [him] but for [his] children and their children"); *id.* at 57 (statement of Carlos Santana that he believed his work would give his children a secure base and that "[i]t never occurred to [him] that because of the application of our copyright laws, [his] songs would not be sufficiently protected").

505. *H. Hearings II, supra* note 457, at 83. Rep. Coble asked the hypothetical question of possible critics of extension: "Mr. Weiss, you yourself are a songwriter, are you suggesting that you wouldn't have written those songs without a life plus 70 copyright term? [Answer by] Mr. Weiss. No, I am not suggesting that . . ."

when young people choose their careers, they will consider how they can best make a living for not only themselves, but also for their spouse, children, and grandchildren, and “[i]f a young person sees that the copyright laws of our country are not protecting him and his children and grandchildren, he may very well decide on a different profession.”⁵⁰⁶ The problem with this argument is that it is disconnected from reality. How many young people who aspire to be writers or artists make their career decisions based on the details of copyright law protection? How many writers or practicing artists today know the term of copyright protection their works enjoy? Even if these young people do know the details of copyright law protection, other factors dwarf any impact the copyright term might have in making their career decisions. Their personal interests, life satisfaction, ability to pay their own bills, and their probability for success are all considerations.⁵⁰⁷ In all likelihood, most never get past consideration of the uphill struggle of successfully making a living in the music or art industries *in their own lifetimes*. These more pressing concerns leave very little opportunity for aspiring authors to ponder how their unborn grandchildren will possibly survive.⁵⁰⁸

Nor does extension provide any incentive for the creation of new works for corporations. Corporations, whose works made for hire prior to extension enjoy seventy-five years of copyright protection, need return on their works long before the seventy-five years expire. Professor John Belton, on behalf of The Society for Cinema Studies, testified at the House hearings that corporations that produce motion pictures and television programs “need to recoup their costs and make a profit during their initial play-off, which runs from roughly two to five years,” any income beyond that is “pure gravy and has little or no relation to the initial incentives which led to its production.”⁵⁰⁹

506. *Id.* at 83-84.

507. Edward P. Murphy testified to the harsh reality for songwriters and publishers that “many works and the investments in those works never show a profit,” and “for every song that becomes a hit, hundreds, many more, go unnoticed.” *Id.* at 76.

508. If we could ask 100 aspiring artists or authors what considerations they are weighing in choosing their careers, I doubt that a single one would mention their grandchildren or the term of copyright protection.

509. *H. Hearings I, supra* note 457, at 286. Prof. Jaszi also explained: “No

The other problem with the argument that people will be discouraged from becoming authors (in the broad copyright sense)⁵¹⁰ is that the argument assumes that life plus fifty years is an inadequate term of protection. At the subcommittee hearings on term extension, Representative Coble, referring to Mr. Weiss's testimony, stated "[i]n your written testimony, you argued convincingly that without term extension, songwriters would have little or no incentive to create and compose songs."⁵¹¹ To the contrary; this argument should have been anything but convincing. Songwriters created and composed songs for thousands of years, long before the existence of any copyright protection. Without question, strong copyright protection in the past two hundred plus years has encouraged the creation of creative works, but a term for the life of the author plus fifty years *is* strong copyright protection.⁵¹² The records of the respective congressional hearings are replete with statements of authors and others proclaiming United States' dominance in the intellectual property industries; all of these authors created their works under prior copyright law which afforded shorter copyright terms.⁵¹³

The argument that a twenty-year extension of copyright terms would create greater incentive to create new works does not in any way justify the extension of the term for existing copyrights.⁵¹⁴ Those authors already created their works

rational business makes economic decisions about present investment based on the mere possibility of income 75 or 100 years in the future." *S. Hearings, supra* note 457, at 72.

510. *See* Copyright Act of 1976, 17 U.S.C. § 102 (defining broadly "works of authorship").

511. *H. Hearings II, supra* note 457, at 83.

512. Senator Brown understood this: "To suggest that the monopoly use of copyrights for the creator's life plus 50 years after his death is not an adequate incentive to create is absurd." S. REPORT NO. 104-315 (minority views of Sen. Brown).

513. Under the 1909 Copyright Act, the term of an author's copyright was twenty-eight years with the possibility of one twenty-eight-year renewal term. SCHECHTER & THOMAS, *supra* note 471, § 8.1.1, at 149. Under the 1976 Act, prior to extension, the term was the life of the author plus fifty years. *Id.* § 8.2, at 153.

514. *See* Heald & Sherry, *supra* note 3, at 1169 ("The retroactive extension of the copyright term cannot possibly provide any incentive for Gershwin—or even a living author—to create an already existing work."); Landes & Posner, *supra* note 503, at 362 (noting that any increased incentive applies only to creation of works not yet produced, and finding "a strong argument against making increases in copyright term retroactive"); Marvin Ammori, Note, *The Uneasy Case for Copyright Extension*, 16 HARV. J.L. & TECH. 287, 293 (2002) ("It seems fairly

without any promise or indication of protection for a term of life plus seventy years. Copyright term extension for existing works was merely a windfall to current copyright owners—who, in many cases, are not themselves the authors. On this point, proponents of extension suggested that the extension of existing copyrights would provide incentive to preserve, restore, and make available older works whose copyrights were nearing expiration.⁵¹⁵ This argument was accepted by the Supreme Court in *Eldred v. Ashcroft* as providing a rational basis for the extension.⁵¹⁶ Mr. Valenti, before Congress, made this impassioned plea:

Whatever work is not owned is a work that no one protects and preserve[s]. The quality of the print is soon degraded. There is no one who will invest the funds for enhancement because there is no longer an incentive to rehabilitate and preserve something that anyone can offer for sale. A public domain work is an orphan. No one is responsible for its life. But everyone exploits its use, until that time certain when it becomes soiled and haggard, barren of its previous virtues. How does a consumer benefit from the steady decline of a film's quality?⁵¹⁷

Consider Valenti's statement. Unowned works are not preserved or protected. Libraries and museums all over the world, chock full of copies⁵¹⁸ of works now in the public domain, testify to the literal falsity of this statement. The material objects in which works are fixed continue to be owned and preserved as property. In most cases this ownership interest assures preservation of not only the material object but also the work embodied in the object. If a person owns an

clear that retrospective copyrights cannot encourage innovation.”).

515. See, e.g., *S. Hearings, supra* note 457, at 3 (statement of Sen. Hatch); Hatch & Lee, *supra* note 9, at 16 (arguing that extension encouraged distribution and dissemination of copyrighted works). Senator Hatch and Professor Lee argue that the encouragement of distribution and dissemination of existing works satisfies the requirement that extension “promote the progress of science.” *Id.* But see L. Ray Patterson, *Eldred v. Reno, An Example of the Law of Unintended Consequences*, 8 J. INTELL. PROP. L. 223, 234 (2001) (finding “[t]here is . . . no language in the Copyright Clause that empowers Congress to grant a copyright for the preservation of works”).

516. *Eldred v. Ashcroft*, 537 U.S. 186, 186 (1834).

517. *S. Hearings, supra* note 457, at 42 (prepared statement of Jack Valenti).

518. Copyright Act of 1976, 17 U.S.C. § 101 (2000). “Copies” takes the meaning assigned by the Copyright Act. It means the material objects in which a work is fixed, including the original material objects in which they are first fixed. *Id.*

original painting, regardless of whether he or she also owns the accompanying copyright, that person will continue to own the original painting after the copyright expires and have the same incentive to preserve and protect it. Preservation of the copy—in the Copyright Act sense of the word⁵¹⁹—will insure preservation of the work itself.

The same is true of a published book. Each owner of a copy of a particular book continues to own the copy even after the copyright expiration. The work is preserved in the copies of the book. True, as interest in the book wanes some owners of copies will neglect or destroy their copies, but others, now freed of the constraints of copyright protection, will be able to freely copy and preserve the work in a different medium or by publication of new editions.⁵²⁰

Even if copyright owners do have a diminished incentive to protect or preserve works as the public domain approaches, after expiration others will be freed to protect, preserve, and use the works. This “orphan,” no longer caged by a single keeper, will grow up and may flourish. If there is still interest in a work and a market for it, others are likely to pick up the work and preserve it when the copyright expires. In fact, that is the precise objection of many proponents of extension. Speaking of a work in the public domain, Valenti stated: “But everyone exploits its use, until that time certain when it becomes soiled and haggard, barren of its previous virtues.”⁵²¹ How does public use of works in the public domain degrade or devalue the works? This view is antithetical to the public benefit rationale that for centuries has been the basis of American copyright law.

Other witnesses at the hearings also questioned the value of the public domain.⁵²² Allowing use of works and crea-

519. *Id.* (defining “copies” as material objects in which works is fixed, including “the material object . . . in which the work is first fixed”).

520. *See Back to Basics: Old Is New Again, as Publishers (and Book Stores) Push the Classics*, U.S. NEWS & WORLD REP., May 12, 2003, at 49 (noting the drive to publish new editions of the classics and noting the profitability of these works because they are in the public domain and therefore are inexpensive to publish).

521. *S. Hearings, supra* note 457, at 42.

522. *See id.* at 56 (statement of Don Henley, noting “the questionable real value to the people of public domain material”); *id.* at 54 (statement of Alan Menken, arguing “[w]hile the term ‘public domain’ implies that the ultimate public, the consumer, will have free and easy access to creative works, this is really not the case”).

tion of new derivative works based on previously copyrighted works in no way devalues them. Instead, the use has the potential to create new interest and new opportunities.

Copyright owners already have incentive to continue to preserve and market profitable works even in the face of possible competition; they enjoy easy access to the work and have a headstart in preparing and marketing it. On the other hand, if there is not a market or interest in a work, even an extended copyright will not save it. Why would a copyright owner who was not already otherwise motivated to preserve a work invest money in a work for which there is no market?

Anytime a copyright is about to expire, copyright owners could make this same argument that a lengthened term would encourage preservation and investment in existing works. Accept this argument and there is no end to extension; copyrights will be perpetual.

VI. CONCLUSION

From the beginning of copyright protection, printers and publishers have argued a property right rationale in support of copyright protection. Later, authors took up the cause for increased copyright protection, and more recently authors' children and grandchildren have joined in the cause. But the public benefit rationale for copyright protection enjoys an equally long pedigree. The early privileges obtained in Venice were concerned primarily with the rights of printers. These printers did not rely upon natural rights of authors, but they did make fairness and public interest arguments. Later, members of the Stationers' Company—usually booksellers and printers, but not authors—controlled copyrights in England and claimed to act in the public interest. As hostility to the Stationers' monopolistic powers grew, the Stationers began to tie their interests to the purported natural rights of authors. The Statute of Anne elevated the interests of authors by extending copyright ownership to them. Although the Statute of Anne demonstrated concern for authors, it had an unmistakable public benefit focus.

Throughout the history of copyright law, supporters of the natural law property right view and supporters of the public benefit view have competed to control the course of copyright protection. In the United States, the Constitution embraced the public benefit rationale. The courts generally

have construed American copyright law in light of this rationale.

The original purposes of copyright protection identified in the Constitution and inherited from the Statute of Anne, however, are not served by the CTEA. The passage of the CTEA signaled a troubling shift away from the public benefit rationale. Congress, enticed by calls of "harmonization" with EU law, a continued "healthy surplus balance of trade" in copyrighted works, and "fairness" allowed the private interests of a few copyright holders to eclipse the interest of the general public.⁵²³ The arguments in support of the CTEA discounted the benefits of the public domain and the expense to American consumers of copyrighted works.

Advocates of the public domain need to be heard. The owners of valuable copyrights are well-organized, well-funded, and strongly motivated to influence the direction of copyright law, and Congress has responded to them.⁵²⁴ As a result, members of the public will pay more than they should for certain works and have limited use of works which otherwise would have passed into the public domain. Owners of extended copyrights will potentially collect royalties and otherwise continue to control their works. The creation of derivative works will be impeded and the use of works under extended copyrights will be limited. In short, works under extended copyrights will remain secure, free from the threat of being freely used by other authors, scholars, and everyday people.

The CTEA is now law, and there is no chance that Congress will reconsider this extension.⁵²⁵ The Supreme Court in *Eldred v. Ashcroft* made clear that it will not intervene and invalidate the CTEA.⁵²⁶ Nonetheless, advocates of the public benefit rationale need to be vigilant as Congress considers fu-

523. See Patterson, *supra* note 515, at 240 (noting that "[t]he CTEA . . . is in the tradition of publishers seeking to enhance their monopoly").

524. See Ammori, *supra* note 514, at 293 (noting efforts of Disney and publishing interests against weaker coalition of opponents).

525. The CTEA enjoyed broad bipartisan support. See, e.g., 144 CONG. REC. S11673 (daily ed. Oct. 7, 1998) (remarks of Sen. Kennedy, commending the bipartisan cooperation on the bill); 144 CONG. REC. H1463 (daily ed. Mar. 25, 1998) (remarks of Rep. Gallegly noting that "extension has enjoyed strong bipartisan backing and is supported by a wide-ranging coalition").

526. This article does not take a position on the merits of the holding in *Eldred*. Instead, it argues that Congress made a poor policy decision not in harmony with the historical purposes of copyright law.

ture copyright legislation. Almost certainly, those who hold the property right view will continue their efforts to achieve perpetual copyright. However, as Congress struggles with new issues posed by digital technology including peer-to-peer file sharing, computer software copying, encryption (and decryption) of DVDs, and educational uses of emerging technologies, Congress should view proposals through the lens of the public benefit rationale. Champions of the public benefit rationale should push Congress back in the direction of the public benefit and should also attempt to educate the public about the interests at stake.

The debate will not always pit advocates of the public benefit rationale against copyright holders. The public benefit rationale requires strong and appropriate copyright protection to encourage creation of works, but it also recognizes the need for limits to those protections both in duration and in scope. Without the proper focus and balance, however, copyright owners risk alienating a public full of consumers of copyrighted works much as the Stationers' Company did with its monopoly powers centuries ago. The result could be a backlash leading to disregard for copyright law or an undermining of necessary aspects of copyright protection.⁵²⁷

527. See Ginsburg et al., *supra* note 12, at 701 (expressing fear that extension may promote efforts "to cut back on the scope of copyright" to offset excessive copyright terms).
