# AMERICAN COPYRIGHT: ITS ENGLISH ORIGINS AND EVOLUTION FROM PUBLIC GOOD TO PRIVATE PROPERTY IN THE NINETEENTH CENTURY

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Abstract: The original purpose of the American copyright law was to promote the progress of science and useful arts by granting exclusive rights to an author in their works for a limited time. While these ideas originated in English law, legislatures in the United States adapted them to create a uniquely American law. The English heritage and the colonial experience offered the Founding Fathers precedents to draw upon in writing the Copyright Act of 1790. The designers of that law considered twenty-eight years an appropriate amount of time. However, it did not take long for the law to be used to further the cause of individuals as they advocated for better protection for creators and their families as the law was adjusted to ensure that family members could maintain a copyright even after the authors' death. The innovations and growth of the market revolution assisted in this transition as the ability to manufacture a larger number of products for sale to a larger number of markets made copyrightable materials more profitable. And, while the public had access to these works, their access was not free and the changes made to copyright laws ensured that the public had to wait longer to get free access. This transition of copyright occurred at a time when democratization flourished, and it seems ironic to extend political rights to a larger number of Americans while simultaneously denying access to private materials the Founding Fathers hoped to provide for them.

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# INTRODUCTION

Today, copyright is once again a major topic of discussion thanks in part to Google's digitization program. By the end of 2009, Google's Book Search digitized nearly ten million books and made them available online for a fee, which led to a debate over copyright and the future of digitization. Google's project caused concern because it digitized books without contacting the copyright owners. Google's actions represented the formation of a monopoly as the Justice Department filed a memorandum warning of a possible antitrust violation. In November 2013, Circuit Court Judge Denny Chin dismissed the case, arguing that Google's action did not infringe any copyrights. Chin determined the action "advances the progress of the arts and sciences, while maintaining respectful consideration for the rights of authors and other creative individuals, and without adversely impacting the rights of copyright holders." The ruling stated that the doctrine of fair use provided by copyright law protected Google's program; Google only allows people to read portions of copyrighted books, not the complete work.[1]

[1] Robert Darnton, *The Case for Books: Past, Present, and Future* (New York: Public Affairs, 2009), xviii, 3; Claire Cain Miller and Julies Bosman, "Siding With Google, Judge Says Book Search Does Not Infringe Copyright," *New York Times*, November 14, 2013, http://www.nytimes.com/2013/11/15/business/media/judge-sides-with-google-on-book-scanning-suit.html (accessed April 08, 2014).

The Google case represents the changing history of American copyright law because it symbolizes the most recent moment in the transformation of the print industry. From its beginnings in English censorship laws to the modern day, copyright has evolved because of individuals arguing over the ownership of individual property rights. Historically, major changes to copyright law in the United States resulted from responses to demands of the public, authors, or because of decisions made in the courts or Congress.

Michael Heller, in his book *The Gridlock Economy,* writes, "Private ownership usually creates wealth. But too much ownership has the opposite effect—it creates gridlock."[2] This statement is an insightful description of copyright law in the United States. Initially, the purpose of copyright was to benefit authors and motivate individuals to write and publish useful works by allowing them to profit from their intellectual property for a limited time. The gridlock that Heller describes refers to a situation when too many individuals own portions of one object, including ownership of copyrighted material. In reference to copyright, Heller argues, "copyright has veered off the rails. A court recently ruled that even an unrecognizable one-and-a-half second sound clip was copyright-protected and permission was required before the clip could be sampled."[3] Heller's example articulates the complexity of copyright law in the modern world; a one-and-a-half second clip receives the same protection as a literary work.

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[2] Michael Heller, *The Gridlock Economy: How Too Much Ownership Wrecks Markets, Stops Innovation, and Costs Lives* (New York: Basic Book, 2008), xiv.

[3] Ibid., 14.

How, then, did American copyright law reach this state of disarray? The major issue of copyright was an argument over the need to reward authors and inventors for their intellectual contributions and the right of the public to see and make use of those contributions. At the time of the drafting of the Constitution, the founders established limited exclusive rights for authors and inventors to balance the benefits of intellectual properties between the creators and the public. However, this balance vanished during the nineteenth century as copyright moved toward granting less restricted monopolistic power to individuals, much to the detriment of public interest.

In the sixteenth century, the English monarchy used royal privilege to begin granting printing patents, the predecessor to modern copyright, to university presses and individual printers. This early form of copyright was a monopolistic right because it granted exclusive privilege or control over specific properties to a limited number of entities. The only limit to these monopolies was the whim of the monarch. A specific example of this right was the London Stationers' Company, a group of London printers, who used royal printing patents to control the book industry for most of the sixteenth and seventeenth centuries. The expansive powers of copyrights granted by royal patent came under attack in the late seventeenth century as individuals sought to limit the power of the Stationers' Company and those printers granted royal patents. In 1709, Parliament passed the first statutory law extending the ownership of copyright to a larger portion of the population, by expanding private ownership, but restraining the monopoly by implementing term limits.

In the United States, the Founding Fathers followed the anti-monopolistic ideals of the English and created a copyright law that was a limited right. This ensured that

protective rights ended with the author's death rather than passing on as an inheritance. This favored the interests of the public. Throughout the nineteenth century, copyright developed as the list of protected materials and term limits expanded. While American legislators revised the law, they broadened the scope of copyright and set the foundation for copyright in the twenty-first century. The changes to American copyright transitioned the law away from its anti-monopolistic origins in 1790, and, instead, allowed American authors to use the law to gain greater control over their intellectual property. American copyright, then, was a monopoly because it granted the owner an exclusive privilege or control over their property, but not forever. Despite the extension of term, the protection eventually ended.

The central problem this dissertation investigates is the tension between giving innovators the incentive to publish with the bestowment of a monopoly privilege and the public's right to access original contributions. The purpose of a copyright is to stimulate the production of new ideas and knowledge by inventive minds so that the public can benefit. Copyright is not merely a device to enrich individuals for original creative acts, but to enable the public to progress by obtaining and using new information and perspectives.

The thesis of this dissertation is that the original purpose of the founders of the Constitution was to stimulate creative thought by granting a limited monopoly to imaginative people for their productions, but it was limited so that the public would soon have access to them. This concept was evident in both England and the early American Republic in the eighteenth century. However, as the nineteenth century progressed, the idea of copyright became individualized so that the only beneficiary of the copyright was

the author; the public was omitted from consideration.[4] During the nineteenth century revisions to copyright law began to divert from its original intent. However, none of the changes made during the nineteenth century weakened the power of copyright. Through the period, copyright supporters labored to maintain control over their works. Despite the anti-monopolistic origins of the American law, personal interests drove proponents to maintain control, despite continued arguments that a limited term copyright was in the best interest of the American people. From the time of the Stationers' Company in London to American opposition toward international copyright, copyright advocates always looked out for their own personal interests and worked to protect their property.

The existing literature on copyright incorporated many topics, but often does not focus on the tension between the bestowal of a monopolistic right to an author and the public's ability to access the author's productions. Some focus on the legal history, on the rights of authors, on creation of an international copyright law, and on the role of the author in producing novel information or art. Only recently has work appeared that has taken the public into account, and this dissertation joins this trend in stressing how imbalanced the relationship between innovator and public has become. It does so, unlike so much of the literature by looking at the United States in the nineteenth century—not just England and not just the ending of the eighteenth century.

Literature on copyright first appeared in the eighteenth and nineteenth centuries as part of legal treatises. During the eighteenth century, intellectuals, such as William Blackstone and Denis Diderot, explored historical texts looking for laws prescribing

[4] Gillian Davies, *Copyright and the Public Interest* (London: Sweet and Maxwell, 2002), 3-5, 353.

standards of copying. Throughout the nineteenth century, copyright history was included in practically every legal treatment of literary property, authorial rights, and/or publisher rights. Most histories focused on the rights of authors and publishers and included detailed discussions of the law at that time. Many of these works argued that copyright originated from a natural right and, therefore, should be perpetual. Near the end of the nineteenth century, following the Berne Convention, an international copyright agreement signed by ten nations in 1886, interest in copyright history faded. The study of it then became the purview of lawyers, with little historiographical significance.[5]

A few works were vital to this study. First, Eaton S. Drone's *A Treatise on the Law of Property in Intellectual Publications in Great Britain and the United States* (1879) offered a clear and concise interpretation of copyright law at the time. It was also the first comprehensive study of American copyright law; previous works focused primarily on British law. While Drone concentrated on copyright from the conceptual view of ownership of property, rather than viewing it as a limited financial benefit, he suggested that much of the confusion experienced in the American system was the result of incompetent people writing the laws that were later interpreted by individuals with a limited understanding of the law. According to Drone, the intricate, often confusing, nature of copyright in the nineteenth century resulted from the fact that creators and

[5] Martin Kretschmer, Lionel Bentley, and Ronan Deazley, "The History of Copyright History: Notes from an Emerging Discipline," in *Privilege and Property: Essay on the History of Copyright,* eds. Martin Kretschmer, Lionel Bentley, and Ronan Deazley (Cambridge: OpenBook Publisher, 2010), 2; Isabella Alexander, *Copyright Law and the Public Interest in the Nineteenth Century* (Portland, OR: Hart Publishing, 2010), 4-11; The Berne Convention was an international copyright agreement that the signatory nations agreed to in Berne, Switzerland, in 1886. The convention required signatory nations to treat the copyright of authors from other fellow signatories as if it was that nations own law.

interpreters of the law did not fully understand it, but it did not dwell on public access to original works.[6]

A second work is Richard Rogers Bowker's *Copyright: Its Law and Literature* (1886). Bowker, the publisher of *Publishers' Weekly*, described his work as a brief view of the history of both domestic and international copyright. He defined copyright as the right to reproduce copies of intellectual products, primarily literature and art. In his compiling and summarizing of the law, he focused on the debate between the common law and statutory rights of authors, as well as how the laws changed over time. Like Drone, Bowker outlined the muddled state of copyright and called for revisions to improve the system. He offered reforms, but his emphasis was on the author and not on the public.[7]

Also in this early tradition was Thorvald Solberg's *Copyright in Congress, 1789-1904* (1905), a bibliographic work outlining the history of copyright and its revision over time. Solberg, the first Register of Copyright in the United States, argued that additional revisions were necessary because the original law failed to provide adequate protection, was difficult to interpret, and was too complicated to administer, which often led to misunderstanding and abuse. Specifically, Solberg questioned the requirement of meeting specific stipulations of the law to receive and maintain copyright ownership when many of those regulations had nothing to do with the rights involved. Although he proposed

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[6] Easton S. Drone, preface to *A Treatise on the Law of Property in Intellectual Productions in Great Britain and the United States* (Boston: Little, Brown, and Company, 1879), v.

[7] Richard Rogers Bowker, *Copyright: Its Law and Its Literature* (New York: The Publishers Weekly, 1886), 1-36.

various reforms, he failed to address the central question of private rights versus public access.[8]

These three works represented views of American copyright as it entered the twentieth century. They focused on the weaknesses and supported revisions to improve copyright, but ignored the anti-monopoly ideas of the founders. Drone, Bowker, and Solberg all recognized the failure of copyright to live up to the expectations of the law's original intent: to create an exclusive right protecting intellectual property that expired after a limited time. While other works followed, the study of copyright remained the occupation of lawyers, not historians, until the 1960s.

In the fashion of Drone, Bowker, and Solberg, Benjamin Kaplan's *An Unhurried View of Copyright* (1967) advocates revisions to the copyright system by using a study of the history of copyright in England and the United States to show that things were different in the past. Historically, lawmakers attempted to create a copyright system that was fluid and able to adapt. However, one of Kaplan's primary concerns is accessibility to intellectual property. He advocates easy public access to ensure both the use and improvement of intellectual properties. When Kaplan wrote his book, Congress began the process of revising the copyright law. He took exception to the suggested change in the term limit of copyright, to the life of the author plus fifty years. Kaplan suggested that this did not benefit the author as he argued that four of ten published works were works made for hire, meaning that the employer, not the author, benefited from the copyright,

[8] Thorvald Solberg, *Copyright in Congress, 1789-1904* (Washington, DC: Government Printing Office, 1905), 7.

but he did not directly address the problem of individual monopoly in a copyright versus public access [9]

The argument that authors did not truly benefit from the copyright continued in the work of Lyman Ray Patterson, whose *Copyright in Historical Perspective* (1968) looked at how copyright emerged as the right of the author, while maintaining the original purpose of the law, the right of publication. Patterson focuses on the conflict between the existence of a common law copyright, or a right that existed independently of the legal code, and a statutory copyright created by the law as defined by the courts. Patterson deals with the unsatisfactory nature of copyright law. The dilemma created by the existence of both a natural and a legal right was that statutory law created a system in which common law rights gave way to a limited monopolistic right, rather than a perpetual one. He advanced the viewpoint that it became the responsibility of the courts to form a definition of copyright based on the argument over the existence of both a common law right and a statutory right. But the conflict between the public use of an innovation and an innovator's right to compensation was attenuated in his book.[10]

In 1978 Victor Bonham-Carter's *Authors by Profession* continued the discussion of the changing situation of modern authorship and copyright. Carter studies authorship from 1500 to 1900, but his work concentrates on authors, not the public access to works

[9] Benjamin Kaplan, *An Unhurried View of Copyright* (New York: Columbia University Press, 1967), 114 -125.

[10] Lyman Ray Patterson, *Copyright in Historical Perspective* (Nashville, TN: Vanderbilt University Press, 1968), 4- 5, 168-172, 229; Millar v. Taylor, London (1769), Primary Sources on Copyright (1450-1900), eds. L. Bently & M. Kretschmer, www.copyrighthistory.org; Donaldson v. Becket, London (1774), Primary Sources on Copyright (1450-1900); Wheaton v. Peters, Washington D.C. (1834), Primary Sources on Copyright (1450-1900).

of originality. Authors, as Bonham-Carter states, were individuals who made their living by writing. He expands on this definition by stating that the majority of authors did not make a livelihood by writing; they usually relied on patronage or other forms of employment for survival. The relationship between copyright and authorship was a complicated one, as copyright began as a privilege granted to the publisher not the author. However, despite the passage of the pro-author Statute of Anne in 1709 in England, authorial publishing options remained limited. They could either sell their copyright to a publisher giving up future rights to their materials, form a partnership with a publisher to guarantee some benefit from their labors, or, they could use a subscription service through which the printing of the book relied on the advanced orders. In general, though, the practice of selling copyrights was the most often used option. This illustrates how little copyright benefitted the author, as they lacked the ability to control their property. While copyright had adapted in the eighteenth century to focus more on the author, publishers clearly maintained their dominance of the print industry.[11]

The investigation of copyright changed in the 1970s with the publication of the theories of French philosopher Michael Foucault, who in 1969 gave public lecture entitled *What is an Author?* While Foucault does not deal directly with copyright, his work changed the direction of the study of copyright history—and in most ways ignored the conflict between an author's contribution and the public's access to that contribution. He sought to refocus the relationship between copyright and authorship by challenging the existing assumptions related to the rise of the author and placement of authors and the

[11] Victor Bonham-Carter, *Authors by Profession,* 2 vols. (Los Altos, CA: William Kaufmann Inc., 1978-1984), 1:12, 25.

works inside the system of property relations.[12] Looking at the author/text relationship, Foucault sought to reevaluate this connection and look at how the author created the work, but also existed outside of it. The traditional view of the author, according to Foucault, portrayed him or her as the creator of a work formed from their inexhaustible wealth of knowledge. Foucault viewed the connection differently. Through the act of creating a work, the author establishes a meaning for the text; however, he or she surrenders this function when the text takes on a meaning of its own. Marxism and Freudianism took on their own meanings as the philosophical ideals "established an endless possibility of discourse."[13] Foucault's work influenced the future study of copyright as authors sought to refine/define the author/text relationship.

In the 1980s, in response to Foucault, new studies of copyright appeared that moved away from a focus on the development of the law. Historians became preoccupied with studying the emergence of authors, their claim of ownership over their texts, and the function/origin of authorship. While these works do not address the public interest, the focus on authorial rights drove changes to the copyright system that pushed it away from the original intent of the founders. In 1984, Martha Woodmansee's article "The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'" suggests that the author emerged because eighteenth-century writers sought to make writing their livelihood after the passage of the Statute of Anne. In fact, this led to calls for the revision of copyright because authors sought to benefit from their works for

[12] McKeough, et al., *Intellectual Property: Commentary and Materials*, 21-22.

[13] Michael Foucault, *The Essential Works of Foucault, 1954-1984*, eds. Paul Rabinow and James D. Faubion, trans. Robert Hurley, 3 vols. (New York: The New York Press, 1997-2001), 2:205-222.

longer than the initial seven to fourteen years.[14] In 1988, Mark Rose, in his "The Author as Proprietor," credits the various legal cases of the eighteenth century for this development. Rose examines *Donaldson v. Becket* (1774) and argues that authors did have a right to their creations, or a common law right, but upon publication of their work, statutory law, not common law, governed their copyright. According to Rose, the eighteenth-century legal struggles were essential to the maturation process of the author as the creator of a work that bears his or her unique personality.[15]

David Saunders, in his *Authorship and Copyright* (1992), responds to Mark Rose and others about the origins of the author. Saunders focuses more on the author as defined by legislation, as authors owned their property because the law created their right. In his attempt to define authorship, Saunders concentrates on legislation passed during the eighteenth century, the same period considered by Rose and Woodmansee. However, Saunders places more emphasis on this early legislation, and the period up to *Donaldson v Beckett* in 1774. Citing the work of Lyman Patterson, Saunders seeks to save the idea of authorship from postmodern criticism like that of Rose and Woodmansee, who look at copyright as a relationship between text and the subject.[16]

The works of Rose, Woodmansee, and Saunders deal with the author and his/her claim to legal ownership of a text, but they leave out any discussion of public rights to an

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[14] Martha Woodmansee, "The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author,'" *American Society for Eighteenth-Century Studies* 17 (Summer 1984): 426.

[15] Mark Rose, "The Author as Proprietor: *Donaldson v. Beckett* and the Genealogy of Modern Authorship," *Representations* 23 (Summer 1988): 58

[16] David Saunders, *Authorship and Copyright* (London: Routledge, 1992), 8; McKeough, et al., *Intellectual Property: Commentary and Materials*, 25-26.

author's original contribution. Gillian Davies points out the importance of the public's interest in her *Copyright and the Public Interest* (2002). Davies states that both the Statute of Anne and the copyright clause of the United States Constitution address the importance of the public interest. One of the main goals of the Statute of Anne was to encourage learned men to compose useful books, while the copyright clause of the Constitution intended to promote both learning and the useful arts. The general purpose of copyright was to guarantee benefits to creators to ensure works that promoted learning and the advancement of the arts and sciences. Copyright law, therefore, protected the interests of both the public and the author.[17] However, her monograph does not extend into the nineteenth century and the changes made in copyrights during that time.

Ronan Deazley, in his work *On the Origin of the Right to Copy* (2004), presents a further discussion of the question of the public's interest in copyright. Looking at copyright during the eighteenth century, Deazley concentrates on "relevant and revelatory materials" overlooked by other historians, arguing that the explanations offered by earlier works failed to make use of all available sources. Looking at both legislative action and court cases, Deazley tracks the development of copyright in England from a publisher's right to an authorial right. However, he claims that copyright was never concerned with simply the rights of authors, publishers, and/or booksellers. The primary concern of copyright was the reading public, the reinforcement and proliferation of knowledge, and the publication of books useful to the public. More importantly, the public's interest was at the core of copyright from the beginning,

[17] Gillian Davies, *Copyright and the Public Interest* (London: Sweet and Maxwell, 2002), 3-5, 353.

meaning that statutory law was designed to incentivize authors to create beneficial works for the public.[18] Deazley's focus is primarily on English law, but his argument can be applied to copyright in the United States by focusing on the original intent of the Founding Fathers, which was to establish a limited right that would encourage authors to create works that benefited society, while ensuring that authors also profited from their labors. This is achieved here by extending that debate into the nineteenth century.

A third work dealing with the significance of copyright and the public interest is Isabella Alexander's *Copyright Law and the Public Interest in the Nineteenth Century* (2010). Like Davies and Deazley, Alexander emphases English law. She suggests that public interest played a substantial role in the development of copyright, but scholars have paid little attention to the meaning of public interest and its role in shaping copyright. Alexander also argues that presenting the public, as a single entity is an impossibility; rather, there were multiple "publics."[19] It is appropriate to take Alexander's findings and apply them to the American copyright. This seems especially significant because the patent and copyright clause in the Constitution created a limited right for authors and inventors. The Founding Fathers seemed to have the public interest in mind when writing this clause, as it granted Congress the power to "provide for the general welfare" and "promote the progress of science and useful arts" by encouraging the creation of new material. The reasoning being that granting creators a limited exclusive

[18] Ronan Deazley, *On the Origin of the Right to Copy* (Portland, OR: Hart Publishing, 2004), xxiv-xxv, 226.

[19] Alexander, *Copyright Law and the Public Interest in the Nineteenth Century*, 4-5.

right would encourage them to create more, but the real goal was to ensure that new knowledge was advanced and dispersed to society.[20]

The issue of international copyright is another theme important in the study of American copyright. Generally, authors are interested in the explanations of why Americans were so recalcitrant in adopting an international standard. These books have little to say about the tension between an innovator's right to just compensation and ultimate public access to his/her contributions. Among the authors detailing the dilemmas surrounding the international copyright in the United States are Aubert Clark and James Barnes.[21]

More recently, the appearance of studies detailing the cultural, social, and economic aspects of copyright law have further broadened the study of copyright history. The attention of these works is less on the legal rights of authors and their relationship with their property and more on the book trade and its impact on society—elements of the history of copyright that are not central to this dissertation. In *A Fictive People: Antebellum Economic Development and the American Reading Public* (1993), Ronald Zboray focuses on the way the economic transformation of the antebellum era shaped the literary culture. Zboray looks at the development of publishing and distribution, motives for reading, and the readers' experiences to explore American reading habits during the Market Revolution and the role reading practices played in contributing to a new image

[20] United States Constitution, Article 1, Section 8; Howard Besser, "Will Copyright Protect the Public Interest?" *A Journal of Social Justice* 11 (January 1999), 26.

[21] Aubert J. Clark, *The Movement for International Copyright in Nineteenth-Century America* (1960; repr., Westport, CT: Greenwood Press, 1973), 28.

of an American identity. Despite focusing on the print industry, Zboray also deals with the issue of international law by attacking the lack of an international copyright agreement. He suggests that the proliferation of newspapers and the presence of publishers willing to print cheap, pirated copies of works undermined the authority of traditional publishers. The author and the text are still present in the discussion, as Zboray's concentration on the book trade advances the role public interest played in the development of copyright.[22]

Similarly, Meredith McGill's *American Literature and the Culture of Reprinting, 1834-1853* (2003) challenges the idea that the absence of an international copyright law frustrated the development of an American literary culture. In fact, the lack of an international copyright led to the development of a culture of reprinting that created a significant print industry in the United States. Antebellum ideas about intellectual property produced a unique literary culture that was both regional and transnational. McGill's work compares three case studies, looking at the experiences of Charles Dickens, Edgar Allen Poe, and Nathaniel Hawthorne, who represent authors and the culture of reprinting. All three men encountered firsthand the problem of literary piracy, but McGill uses their experiences to place copyright's role in society beyond that of the an author's legal rights to their property by assigning more significance to copyrights' ability to promote the public interest over that of the individual author.[23]

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[22] Ronald Zboray, *A Fictive People: Antebellum Economic Development and the American Reading Public* (New York: Oxford University Press, 1993), xvi-xvii, 21.

[23] Meredith McGill, *American Literature and the Culture of Reprinting, 1834-1853* (Philadelphia: University of Pennsylvania Press, 2003), 1.

Finally, in *Democratization of Invention: Patents and Copyrights in American Economic Development, 1790-1920* (2005), B. Zorina Khan explores the development and influence of the copyright and patent system during the nineteenth century. Khan's text provides an overview of American copyright policy. She compares and contrasts the intellectual property systems of England, France, and the United States. Using this comparison, Khan argues that the features of American democracy and the linkage between decentralized markets, economic democracy, and political freedom defined the American intellectual property system. It was the presence of an extended market established through westward expansion, the ability of a large numbers of citizens to be involved in the economic system, and democratization that allowed for copyright's development. Khan's interpretation allows for the theme of the public interest, but expands it beyond just the promotion of learning to include economic and political aspects as well.[24]

Thus, existing work on the copyright tends to focus on authors and their battles with publishers, international copyright, and competitors. Most of these works deal more with English copyright law than with the United States and few, other than Ronald Zboray and Meredith McGill, follow the topic into the nineteenth century. Ronan Deazley and Gillian Davies have explored the interest of the public. In these studies, the information located in congressional debates has not been fully consulted.

[24] B. Zorina Khan, *Democratization of Invention: Patents and Copyrights in American Economic Development, 1790-1920* (New York: Cambridge University Press, 2005), i, 255.

This dissertation broadens the investigation of Alexander, Davies, and Deazley by expounding on the struggle between authorial ownership of a work and the public's access. Without reward, authors and artists had no incentive to produce anything because others would receive the rewards of their labor; thus, copyright laws bestowed upon creative individuals a limited monopoly over their creations. For the intellectual properties to be useful to the public, it required the creators' rights to be limited. It is the thesis of this dissertation that the founders of the Constitution understood the need for this balance and imposed limitations on the rights granted to authors and inventors to ensure that their products would eventually become available to the public. This initial equilibrium faded throughout the nineteenth century as Congress revised and expanded copyright law. Because of these changes, copyright became an unlimited monopolistic power granted to the individual at the expense of the public interest. This set the stage for the copyright in the twentieth-first century, which grants copyrights to persons creating 1.5 seconds of Internet video. This dissertation establishes this claim by investigating congressional debates over copyright laws and the intentions of those legislators, and only incidentally utilize private papers, judicial decisions, and journal discussions.

This dissertation will provide a legislative history of copyright in the United States, focusing specifically on how legislative actions changed copyright from an anti-monopolistic system into a monopolistic one, thus creating the complicated copyright system that exists today. This study will first look at the history of copyright in England from the sixteenth century through the eighteenth century to show where the ideas used in the development of American copyright originated. The portion of the study looking at

the English law will explore the royal decrees, legal rulings, and Parliamentary actions that laid the ground work for ideas that transferred to the United States and formed the basis for the American copyright system.

From its origins in the royal privileges of sixteenth- and seventeenth-century England to the passage of the Chace Act in 1890, copyright proponents laid the foundation for the transition of copyright from a limited monopoly to a long-term monopoly. The expansion of copyright laws in the nineteenth century created a system that allowed people to protect materials at the expense of the public, who were supposed to be joint beneficiaries of copyright law. This argument does not suggest that creators should not profit from their labors, rather copyright revision created a system that distorted the Founding Fathers' original intent. They envisioned the creation of works that promoted science and the arts that would assist in the education of the American people, not works intended for leisurely purposes, like novels.[25] Thomas Jefferson once noted the ill effect of reading novels, stating, "When this poison infects the mind, it destroys its tone and revolts it against wholesome reading."[26] Jefferson's views remained popular at the time, and the novel remained stigmatized as frivolous in the early nineteenth century. The alterations made to the copyright system, along with the growing number of works created, moved copyright law away from its original purpose, which was to encourage authors to write useful works beneficial to the American public.

[25] L. Ray Patterson and Craig Joyce, "Copyright 1791: An Essay Concerning the Founders' View of the Copyright Power Granted to Congress in Article I, Section 8, Clause 8 of the U.S. Constitution," *Emory Law Journal* (Spring 2003): 245-252.

[26] Thomas Jefferson to Nathaniel Burwell (1818), in *The Writings of Thomas Jefferson,* 19 vols., ed. A. A. Lipscomb and A. E. Berg (Washington, DC: The Thomas Jefferson Memorial Association of the United States, 1903), 15:166.

# CHAPTER I

## FROM THE RIGHT TO COPY TO COPYRIGHT: THE ENGLISH ORIGINS OF AMERICAN COPYRIGHT

Johannes Gutenberg's invention of the printing press in 1439 revolutionized the world; the printing press made possible the mass reproduction of books. The printing press spread throughout Europe, influencing each nation as it became more accessible. Thirty-seven years after its invention, the printing press appeared in England, and the development of what would become American copyright law began. William Caxton's introduction of the printing press into England in 1476 set in motion the creation of a new form of property, which came to be modern copyright. The English government perceived the introduction of the printing press in two ways. First, printing was a beneficial trade that deserved encouragement. Second, the press represented an instrument that the government needed to control.[1] In England, copyright first appeared as a right granted by the Crown to printers, not authors. The right was an authorization to print a work. The Crown controlled the print industry through the use of royal grants and privileges. The process of royal privileges developed into a licensing system that maintained a monopoly in the hands of a small number of people, usually printers, which

[1] Lyman Ray Patterson, *Copyright in Historical Perspective* (Nashville, TN: Vanderbilt University Press, 1968), 20-21.

lead to debates over licensing versus the rights of individuals, especially authors, to control their property.

From the introduction of the printing press in England to the passage of the first modern copyright law in the eighteenth century, English copyright shifted from a privilege, granted by either the Crown or the royal chartered Stationers' Company of London, into a legally-protected form of property granted to all who met the requirements of the law. It was the emergence of the author, during the seventeenth and eighteenth century, that instigated this transition, as individuals demanded more control over their property.

The English government's attempt to control the printing press using licensing acts and special privileges engendered both support and opposition. The history of copyright law in England is the history of a monopoly created and controlled by monarchs, the court system, and the Stationers' Company. Originally, copyright was simply the right to copy and, for the most part, the right was limited to printers, or the men who made the copies. The emergence of the author and the idea that individuals held property rights in their creations began to weaken the monopoly of the Crown and its printers, by extending legal rights to more people.[1]

The major issues of the early history of copyright development in England dealt with the control of the fledgling printing industry. The growth of the industry created a

[1] Charles H. Purday, *Copyright: A Sketch of Its Rise and Progress: The Acts of Parliament and Conventions with Foreign Nations Now in Force, with Suggestions on the Statutory Requirements for the Disposal and Security of a Copyright, Literary, Musical, and Artistic* (London: W. Reeves and J. B. Cramer & CO., 1877), 1.

desire for governments to control what appeared in print to ensure that nothing too radical enticed the population to question authority. To prevent the publishing of critical works, the Crown permitted only specific individuals to print. The practice of granting monopolies to specific printers provided a protection against printing by anyone other than the privileged few. The foremost problem was who would receive the right to copy. In most cases, it was a printer, like a member of the Stationers' Company or a University printer, not the author. In the fifteenth century, the focus was on reprinting classics, not contemporary works, so the right to copy dealt with controlling and printing older works. As the fifteenth century progressed, the number of authors increased. To publish their works, these authors generally signed contracts with printers. The printer, not the author, then owned the copyright.[2]

The printing patent was an integral part of the royal prerogative. One of two forms of early copyright law, royal prerogative was the power of the monarch to grant a printing patent to anyone deemed worthy. Royal patents granted a monopoly to their recipients, who often received patents for all books they had printed, or would print.[3] The English government used the privilege system to control the press. Under Henry VIII (1509-1547), a 1538 proclamation, prompted by the King's launching of the English Reformation, introduced new regulations that limited both the printing of ecclesiastical and other works in England and the importation of books from continental Europe. The proclamation, titled "A Proclamation Prohibiting Unlicensed Printing of Scripture,"

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[2] Patterson, *Copyright in Historical Perspective*, 21.

[3] George Burton Adams, *Constitutional History of England* (New York: Henry Holt and Company, 1921), 4-5, 78.

decreed that no one could transport any book printed in English, nor should anyone try to sell or republish such works.[4] The penalty for disobeying was imprisonment. However, the proclamation also established the precedent for pre-publication licensing of literary works in England by limiting the number of domestic printers. Threats specifically named in the proclamation included the Anabaptists and Archbishop of Canterbury Thomas Becket.[5]

While the printing patent was the prominent form of early copyright, the recipients' privilege was at the whim of the monarch. Following the example of his father, Edward VI (1547-1553) granted patents to three printers in 1553. The first went to Richard Totell of London, giving him the right to print all books dealing with the common law for a period of seven years with guaranteed protections against infringement by other printers.[6] The second royal grant went to William Seres. He received a seven-year printing patent for a prayer book, or a primer, appropriate for use by children and adults outside of church.[7] The final printing patent went to John Day for the printing of a Catechism. He received the patent to print an English-language Catechism to aid the instruction of English in the schools.[8] The King granted these patents to control the printing of specific works. In the case of Totell, the printer had the right to print any book

[4] *Henrician Proclamation, London (1538)*, Primary Sources on Copyright (1450-1900), eds. L. Bently & M. Kretschmer, www.copyrighthistory.org.

[5] Ibid.

[6] *Totell's Printing Patent, Westminster (1553)*, ibid.

[7] *William Seres' Printing Patent, Westminster (1553)*, ibid.

[8] *John Day's Privilege for the Catechism, Westminster (1553)*, ibid.

dealing with the common law, a broad range of topics. On the other hand, Seres and Day received patents for very specific titles; but, all three were monopolies.

King Henry's daughter, Mary I (1533-1558), succeeded Edward VI, but she experienced a short-lived reign just as her successor had. The brevity of their reigns caused problems for the copyright system as each monarch granted their own privileges; and, they could remove earlier privileges. While Edward chose to grant privileges to individuals, Mary chose to empower a specific company with copyright protection. The incorporation of the Stationers' Company of London created the Stationers' copyright, a second type of the early copyright, beyond the royal privilege. Printers, as members of the Company, received the majority of the patents for works that they did not write.[9] In truth, most of the early patents involved the reprinting of classic works; authors were unable to protect their own interests. It was not until later in the sixteenth century that the debate over authorial rights in copyright began. While the two forms of copyright essentially completed the same task, the one glaring difference was profitability and prestige attached to the printing patent.[10]

The Stationers' Company received its Letters Patent in 1556. Letters Patents from the Crown empowered the Company to police printing in England. Stationers' took advantage of the monopoly provided by the royal patents. The charter of the Company allowed it nearly complete control over printing in England. The charter of the Stationers' Company stated that no one should practice the art of printing or participate in the book

[9] John Feather, *A History of British Publishing* (London: Croom Helm, 1988), 15.

[10] Patterson, *Copyright in Perspective,* 80.

trade in any fashion unless they were a member of the Company or attained a royal printing patent.[11]

The charter gave the Stationers a monopoly over the English book trade. Company members owned the right to print any book on its list at the time of the charter. Subsequently, the Company controlled the printing of any book added to its lists. Works published by others were illegal and the Company could pursue legal action against that printer. Only works controlled by printers with royal patents, a group that included university printers as well as individual printers, were denied to the Stationers' Company.[12]

After the turn of the sixteenth century, competition among printers rose as the number of printers increased along with the demand for protection of printed works. By granting a charter to the Stationers, the Crown extended its control over the press in England. Following her ascension to the throne, Elizabeth I (1558-1603) reaffirmed the Company's charter to ensure the regulation of the press, granting the Company authority to regulate the book trade.[13] While the Stationers served as a literary police force, they received many benefits from their connection to the Crown. The charter forced the Stationers to accept royal supervision as Crown was not going to allow the Company to print potentially subversive material. However, in exchange for a monopoly over printing

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[11] *The Charter of the Company of Stationers of London (1557)*, in *A Transcript of the Stationers' Registers, 1554-1640 A.D.,* 5 vols., edited by Edward Arber (1875; repr. New York: Peter Smith, 1950), 1: xxx-xxxi.

[12] Ibid.

[13] Patterson, *Copyright in Historical Perspective*, 36.

in England, the Company accepted royal supervision, the authority of censorship regulations, and the licensing of all books printed in England.[14]

While the Stationers' Company gained control of the press, the composition of the organization heralded the rise of the printer. The members of the Company, at the time of its charter, were a diverse group representing various segments of the book trade. While the primary members were printers, bookbinders, and booksellers, there were also paper suppliers, illuminators (who added illustrations to texts), and even lawyers. Bookbinding and bookselling, as occupations, existed long before printers. However, it was the printers who dominated the Stationers' Company.[15] By law, the charter stated there could be no printers in England who were not members of the Company. The only exceptions were those printers given licenses by the Crown. The dominance of the Company printers was so strong that in its first year of incorporation, only two registered copyrights went to individuals who were not printers.[16]

Elizabeth I, however, fashioned additional legislation that strengthened governmental control of the press. The Parliamentary Acts of Supremacy and Uniformity, or the Elizabethan Injunctions, contained two major regulations that dealt specifically with the printing of religious books. These laws outlined the Queen's power and authority, naming her the head of both the Church and the State as well as outlining her censorship powers. Injunction Six charged that the clergy, at the expense of their

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[14] Bruce W. Bugbee, *Genesis of American Patent and Copyright Law* (Washington, DC: Public Affairs Press, 1967), 50.

[15] Cyprian Blagden, *The Stationers' Company*: *A History, 1403-1959* (Cambridge, MA: Harvard University Press, 1960), 34-39.

[16] Patterson, *Copyright in Historical Perspective*, 36.

respective parishes, should provide within three months of the passage of the law one copy of the Bible, printed in English for parish use. In addition, the clergy were not to discourage the reading of the Bible in either English or Latin, but were to encourage all persons to read the same version. This injunction did not deal specifically with any issues of copyright; however, it is an important piece of legislation for the book trade, because it called for the printing of books in either English or Latin. Reading the same version ensured that the people knew their duties to God, the Queen, and their neighbors. While the Queen reaffirmed the Stationers' charter, the Injunctions of 1559 strengthened the control of the Privy Council, not the Company. In Injunction Fifty-One, the Queen commanded that no one should print a book or paper without first receiving a license from the Queen, or an authority appointed by her.[17] The law listed the Privy Council, the Archbishops of York, Canterbury, and London, or the chancellors of Oxford and Cambridge as individuals empowered to grant the right to print. The law did not empower the Stationers' Company beyond the affirmation of its existing charter. The intent of Injunction Fifty-One was to expand the power of the Queen.

The Injunctions stood as the model for all subsequent licensing laws. After 1559, the Queen issued several proclamations dealing with licensing and sedition, but Parliament passed no statutes to control the press, as the Queen's proclamations were seen as law.[18] The Elizabethan Injunctions provided her with the power necessary to control the press, rendering any statutory law unnecessary. Injunction Fifty-One enacted

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[17] Elizabethan Injunctions, London (1559), in *A Transcript of the Registers of the Company of Stationers of London, 1554-1640,* 1: xxxviii.

[18] Cyndia Susan Clegg, *Press Censorship in Elizabethan England* (New York: Cambridge University Press, 1997), 31.

censorship to ensure that new books received the approval of the Queen or one of her agents before publication. Along with the Injunctions, Elizabeth established the High Commission, an appointed body empowered by the Queen to approve texts for publication. [19]

The Queen's recognition of the Stationers' Company and the rights granted in its charter meant that the only books exempt from registration with the Company were those belonging to printers granted special privileges by the Crown.[20] The High Commission, established under the Elizabethan Injunctions, was responsible for handling those patents printed under special privilege or state monopoly. In 1559, there were twenty licenses to print granted by the Stationers' Company, compared to four patents granted by Royal decree. Among the first licenses listed for the reign of Queen Elizabeth was Richard Totell's license to print details of the Queen's passage through London after her coronation in 1559.[21] The four patents granted by the Queen went to five individuals: John Cawood, John Day, Richard Jugge, William Seres, and Richard Totell, all members of the Stationers' Company. In addition, each man received a lifetime patent from the Queen for other titles. [22]

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[19] John Feather, *A History of British Publishing*, 30-32.

[20] Frank Arthur Mumby, *Publishing and Bookselling: A History from the Earliest Times to the Present Day* (London: Jonathan Cape Thirty Bedford Square, 1930), 61.

[21] Edward Arber, ed., *A Transcript of the Stationers' Registers, 1554-1640 A.D.* 1:96.

[22] *Day's Privilege for The Cosmographical Glass*, Westminster (1559); *Totell's Patent for Common Law Books*, Westminster (1559; *Seres' Patent for Primers and Psalters*, Westminster (1559); *Jugge and Cawood's Printing Patent for Statute Books*, Westminster (1559), Primary Sources on Copyright (1450-1900).

The Stationers' Company and the High Commission were separate entities and both protected their own interests. The Company worked for the benefit of its members, while the High Commission worked in the interest of the Crown.[23] The Company understood that the High Commission chose to grant the Stationers' control of the licensing system as long as the Company maintained order. However, despite the work of the Company and the High Commission, the Star Chamber, the judicial wing of the Privy Council, was the most active in attempting to control the press.[24]

In 1566, the Court of the Star Chamber issued its first decree dealing with the regulation of printing in England. That decree announced an era of cooperation between the government and the Stationers' Company as the government attempted to limit the number of persons printing books in an attempt to better control the book trade. It created a relationship between the government, which held the authority to control the press, and the Company, which had the knowledge and ability to execute governmental orders over the trade. The relationship was reciprocal; the government feared criticism of the press, and the Company feared a reduction of its control over the book trade.[25] Stationers gained the authority to protect their monopoly against any encroachment, both foreign and domestic. The Star Chamber decree was the first governmental acknowledgement that it needed to work with the Company to achieve censorship.[26] Working to prevent the

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[23] Mumby, *Publishing and Bookselling*, 61.

[24] Fredrick Seaton Siebert, *Freedom of the Press in England, 1476-1776: The Rise and Decline of Government Controls* (Urbana, IL: The University of Illinois Press, 1952), 29.

[25] Cyprian Blagden, "Book Trade Control in 1566," *The Library, 5th ser.,* 13 (December 1958): 287-288.

[26] Patterson, *Copyright in Historical Perspective*, 39.

introduction of prohibited or uncensored texts, the decree stated that no one could print or import any work that violated any existing or future statutes, injunctions, letter patents, or ordinances set forth by the Queen or her appointed authorities.[27]

The Star Chamber decree originated in the religious conflict occurring at the time in England; Elizabeth was attempting to prevent the introduction of Catholic texts from the Continent. However, the decree prevented the importation of any book already printed in England and protected by a royal privilege. Offenders would forfeit all copies of the work and spend three months in jail without bail.[28] Additionally, the Wardens of the Company received broad powers to search and seize illegal texts. The Wardens or any two members of the Company appointed by the Wardens, had the authority to search all workhouses, shops, and warehouses involved in the production and importation of books into the kingdom. Illicit works included any text covered by a patent, allowing the Company to police individuals illegally printing works listed in the Company register.[29]

The two major outcomes of the decree were that it allowed the government to search incoming ships for illegal imprints, and it defined more clearly the rights of the Stationers' Company.[30] Strengthened by the Queen's decree, the Stationers' Company reaped large rewards; not only did it gain additional rights to print and reprint texts, but it also gained the power to defend its right against literary pirates. The Crown also

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[27] Star Chamber Decree, Westminster (1566), in *A Transcript of the Registers of the Company of Stationers of London, 1557-1640,* 1:322.

[28] Ibid.

[29] Ibid.

[30] Clegg, *Press Censorship in Elizabethan England*, 46.

benefited; first, it blocked Catholic texts from entering England and, second, it strengthened the Crown's control over printing.[31]

The Star Chamber Decree of 1586, proposed by Archbishop of Canterbury John Whitgift, consisted of nine points. First, the decree defined the process for the registration of printing presses. It stated that any person who owned a press before the decree, or set up a press after the decree, needed to register their press with the government. Second, the decree limited printing to London and its suburbs, the universities of Cambridge and Oxford, and nowhere else. Any person found operating an unlicensed press faced one year in jail without bail. The third portion of the Decree denied the opening of new presses in London until the number of existing printers declined. Limiting the number of presses made it easier for the Crown and the Stationers to control what was printed by limiting to presses they controlled. The Company benefitted significantly because most printers, with the exception of the Queen's printers, were members of the Company. Presses run by anyone, not a Stationer or a royal privilege owner were illegal presses. The remaining portions of the decree provided the Company greater control over the printing industry and book trade in London. [32]

The Decree of 1586 granted the Company powers similar to those provided for by the Decree of 1566. In items six and seven, the Wardens of the Company attained the authority to search and seize illegal books, to arrest offending printers, and to seize

[31] Star Chamber Decree, Westminster (1566), in *A Transcript of the Registers of the Company of Stationers of London, 1557-1640,* 1:322.

[32] Star Chamber Decree, Westminster (1586), ibid., 2:808.

unlawful presses.[33] These powers allowed the Company to maintain its monopoly over copyright by protecting the rights of its members against the illegal reprinting of literary pirates. Items eight and nine limited the number of apprentices. If these men did not become master printers, then they could not open presses of their own. In addition, the efforts to limit the number of apprentices meant a restriction in the number of future journeymen, meaning fuller employment for current journeymen and master printers.[34]

The regulation of the press presented in the Star Chamber Decree of 1586 extended the authority of the Stationers' Company. By limiting both the number of printers and apprentices, the decree allowed for the Masters and Wardens of the Company to divide the texts in the Stationers' registry among themselves. As the Stationers' monopoly derived from a royal grant, the Masters and members of the Company eagerly followed the decrees of the Star Chamber to maintain their position. By the end of the 1580s, the right to print a particular text belonged exclusively to the members of the Company, and the Stationers worked to limit ownership of presses and printing rights to its own membership.[35]

In 1603, King James I (1603-1625) came to the throne following the death of Queen Elizabeth. In 1603, James issued a patent for the Stationers' Company granting them, in perpetuity, the privilege to print primers, Psalters, psalms in meter, almanacs, and prognostications. This patent was arguably among the most significant in the history

[33] Patterson, *Copyright in Historical Perspective*, 118.

[34] Clegg, *Press Censorship in Elizabethan England*, 58.

[35] Feather, *Publishing, Piracy and Politics*, 25.

of the Company; it removed the rights to copy from James Roberts, William Seres, and John Day, who had received their patents from Elizabeth I, and gave those rights to the Company.[36]

In addition, there was also a shift in the relationship among the Company, the Crown, and the clergy. During the reign of Queen Elizabeth, the three entities worked together to maintain a balance between Company printers, royal patent holders, and the Church, but under the Stuarts that symmetry was upset as tension between the three grew. Despite the cancellation of the Elizabethan letters patents, James I maintained the Star Chamber Decree of 1586. The cause of this altered relationship was the political and religious upheaval that accompanied the Thirty Years War, which led to further censorship as more books, deemed seditious, appeared in print after 1620.[37]

Despite the changes that occurred under James I, it was during the reign of King Charles I (1625-1649) when the most significant Stuart document related to the press appeared.[38] The Star Chamber Decree of 1637 created a more intricate and elaborate system of licensing than in 1586. Whereas the earlier decree consisted of nine items governing the press, the Star Chamber Decree of 1637 consisted of thirty-three. The decree, designed to revise the licensing system, instituted the most comprehensive regulations of the early seventeenth century designed to stop the abuses and

[36] Cyndia Susan Clegg, *Press Censorship in Jacobean England* (New York: Cambridge University Press, 2001), 39.

[37] Siebert, *Freedom of the Press in England*, 141-142.

[38] Patterson, *Copyright in Historical Perspective*, 120.

circumventions of the licensing system occurring at the time.[39] The members of the Court of the Star Chamber did not eliminate any of the earlier decrees, but, instead, added to them. The 1637 Decree was fashioned to prevent the printing of libelous, seditious, and disturbing works printed without license, but it stated that the decree added additional regulations and legal explanations to the foundation of past decrees.[40]

The 1637 Decree included several key additions to the existing regulatory system. First, individuals had to license everything printed, including the title, prefaces, preambles, introductions, tables, and dedications. The Decree also stipulated that new works had to be registered with the Stationers' Company. Combined with the letters patents granted by James I, this portion of the 1637 Decree strengthened the power of the Company by expanding the list of works it controlled. In addition, the law limited the number of master printers to twenty. Lastly, it decreed the submission of one copy of every newly-printed book, or reprinted work, to the University of Oxford, for the use of its public library. In London, the Company retained its search and seizure powers of 1586. [41]

While the Star Chamber Decree of 1637 strengthened the Company's control of the printing industry, it was only in place for a short time before the outbreak of the English Civil War. The Long Parliament, which began in 1640, abolished the Star

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[39] Siebert, *Freedom of the Press in England*, 142.

[40] Star Chamber Decree, Westminster (1637), in *A Transcript of the Registers of the Company of Stationers of London, 1557-1640,* 4:529.

[41] Star Chamber Decree, Westminster (1637), in *A Transcript of the Registers of the Company of Stationers of London, 1557-1640,* 4:536.

Chamber, but the importance of the Decree of 1637 surpassed its brief existence.[42] The Decree of 1637 acted as a model for licensing upon the restoration of the monarchy in 1660. As Parliament worked to control the print industry, this was a period during which the press was moderately free to work without strict government regulation.[43] The unregulated printing of scandalous and seditious texts expanded greatly due to the Stationers' Company experiencing an internal struggle, and James's successor, Charles I (1625-1649), dealing with Parliament's attacks on his authority.[44]

Parliament then decided to take control of the press. The reasoning behind this change was the desire to protect Parliament against the publication of inaccurate proceedings.[45] Therefore, from 1640 to 1660, Parliament responded to the print industry by passing three ordinances in 1643, 1645, and1649. In addition, the Stationers' Company, in response to the power struggle between the Crown and the Long Parliament, petitioned Parliament for authority to maintain its control over the printing industry. In its petition, the Company expressed concern about the increased amount of scandalous materials printed since the abolition of the 1637 decree.[46] The Stationers realized that their power over the press came from working with the state. The Stationers' petition, *The Humble Remonstrance of the Stationers' Company,* was an indication that

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[42] Patterson, *Copyright in Historical Perspective*, 125.

[43] Joseph Frank, *The Beginnings of the English Newspaper, 1620-1660* (Cambridge, MA: Harvard University Press, 1961), 21.

[44] Blagden, *The Stationers' Company*, 130-152.

[45] W. M. Clyde, "Parliament and the Press, 1643-1647," *The Library, 4th ser.,* 13 (March 1933), 399.

[46] Joad Raymond, *The Invention of the Newspaper: English Newsbooks, 1641-1649* (Oxford: Clarendon Press, 1996), 28.

the Company was willing to cooperate with Parliament to protect its interests. The petition came at a time when printers in England, due to the lack of regulation by Parliament, printed what they pleased, weakening the Company's control and profits. In the petition, the Stationers first stated the reasoning behind their demand for regulation, suggesting that the most important outcome of the press was the advancement of knowledge to the public, while the second outcome was the prosperity of printers, which relied on regulations to accomplish the first.[47]

The petition recommended regulation to avoid seditious and scandalous material threatening society. The Stationers argued that Parliament needed to empower the Company to control the press to limit the number of printers, presses, and apprentices. This would allow the Company to control output and maintain control over the print industry, by limiting the number of presses and apprentices. Limiting the number of apprentices meant, first, more work for journeymen, and second, it controlled the labor force by limiting the number of future journeymen. The regulation the Stationers requested would create a more stable industry that would be beneficial to both the state and the Company.[48]

Reintroduction of laws that limited the number of presses and apprentices benefited the Company greatly, and it regained control of the market from the growing number of nonmembers who appeared after the dissolution of the Star Chamber. However, the Stationers' petition of 1643 included another argument in favor of

[47] The Humble Remonstrance of the Stationers' Company, London (1643), in *A Transcript of the Registers of the Company of Stationers of London, 1557-1640,* 1:585.

[48] Ibid., 586.

regulation that permanently changed the nature of copyright history. The existence of an unregulated press in the early 1640s was problematic for the Stationers because it interfered with their profitability and control of the market, but it was also an issue for authors, who took the lack of regulations as an opportunity to take control of their property. Prior to the 1640s, copyright was primarily a printer's right, or the right to copy a work. Authors received little protection, unless they were a member of the Company. However, authors did have some rights in the printing process; the Company recognized the right of the author to the profit and compensation of copyright. As early as 1559, there is evidence that Stationers recognized an author's right to payment. It became necessary for a Stationer to gain the author's permission before printing a work. However, the author usually signed over the copyright to ensure the work's publication.[49] The petition argued that authors, like the printers of the Company, relied on the benefit of their work, despite the fact that the authors failed to gain membership in the Company. This argument over authorial rights became more prominent following the Restoration of the monarchy in 1660.

Parliament responded to the Company's petition with *An Ordinance for the Regulation of Printing* (1643). The Ordinance stated that no one could print without the permission of either the House of Commons or the House of Lords, and registry with the Company was required. The printing of books already on the Stationers' registry was off limits without the consent of the Company, and any book licensed to an individual by the government needed the copyright owner's consent to be printed. The most important

[49] Patterson, *Copyright in Historical Perspective*, 67-69.

component of the Ordinance was the search and seizure policies. The Masters and Wardens of the Company, along with members of the Committee of Examinations created by Parliament, gained authorization to search out any unlicensed presses, as well as any press employed in printing works belonging to the Company.[50]

John Milton, an advocate for freedom of the press, wrote *Areopagitica,* or *A Speech for the Liberty of Unlicensed Printing,* attacking Parliament's recent actions. Milton argued rather than encouraging learning, the Ordinance discouraged it by hindering both religious and civil knowledge. Despite this opposition, the Stationers gained back some of the powers lost with the dissolution of the Star Chamber in 1641 and restored their monopoly. With the printing of texts limited to the Stationers' registry and those patents owned by individuals, profitability, for the Company and letter patentees, returned to the print trade.[51]

The *Ordinance for the Regulation of Printing* (1643) did not end the printing of unlicensed works or works of a scandalous nature. The abolition of the Star Chamber Decrees by the Long Parliament created a system of printing in which men, such as Milton, believed that they had the right to print the truth. The government did not have the right to forbid individuals from printing because the text was offensive. Parliament took additional steps to curb unlicensed printing in 1647 with the *Ordinance Against*

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[50] An Ordinance for the Regulation of Printing, London (1643), in *Acts and Ordinances of the Interregnum, 1642-1660, 3 vols.,* eds. Firth, C.H., and Rait, R.S. (London: Her Majesty's Stationary Office, 1911), 1:185.

[51] John Milton, *Areopagitica* (1644; repr. New York: Payson and Clark Ltd, 1927), 4; An Ordinance for the Regulation of Printing, London (1643), in *Acts and Ordinances of the Interregnum, 1642-1660, 3 vols.,* eds. Firth, C.H., and Rait, R.S. (London: Her Majesty's Stationary Office, 1911), 1:185.

*Unlicensed or Scandalous Pamphlets*. The ordinance decreed that any person who wrote unlicensed or scandalous works would forfeit all copies and pay a forty shilling fine. Failure to comply would lead to imprisonment for up to forty days, or until the fine was paid. The Ordinance listed punishments for the printers, sellers, and peddlers. For printers, the fine was twenty shillings or twenty days; for sellers, it was ten shillings or ten days; for peddlers, the punishment was the loss of all texts for sale and a public whipping.[52] This ordinance was significant because it was the first licensing law that specifically mentioned authors and sellers in the same regard as printers. While the Company remained a force in the print industry, the power of authors and booksellers was on the rise.

In 1649, Parliament extended the licensing process set forth in the Acts of 1643 and 1647. With *An Act Against Unlicensed and Scandalous Books and Pamphlets*, Parliament passed laws similar to those of the Star Chamber Decree of 1637. The Act of 1649 increased the fines for the individuals involved in illegal activities, defined as the contriving, printing, and vending scandalous, seditious, or libelous materials.[53] The penalty for the author was ten pounds or forty days in jails; for the printer, it was five pounds or twenty days imprisonment; for the bookseller, it was forty shillings or ten days. In addition, the purchaser had to pay twenty shillings for each item purchased. Just as the Star Chamber Decree of 1637, the Ordinance of 1649 provided the Stationers with the power to enforce the law and regulate the press, but it also protected the copyright of the

[52] Ordinance against Unlicensed or Scandalous Pamphlets, London (1647), in *Acts and Ordinances of the Interregnum, 1642-1660,* 1:1022.

[53] An Act against Unlicensed and Scandalous Books and Pamphlets, London (1649), ibid., 2:245.

Stationers and patent holders. The law decreed any book listed in the Stationers' Register Book needed the consent of the owner of the copyright for publication.[54]

The execution of Charles I led to the creation of the Commonwealth in 1649. While the Act of 1649 proved ineffectual against the social upheaval that followed, Parliament waited until 1653 to discuss the licensing system. In 1653, Parliament passed *An Act for Reviving of a Former Act, An Act against Unlicensed and Scandalous Books and Pamphlets, and for Regulating of Printing, with Some Additions and Explanations* to revive the Ordinance of 1649.[55] The Act empowered the Council of State to investigate the number of existing printing houses and how many should remain open.[56] As a result, the Stationers' Company, if it wished to maintain any control over the press, had to agree to the edicts of the Council of State. While the Act of 1653 weakened the Company, it did not destroy it. The Act of 1653 was the final licensing law passed before the restoration of the monarchy in 1660.

Following the restoration of Charles II, new plans for the control of the press quickly became effective. Like the Parliaments of the Interregnum, the writers of the 1662 Licensing Act referred to the Star Chamber Decree of 1637 for guidance. The new licensing act also included portions of the Ordinances of 1643, the Act of 1649, and the Act of 1653. However, the new law was not just an attempt to reinstate the old ways; instead, the King granted Parliament the authority to regulate what had previously been

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[54] Ibid, 251.

[55] Patterson, *Copyright in Historical Perspective*, 134.

[56] An Act for Reviving [the 1649 Act], London (1653), in *Acts and Ordinances of the Interregnum, 1642-1660,* 2:697.

solely a royal privilege. But, the King retained his right to distribute patents based on royal prerogative. The Licensing Act also guaranteed the protection of those individuals who already held printing patents granted by royal prerogative. [57]

The Licensing Act of 1662 contained twenty-four clauses that originated in the Star Chamber Decree of 1637, suggesting that little had actually changed. One important difference was the number of copies printers had to provide under the law. The new law ordered every printer to submit three copies of every newly-printed, or reprinted, work for delivery to the King's library, Cambridge University, and Oxford University for use by library patrons. For the first time, library deposit became a requirement of a licensing act. Other new additions in 1662 included protection for booksellers importing works from the Continent, a limitation of the search and seizure power to only the homes of men involved in the trade, and continued protection for printers who earned royal grants.[58] The Licensing Act remained in force until 1694.[59]

During the debates about the renewal of the Licensing Act, held in 1694, John Locke spoke out against the licensing system. Locke's *Memorandum on the 1662 Act* attacked licensing and other attempts to control the press. Like Milton in the 1640s, Locke decried the law and argued that it, in fact, obstructed knowledge rather than encouraged it. Locke focused specifically on the Stationers' Company monopoly over the printing of the classics, arguing it unreasonable someone should control rights in a book

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[57] Siebert, *Freedom of the Press in England,* 237.

[58] *Licensing Act, London* (1662), Primary Sources on Copyright (1450-1900).

[59] Raymond Astbury, "The Renewal of the Licensing Act in 1693 and its Lapse in 1695," *The Library, 5th ser.,* 33 (December 1978), 296-298.

published fifty years earlier. He suggested that anyone should have the liberty to print a work.[60]

In April 1695, the House of Commons ordered another renewal bill sent to committee for discussion. The committee opposed the bill, arguing that it was a law that continuously failed to prevent the printing of seditious and libelous works.[61] In the end, no compromise emerged in either the committee or the House of Commons. The failure to renew the Licensing Act in 1695 represented the end of pre-publication censorship in England. As a result, the Crown and the Stationers' Company lost their authority over the print industry. The emergence of authors and printers into the book trade after the abolishment of the Licensing Act lead to a more diverse literature in the late seventeenth and early eighteenth centuries. This diversification occurred because without licensing laws, men printed what they liked without the fear of censorship.[62]

The lack of licensing regulation after 1695 did not mean that an individual's rights remained unprotected. Both the House of Commons and House of Lords actively prosecuted cases related to the book trade. Many of them relied on the common law argument that the creator of a work owned his or her creation, unless assigned to another. While most cases involved the owner of a copyright suing because of an illegal printing,

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[60] John Locke, *Memorandum on the 1662 Act (1693)* in *The Life of John Locke, with Extracts from his Correspondence, Journals and Common Place Books,* 2 vols*,* ed. Lord Peter King (London: Henry Colburn & Richard Bentley, 1830), 1:379-380.

[61] *Reasons for Objecting to the Renewal of the Licensing Act, London (1695),* Primary Sources on Copyright (1450-1900).

[62] Raymond Astbury, "The Renewal of the Licensing Act in 1693 and Its Lapse in 1695," *The Library* 5th Series 3 (December 1978), 311-322.

many dealt with the printing of seditious, libelous, or treasonous works. This use of the judicial system became more visible in the last decade of the seventeenth century. Such cases were common from 1660 to 1714; however, after 1695 a larger number of them involved works printed by pamphleteers and journalists. Moreover, while both houses of Parliament aggressively worked to suppress seditious and disreputable publications, the House of Commons took the lead. It considered any published material that questioned the actions of the House as dangerous and seditious.[63]

There were also special interest groups, which consisted of various members of the book trade and authors. Daniel Defoe, one of the prominent pamphleteers of the era, wrote an essay in 1704 outlining his argument for a free press and his call for protection against literary pirates. Defoe wrote of the consequences of a licensed press, charging, "it makes the Press a slave to a Party." According to Defoe, whichever party in power at the time would have the influence to keep the people ignorant of political and religious matters. The party in power would have the authority to enforce its policies, ensuring the opposition's voice be suppressed.[64] Defoe believed in the freedom of the press, but also called for protection against licentious and seditious texts. In this case, he argued for outlawing anonymous publications so that the authors of offensive books would receive the proper punishment.[65]

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[63] Siebert, *Freedom of the Press in England,* 276-277.

[64] Daniel Defoe, *An Essay on the Regulation of the Press* (1704; repr. Oxford: Luttrell Society, 1947), 4-5.

[65]Mark Rose, *Authors and Owners: The Invention of Copyright* (Cambridge, MA: Harvard University Press, 1993), 34.

The cessation of the Licensing Act did not end ownership rights in published works. At the turn of the century, the creator, or the author, held ownership of the work. A law requiring the author's name printed on the text would end printers and booksellers from pirating the works of others. Defoe believed men should be able to write what they wanted, but also that men should understand the consequences involved in printing contentious material. In the end, Defoe advocated laws that warned men of the consequences of printing licentious or seditious material, or the pirating of another's work, as long as the laws did not restrict the rights of one group of individuals while benefitting another.[66]

Defoe's arguments for protection of authorial property and his ideas on press control inspired yet another push for reform. The crucial concept Defoe introduced was the idea that literary protection benefited both authors and the trade. Another element was the concept of a law encouraging learning, which the trade now emphasized. In 1706, supplicants presented a petition to Parliament entitled *Reasons Humbly Offer'd for a Bill for the Encouragement of Learning, and Improvement of Printing*. Ironically, despite the emphasis placed on the encouragement of learning and protection of the authorial rights, the majority of petitioners were members of the Stationers' Company. This was merely an attempt by the Company to maintain control over its "English Stock," the Company's list of works copyrighted by its members since the Company's chartering.[67]

[66] Defoe, *An Essay on the Regulation of the Press*, 25.

[67] Feather, "The Book Trade in Politics," 30-32.

The petition opened with a statement that honorable printers had legally obtained their right to print certain works by purchasing that right from the author. However, the petition also mentioned an increase in the incidence of literary piracy as an attack on the profitability of the copyright holder. The Stationers requested aid in protecting their copyright to works secured prior to the expiration of the Licensing Act. This was not a request for regulation; the petitioners asked Parliament to pass laws ensuring protection of their property from theft. They reasoned that if the government did not go after literary pirates, then it would become unprofitable for men of learning to write and publish. The petitioners argued that the author, or their assignee, should hold all the benefits allowed, the most important being the right to copy the work. [68]

The petition failed in committee, but members of the Company petitioned Parliament again in 1707 asking for a bill securing copyright for the author, his/her assignee, or the publisher who purchased the rights. The phrasing of this petition is of critical importance, as it emphasized the rights of the writer, assignee, or purchaser. This made the petitioners appear friendly to the rights of authors. The committee working on a bill was empowered to include a library deposit clause in any new law. The more libraries included in the law meant a small financial loss for copyright owners who were required to deposit copies at their own expense.[69] The failure of this bill affected the Stationers' Company control of the print industry, but they responded with more petitions in 1709.[70]

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[68] *Reasons Humbly Offer'd for the Bill for the Encouragement of Learning, London (1706),* Primary Sources on Copyright (1450-1900).

[69] Feather, "The Book Trade in Politics," 30-32.

[70] Ransom, *The First Copyright Statute,* 90-91

Parliament called for and received a bill that responded to the demands in these various petitions. Initially, the bill was entitled *A Bill for the Encouragement of Learning, and for Securing the Property of Copies of Books to the Right Owners thereof.* As the title suggests, the bill provided the protection and security demanded by the Stationers, and seemed to preserve the structure of the book trade that had existed in the seventeenth century.[71] After amendments, the name of the bill was changed. The new title of the bill became *A Bill for the Encouragement of Learning by Vesting the Copies of Printed Books in the Authors or Purchasers of Such Copies*. Including the term author in the title represented a shift in legal thinking. For the first time, a law stated that literary rights began with the act of composition, and legally defined the author as the basis of rights in copy.[72] This challenged the traditional idea of the publisher being the source of the copyright. In the sixteenth and seventeenth centuries, copyright literally meant the right to copy, or print. Therefore, the rights in copy belonged to the person who first published the work.[73] This new law represented a loss for the Stationers, because authors were not generally members of the Company, and it seemed as if the Company was set to lose any rights on future texts.

The passage of the bill, referred to as the Statute of Anne, represented the culmination of all the censorship, book trade regulation, and licensing acts during the previous two centuries. While copyright remained a monopoly for the person or persons

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[71] Mark Rose, "The Public Sphere and the Emergence of Copyright: *Areopagitica*, the Stationers' Company, and the Statute of Anne," in *Privilege and Property: Essays on the History of Copyright* eds. Ronan Deazley, Martin Kretschner, and Lionel Bentley (Cambridge: Open Book Publishers, 2010), 82.

[72] Ransom, *The First Copyright Statute,* 95-97.

[73] Patterson, *Copyright in Historical Perspective*, 4.

holding the right to copy, one major development was the transition from the publisher to the author. In the mid-seventeenth century, writers began labeling themselves authors in attempt to create a singular status.[74] The Ordinance of 1643 was the first law to recognize authors; but, the power held by the Stationers' Company allowed it to ignore authors. Though the political presence of authors grew, it was the Crown and the Stationers who controlled the power of copyright. While the Company ignored the rights of the authors, it recognized that only they had the right to alter and revise their works. In the eighteenth century, the debate between the rights of the author and printers intensified and became the central question of copyright debates.[75]

Many Stationers believed they could manipulate the system to their benefit through recognition as the author of a work. The suggestion that granting legal rights to authors protected the interest of the booksellers revealed that the failure to renew censorship and licensing laws in 1695 greatly weakened the power of the Stationers' Company. This did not mean, however, that the Stationers were powerless; the Company still controlled the process of making books. In fact, publishers maintained many of the old traditions of the trade, in which they paid writers to gain the right to copy works.[76] The development of eighteenth-century English copyright law came about because of the empowerment of the author. However, the Stationers' Company did not surrender its rights meekly. Both groups looked to the English court system for interpretation of the

[74] Peter Jaszi, "Toward a Theory of Copyright: The Metamorphoses of Authorship," *Duke Law Journal* 40 (April 1991), 455.

[75] Patterson, *Copyright in Historical Perspective*,71.

[76] Jaszi, "Toward a Theory of Copyright," 469.

new laws. All the events that occurred after 1710 affected the future development of American copyright law as the Statute of Anne became the model the Americans followed when shaping their own system of copyright law.

In its original form, the purpose of the Statute of Anne was to define copyright as a form of property. As the initial title suggested, this favored the holders of royal patents and the Stationers' copyright; however, adjusting the title to include the term *author* or *purchaser* changed the law's dynamic. The Statute consisted of eleven clauses. The first stated that all authors or purchasers of works already in print retained that right for a period of twenty-one years.[77] This portion of the bill appeased the Stationers, those printers holding royal patents, and booksellers because it granted them continued control over their property for an extended period, which was precisely the protection they had requested. These groups had invested heavily in the old copyrights, and the limited continuation of their rights prevented the loss of their investments. Additionally, the twenty-one year term gave them time to prepare for extending and protecting their monopolies in the future.[78] That term applied only to those works printed at the time the Statute passed, but the first clause included additional term limits for future publications. Authors, or publishers, of new works received a single fourteen-year copyright term. The Statute, therefore, created two categories of books: those books published before April 10, 1710 and those books published after that date.[79]

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[77] *Statute of Anne, London (1710),* Primary Sources on Copyright (1450-1900).

[78] Patterson, *Copyright in Historical Perspective*, 148.

[79] *Statute of Anne (1710).*

The second, and more important effect of the act, was the statutory copyright. The Statute introduced the idea of the author as the originator of the rights in copy, thereby making copyright an authorial right, not a publisher's right. In addition, the eleventh clause granted a second fourteen-year term to the original author if they were still alive. This allowed for a single fourteen-year renewal, which extended the protection of authorial rights created by the Statute to twenty-eight years.[80]

The introduction of a term limit with the Statute of Anne appeared to break the monopoly of the Stationers' copyright as well as the royal patents. However, the owners of these copyrights argued that they held perpetual common law copyrights unaffected by the new law. The concept of a common law copyright went back to before the invention of printing and the formation of the Company; the Ordinances of 1641 and 1643, the *Licensing Act of 1662,* and the Statute of Anne all seemed to confirm common law rights. The invention of printing and the right to copy made an authorial right easier to ignore, and, as the owners of old copyrights argued, the laws passed protected their rights to those works.[81] These ideas conflicted with the ideas represented in the Statute, which created a law that seemed to erase the idea of common law rights. Once the statutory limit ended, the work would be open to the public for the advancement of learning. The Statute simply provided the authors, or purchasers, time to accumulate some reward for their labors. However, while society was aware of this common law versus statutory law debate, it did not become an issue until later in the eighteenth century.

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[80] Ibid.

[81] Ronan Deazley, *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth-Century Britain (1695-1775)* (Portland, OR: Hart Publishing, 2004), 100-101.

The remaining clauses of the Statute dealt with the process of the book trade and the powers to maintain the control of the trade. The second clause stated that all new books published must be listed in the Register Book of the Stationers' Company. This action was a mere formality, used as a method to track the titles of new books published and have copies available in cases dealing with literary piracy. It was not an attempt to provide the Stationers with additional property, for the property now existed solely in the hands of the author. The third clause said that if a Stationer refused to enter a title in the Registry, the individual would pay a fine of twenty pounds that the author could recover. Protection against the Stationers' refusal to enter a title was important because it protected the authors from licensors who forced them to pay bribes to register their copyrights. The fourth clause protected against price gouging. It laid out the process by which individuals could complain about the cost of books they deemed too high. The fifth clause dealt with depositing books upon publication. Printers were to send one copy each to the Stationers' Company, the Royal Library, Oxford and Cambridge, the four universities of Scotland, Sion College, as well as the Library belonging to the Faculty of Advocates at Edinburgh.[82]

The Statute of Anne created a process for controlling the English book trade that was more beneficial to authors. The seventh clause did not prohibit the importation of books in foreign languages, but allowed the book trade to protect against imported books printed in English. Universities, according to the ninth clause, gained the right to reprint

[82] *Statute of Anne (1710).*

any book or copy already in print. This encouraged the universities to reprint works to encourage learning, as the title of the bill suggested.[83]

The law created in 1710 changed the features of copyright in the eighteenth century. It had been over two hundred years since the introduction of printing in England, during which the right to copy, or print, was censored and licensed. After the passage of the first copyright law, the protection of property rights in published works focused more on the rights of authors/owners rather than controlling the subject or quality of what was printed.[84] While the new law offered incentives to printers, booksellers, and authors, it did not end the debate about the expiration of the licensing laws in 1695. The first modern copyright law created additional arguments between monopolists, who favored the perpetual common law copyright, and anti-monopolists, who enjoyed the statutory law limitation on the right to copy. Parliament passed additional laws in the eighteenth century that extended the coverage of copyright; however, the majority of these changes came about because of court decisions. The most contentious cases dealt with interpreting the Statute of Anne and the definition of copyright.

The first of these court cases was *Burnet v. Chetwood (1721)*; it involved the publication of translations. It was also the first case concerning a printed work not protected by letters patent.[85] This case allowed for an extended discussion of the

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[83] Ibid. The sixth clause stated that if anyone living in Scotland incurred any penalty list in the act, recovery occurred through action before the Court of Session there. The eighth clause outlined the rights of defendants who won their cases. The tenth clause required that any offense of the Statute be prosecuted within three months or the actions would be voided.

[84] Siebert, *Freedom of the Press in England 1476-1776,* 249.

[85] Deazley, *On the Origin of the Right to Copy*, 56.

limitations of the Statute of Anne. The case involved two works written in Latin by Thomas Burnet: *Archaeologica Philosophica* and *De Statu Mortuorum et Resurgentium.* When Burnet died, the rights to his work passed to his brother, George, who was the plaintiff in the case. The defendant, William Chetwood, contrived to print an English version of *Archaeologica Philosophica* and had already placed advertisements in newspapers stating the book would appear soon. George Burnet received the injunction he requested against the publication of the work. [86]

The other work, *De Statu Mortuorum et Resurgentium*, was actually a book Thomas Burnet wrote, but did not publish. According to historian Ronan Deazley, "Burnet did during his lifetime print a few copies of *De Statu* for himself. The printer however, while printing the works for Dr. Burnet, also ran off a copy for himself."[87] The printer then made copies for friends, but instructed them not to make additional copies. It was from one of these copies that Chetwood obtained his duplicate. After the first injunction, the defendant, Chetwood, announced his intention to sell translations of both works. When George Burnet turned to the courts, the defendant argued that his translation was a new book and that the law did not forbid the printing of translations of works already in print.[88]

Chetwood was accurate in stating the Statute of Anne did not protect translations; the court agreed, and Burnet's claim of an infringement of his rights was not supported

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[86] *Burnet v. Chetwood, London (1721),* Primary Sources on Copyright (1450-1900).

[87] Deazley, *On the Origin of the Right to Copy*, 56n26.

[88] *Burnet's Bill of Complaint and Chetwood's Answer, The National Archives (1721),* Primary Sources on Copyright (1450-1900).

by the court.[89] The judge stated that the reason the injunction held was that the book presented facts the author intended for only the educated, those who understood Latin. The work appeared in Latin to keep its information from the less educated classes.[90] The decision indicated that translations were, in fact, new books and, therefore, not infringements upon the copyright of the original work.

The first extension of copyright occurred in 1735, in the form of the Engravers' Copyright Act. The Statute of Anne, which covered literary material, did not protect all forms of printed materials; it ignored artistic works. William Hogarth became synonymous with the movement for copyright protection for etchings, engravings, and inventions. Hogarth collaborated with six fellow artists and designers, who were all recognized figures in their fields, in presenting a proposal to the House of Commons in 1735. [91] The bill—entitled *An Act for the Encouragement of the Arts of Designing, Engraving, and Etching Historical and Other Prints, by Vesting the Properties thereof in the Inventors and Engravers, during the Time herein mentioned*—granted works of art the same protections as printed materials under the Statute of Anne.[92]

With the Engravers' Copyright Act, the catalog of copyrightable material expanded. Like their literary compatriots, artists, designers, and engravers believed that

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[89] David Saunders, "Copyright, Obscenity and Literary History," *Journal of English Literary History* 57 (Summer 1990), 438.

[90] *Burnet v. Chetwood, London (1721).*

[91] David Hunter, "Copyright Protection for Engravings and Maps in Eighteenth-Century Britain," *The Library* 6th Series 9 (June 1987), 128-130.

[92] *Engravers' Copyright Act, London (1735),* Primary Sources on Copyright (1450-1900).

their works were their property and deserved protection. Hogarth looked to test the central principle of the Engravers' Copyright Act that a painting's publication gave it new value beyond what it held by just hanging on a wall. The law functioned to prevent one artist from copying another by defining copying as an exact replica of the original. This extension of copyright seemed a logical step because the artists' labors were as much their property as a book.[93]

In 1735, when Hogarth and his coterie introduced their petition, a group of booksellers also petitioned Parliament for additional protection. Most of them were men who owned copyrights of works printed prior to the Statue of Anne. As stated in that bill, the law protected old books (those published before April 1710) for twenty-one years. When that term ended, the booksellers petitioned for additional protection because their copyrights provided income. There was a bill presented to Parliament in 1735, but it was unsuccessful. However, there was a second bill in 1737. Again, basing their case on the common law argument, the booksellers called for a more extensive term of copyright protection. The bill proposed that authors receive a lifetime copyright term with an additional eleven-year term granted to their heirs. The bill mentioned works published before and after the date of the Statute of Anne.[94]

The Booksellers' Bill attempted to enhance the power of the author in relation to the contracts an author made with printers and booksellers. This was significant because it provided the author the opportunity to restructure contracts with printers. It also

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[93] Ronald Paulson, *Hogarth: His Life, Art, and Times* 2 vols. (New Haven: Yale University Press, 1971), 1:360.

[94] *Booksellers' Bill, London (1737),* Primary Sources on Copyright (1450-1900).

allowed authors to increase the financial benefits from their works. If certain books became more popular, the author would reap that reward. This bill failed. From the printers' point of view, the thought of renegotiating contracts with authors caused concern. Despite its failure, the bill was the first attempt to solve the copyright dilemma of the rights of authors over those of publishers.[95]

While booksellers celebrated the idea of a nearly perpetual copyright, the empowerment of the author lessened their support for the bill. However, there was also a court ruling in the case of *Baller v. Watson* (1737) that encouraged booksellers to support perpetual copyright. The 1737 case was a continuation of the *Gay v. Read* (1729), in which John Gay became the first author to act as a plaintiff in a lawsuit concerning literary property.[96] While Gay received an injunction, it was eight years before the issue concluded. Gay, therefore, became not only the first author to be named as the plaintiff in a case over his own property, but also the first living author to defend his copyright successfully. However, John Gay died in 1732, leaving his wife as executrix. In *Baller v. Watson,* the chancery stated that the injunction granted in *Gay v. Read (1729)* would become perpetual.[97]

As the judges ruled on this case about the same time Parliament debated the Bookseller's Bill, many of the booksellers, who applauded the perpetual injunction,

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[95] Deazley, *On the Origin of the Right to Copy*, 56; Patterson, *Copyright in Historical Perspective*, 157.

[96] Jody Greene, *The Trouble with Ownership: Literary Property and Authorial Liability in England, 1660-1730* (Philadelphia: University of Pennsylvania Press, 2005), 212.

[97] *Baller v. Watson: Entry from the Court's Book of Orders, London (1737)*, Primary Sources on Copyright (1450-1900).

turned against the bill and looked to the courts for assistance. The booksellers sided with whichever authority provided them what they desired, and, at the time, it seemed that the courts were the best option for approval of common-law copyright. In the eyes of the booksellers, it appeared that as judges occasionally granted injunctions to the proprietors of copyrights, judges supported a common-law copyright. [98]

In the mid-eighteenth century, the major players involved in the legal arguments over the definition of copyright were the London printers, attempting to maintain their control over the trade, and the Scottish printers, looking to benefit from the reprinting of books after the terms outlined in the Statute of Anne expired.[99] This struggle led to a series of cases concerned with the issues of property rights and property ownership including *Millar v. Kincaid* (1743), *Tonson v. Collins* (1761), *Millar v. Taylor* (1769), *Hinton v. Donaldson* (1773), and *Donaldson v. Becket* (1774).

In *Millar v. Kincaid*, Millar and other London printers sued Kincaid and a group of printers from Edinburgh and Glasgow for literary piracy. The Scottish printers, who interpreted the Statute of Anne strictly, argued in favor of a definitive time limit for copyright protection. Based on their interpretation, they could reprint these works. After much debate, the case ended with no decision. However, it was clear that Scottish courts

[98] Augustine Birrell, *Seven Lectures on the Law and History of Copyright in Books* (1899; repr., South Hackensack, NJ: Rothman Reprints, Inc., 1971), 103.

[99] Gwyn Walters, "The Booksellers in 1759 and 1774: The Battle for Literary Property" *Library* 5th Series 29 (September 1974), 287-311.

would not protect London printers. The cases that followed continued the debate over the existence of a common-law copyright.[100]

*Tonson v. Collins* resumed the debate begun in *Millar v. Kincaid*. In the years between the two cases, Scottish printers endeavored to preserve their growing print industry. The case dealt with defining what property was and whether or not property had value. The lawyer for the plaintiffs stated that the defendants had infringed the rights of the plaintiffs by reprinting properties held by them in the common law, affecting their right to profit from their property. Alexander Wedderburn, a lawyer acting on behalf of the plaintiff, contended that the profits from a book belonged to the author. Whether the author printed for the use of his friends, for subscribers to the property, or for purchasers, these individuals had the right to use the property and nothing else, and the profits from these printings must go somewhere. Wedderburn argued that individuals involved in the printing process should pay for their work, and it was only fair that the author be paid as well. In arguing this case, Wedderburn suggested that the plaintiff's rights to ownership were a natural right unaffected by the passage of the Statute of Anne. Wedderburn emphasized the power of the royal patents and the Stationers' copyright rather than the Statute of Anne to show that a perpetual common-law copyright existed.[101]

In response, lawyer Edward Thurlow argued on behalf of the defendants, speaking against the monopoly established by perpetual copyright. Thurlow stated that copyright was not a natural law, but the creation of the state. Therefore, copyright was a

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[100] John Feather, *Publishing, Piracy and Politics: An Historical Study of Copyright in Britain* (London: Mansell Publishing Ltd., 1994), 81-82.

[101] *Tonson v. Collins, London (1761)*, Primary Sources on Copyright (1450-1900).

statutory issue and subject to the Statue of Anne. Opposed to perpetual monopoly, Thurlow stated, "[T]he Act of Parliament therefore wisely gives a limited Monopoly, not a perpetual." This was important to the Scottish printers who relied on the argument that the public could use any work freely after its term of copyright expired. That thinking was the idea behind copyright as a tool for the encouragement of learning, while, at the same time, allowing individuals to benefit from their intellectual property, if only for a limited time.[102]

The significance of *Tonson v. Collins* was twofold. First, it was the first case involving literary property to be heard in the Court of the King's Bench. Second, it led to the emergence of two conflicting interpretations of copyright: the view that it was a common law perpetual right versus the view that copyright was a restricted right controlled by statute. After two hearings in 1761 and 1762, *Tonson v. Collins* ended without a definitive ruling. However, the conflicting views of copyright that emerged from the case were dealt with in future cases. [103]

The battle between the Scottish and English printers over the definition of copyright continued in the case of *Millar v. Taylor* in 1769. Unlike previous cases concerned with the interpretation of copyright law, *Millar v. Taylor* ended with a ruling that stated what rights existed in copyright. The court decided that a perpetual common-law copyright existed; consequently, the plaintiff won his case. However, it was not a unanimous decision; the case produced the first dissenting opinion in the Mansfield court.

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[102] Ibid.

[103] Feather, *Publishing, Piracy and Politics,* 84.

The dissenting voice, Justice Joseph Yates, spoke against the natural rights idea of common law and made the case that Parliament could make laws that overruled common law. Yates stated that the legislature could create a new right, as Parliament did with the Statute of Anne. When individuals published their works, Yates suggested, it was a gift to the public, and as a gift, it was beneficial to society not a single individual. Therefore, common-law copyright was detrimental to society, and the Statute of Anne created a compromise favorable to all. Authors profited from the limited protection while society benefited from access to an author's published materials.[104]

William Murray, the First Earl of Mansfield and the Lord Chief Justice, in his ruling on *Millar v. Taylor*, relied on his reading of previous cases involving copyright law. He wrote that the Court of Chancery correctly recognized the existence of perpetual copyright despite the passage of the Statute of Anne. Considering Mansfield presided over many of the most prominent copyright cases in the eighteenth century, it is not difficult to believe that his connection to these cases and the precedents drove his opinion in *Millar v. Taylor*. Justice Edward Willes, who also ruled for the plaintiff, found that the common-law rights of an author were not taken away by the passage of statutory laws. Ignoring the law in the Statute of Anne, Willes claimed perpetual common-law copyright existed in the pre-1710 system of licensing and remained viable after the passage of the Statute of Anne. [105]

[104] Patterson, *Copyright in Historical Perspective*, 168.

[105] *Millar v. Taylor, London (1769),* Primary Sources on Copyright (1450-1900).

The third affirmative vote came from Justice Richard Aston, who offered a different view of common-law copyright than that presented by his colleagues. He argued that the author had a property right to his or her work beginning at the time of composition and that publication made the property valuable. Aston argued that copyright protection began at the time the author formed the property, a perception similar to that of William Warburton.[106] All three justices offered a different view of common law, but all agreed that copyright was perpetual. In *Millar v. Taylor,* the court ruled that perpetual common-law copyright existed and that the Statute of Anne could not infringe upon that right.[107]

*Millar v. Taylor* represented a major victory for the London booksellers who favored a perpetual copyright. The decision denied the authority of the Statute of Anne by ignoring the term limits applied to printed material. This allowed the booksellers once again to monopolize the book trade as they had in the sixteenth and seventeenth centuries. Unfortunately for the booksellers, their victory was short lived because just five years later the courts overturned the *Millar v. Taylor* ruling with the 1774 decision in *Donaldson v. Becket.*

Before *Donaldson v. Becket*, however, one additional case exaggerated the debate between Scottish and English printers, as well as booksellers and authors. In *Hinton v. Donaldson*, heard in the Scottish Court of Sessions, John Hinton sued Alexander Donaldson for illegally reprinting the Reverend Thomas Stackhouse's *History of the Holy*

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[106] Ibid.

[107] Joseph Lowenstein, *The Author's Due: Printing and the Prehistory of Copyright* (Chicago: The University of Chicago Press, 2002), 243.

*Bible*. Donaldson, who reaped large financial rewards from the reprinting, argued against the existence of common law copyright because the Scottish legal system was more influenced by Romano-Germanic civilian tradition than the English system.[108] According to Donaldson, English common law did not exist in Scotland. Eleven of the thirteen judges voted for Donaldson, and against the common law argument. In his statement, David Dalrymple stated that English law was foreign to Scotland, as was the English interpretation of common law. Robert Bruce of Kennet stated that the only right an author had in printing was that granted by the Statute of Anne. The one dissenting voice belonged to James Burnett who said that common law in Scotland and England were both founded upon common sense and justice and were, therefore, identical.[109] The decision in *Hinton v. Donaldson* seemed to overturn *Millar v. Taylor*, at least for Scottish printers.

In the cases of *Millar v. Taylor* and *Hinton v. Donaldson,* the battle of the booksellers reached its zenith. First, there were the Scottish booksellers who advocated a limited monopoly in copyright. On the other side, were the London booksellers who advocated the perpetual monopoly in copyright. Both groups had victories in the courts, with the English courts generally ruling in the favor of perpetual common-law rights and the Scottish courts generally favoring statutory law. The legal conflict over perpetual copyright climaxed in 1774, when the House of Lords made its first decision on the issue. The case of *Donaldson v. Becket* ended the literary property debates of the mid-eighteenth century.

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[108] Deazley, *On the Origin of the Right to Copy*, 179-183.

[109] *Hinton v. Donaldson, Edinburgh (1773),* Primary Sources on Copyright (1450-1900).

Alexander Donaldson moved from Scotland to London and set up a shop, from which he began selling reprinted copies of books by English authors, all of whom were deceased. Following the successful ruling in *Millar v. Taylor*, Millar sold his rights to James Thomson's *Seasons* to Thomas Becket, who then owned the common-law right on that work. Donaldson challenged Becket's right by reprinting and selling a cheaper copy of the work; Becket then filed for an injunction against Donaldson and received it. After the injunction, Donaldson appealed to the House of Lords.[110] There, the issue of copyright was subject to five questions. They were:

> Whether at common law an author of any book or literary composition had the sole right of first printing and publishing the same for sale, and might bring an action against any person who printed, published, and sold the same without his consent?
>
> If the author had such right originally, did the law take it away on his printing and publishing such book or literary composition; and might any person afterwards reprint and sell for his own benefit such book or literary composition against the will of the author?
>
> If such action would have lain at common law is it taken away by the Statute of 8 Anne; and is an author by the said statute precluded from every remedy, except on the foundation of the said statute, and on the terms and conditions prescribed thereby?
>
> Whether the author of any literary composition and his assigns had the sole right of printing and publishing the same in perpetuity by the common law?
>
> Whether this right is in any way impeached, restrained, or taken away by the Statute of 8 Anne?[111]

[110] Deazley, *On the Origin of the Right to Copy,* 191-194.

[111] *Donaldson v. Becket, London (1774*), Primary Sources on Copyright (1450-1900).

The justices responded to each question, with some interesting results. On the first question, the judges ruled 10-1 that an author had the sole right to the first printing for sale. The judges, on the second question, voted 7-4 that the law did not take away the author's rights upon printing. On the third question, the judges ruled 6-5 that the Statute of Anne overruled common law. The fourth question concerned the perpetual copyright, and the judges voted 7-4 that it could exist, theoretically, in perpetuity. On the final question, the judges decided 6-5 that the Statute of Anne controlled copyright.[112]

Other than the first question, all the decisions were very close, and many of the judges believed in the existence of common-law copyright, but at the same time terminated perpetual copyrights by attributing to the Statute of Ann the power to overrule the common-law copyright. Despite the narrowness of the decision, after *Donaldson v. Becket*, perpetual copyright in England no longer existed. Copyright was based upon the term limits set by the Statute of Anne. The case effectively took a perpetual monopoly and made it a limited one, and it appeared that modern copyright law might live up to the ideal of encouraging learning. For now, the enforcement of a limited monopoly allowed works to enter the public domain more quickly. It was also a victory for the Scottish printers, whose business flourished with the reprinting and selling of books once denied

[112] Augustine Birrell, *Seven Lectures,* 124-127.

them. The *Donaldson v. Becket* decision ended the dominance the London printers held over the book trade.[113]

*Donaldson v. Becket* was the last major court case of the eighteenth century concerned with defining copyright law, but it was not the end of the changes made to copyright. In 1777, in the case of *Bach v. Longman*, the Court of the King's Bench ruled that musical composition was a form of writing and, therefore, protected by the Statute of Anne.[114] The Lord Chief Justice Mansfield remarked in his ruling that the wording of the Statue of Anne offered protection to books and other writings, including musical compositions.[115] There were two additional changes made to copyright law through actions of Parliament. The first, the Calico Printer's Act of 1787, granted copyright protections for two months to individuals printing new and/or original patterns on linens, cottons, calicoes, and/or Muslins.[116] The second, the Models and Busts Act of 1798, provided a copyright of fourteen years for the creation of new models, busts, and statues.[117] None of the additions significantly changed copyright law; they merely extended the authority of the Statute of Anne to include additional materials.

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[113] Ibid.

[114] *Bach v. Longman, London (1777),* Primary Sources on Copyright (1450-1900).

[115] David Hunter, "Music Copyright in Britain to 1800," *Music & Letters* 73, 3 (July 1986), 279.

[116] *Calico Printers' Act, London (1787),* Primary Sources on Copyright (1450-1900).

[117] *Models and Busts Act, London (1798),* ibid.

The evolution of English copyright law through the eighteenth century came about due to the debate over authorial rights and the attempts by booksellers to maintain a perpetual monopoly over the trade. The law, as written in the Statute of Anne, did not change significantly through the century. Even with the extensions to cover engravings, musical compositions, and models and busts, the term limits and core of the law remained unchanged. The real changes to copyright law came about because of the battle of booksellers. By the end of the eighteenth century, copyright was a limited monopoly controlled by the time limits of the law. The Statue of Anne and the legal battle of the eighteenth century provided the foundation of American legal thinking after the colonies gained their independence. The development of American copyright law would resemble that of the English laws in many respects.

# CHAPTER II

## COPYRIGHT IN NORTH AMERICA FROM THE COLONIAL PERIOD THROUGH THE CONSTITUTIONAL CONVENTION

The development of English copyright law throughout the sixteenth, seventeenth, and eighteenth centuries set the foundation for the conception of American copyright law. English colonists introduced printing and copyright to British North America beginning in the 1630s. The experience of American copyright law mirrored that of the English experience; however, as the print industry grew in the American colonies, printers and authors adapted the English system to fit their own needs and beliefs, which were akin to those of printers in London. In the colonies, the copyright movement experienced many of the same concerns and questions as the Stationers' Company and the London printers. What did copyright mean? Who controlled copyright? In England, by the end of the eighteenth century, copyright was a protected authorial right defined by the Statute of Anne (1710) and upheld as a limited statutory right by the ruling in *Donaldson v. Beckett* (1774). Copyright law became an important legal issue after the American Revolution; American leaders also supported the inclusion of a copyright clause during the drafting of the Constitution.

The growth of the print industry in the American colonies remained slow in the seventeenth and early eighteenth centuries because of the lack of work for printers, outside of government printing jobs. However, after 1720, printing expanded rapidly with

the emergence of newspapers in the colonies that altered the position of the printers and as cities presented more job opportunities.[1] As the print industry grew and transitioned after 1720, the issues involving copyright became more prominent in the colonies. Like the debates in England at the time, colonial printers argued for protection of their works, but in the case of the American printers, they had little to protect. American printers regularly infringed upon patents held in England by printing pirated copies of almanacs, psalm books, and psalters.[2] Like their Scottish counterparts, American printers tested the limits of English copyright law by reprinting works from the Stationers' Registry. These actions connected American authors, printers, and booksellers to the copyright battles taking place in England in the eighteenth century. The colonists used their knowledge of the English experience to shape their own ideas on copyright and its limitations. The colonial experiences provided an ideological foundation upon which to develop an American copyright law, even though, after the Revolution, American legal thought remained significantly British.

As the British Empire expanded in the sixteenth and seventeenth centuries, explorers and conquerors took with them English cultural, political, and legal ideas, including the system of copyright. In the American colonies, especially, political and governmental institutions followed the English model. Therefore, the laws, relating to copyright in England also controlled the various colonial presses. When the Licensing

[1] William S. Reese, "The First Hundred Years of Printing in British North America: Printers and Collectors," *Proceedings of the American Antiquarian Society* 99 (October 1969), 345.

[2] Hugh Amory, "Reinventing the Colonial Book," in *A History of the Book in America, Volume I: The Colonial Book in the Atlantic World* (Chapel Hill: The University of North Carolina Press, 2007), 44.

Act of 1662 expired in 1695, there were already printing houses located in Cambridge, Boston, St. Mary's City, Philadelphia, and New York.[3]

While the colonial presses existed under British law, the physical distance between London and the colonies often created problems, but, also, provided colonial printers with a less restrictive atmosphere in which to develop. The biggest issue was the ability of the Crown and Parliament to enforce English laws in the colonies. All of the colonies had their own assemblies, which enacted their own legislation. This presented a challenge to authorities in England to control the book trade across the Atlantic. However, enforcement was unnecessary early in colonial era, as American presses existed only with the patronage of a supportive government. Without governmental patronage, the amount of work would have been insufficient to make a profit or maintain a business. In comparison to the output of the London printers, who printed materials for the entirety of the British Empire, American output was inconsequential.[4]

The second major problem of the colonial era was the cultural, geographical, and political differences of colonial America. The colonies were thirteen distinct entities, tentatively held together by their position in the British Empire. Furthermore, the founding of each British North American colony occurred for different reasons. Each was a separate entity with its own form of local government. Each colony initiated unique

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[3] Robert Middlekauff, *The Glorious Cause: The American Revolution, 1763-1789* Rev. Ed. New York: Oxford University Press, 2005), 32; Hellmut Lehmann-Haupt, Lawrence C. Wroth, and Rollo G. Silver, *The Book in America: A History of the Making and Selling of Books in the United States 2nd Edition* (New York: R. R. Bowker Company, 1951), 16.

[4] Hellmut Lehmann-Haupt, et al., *The Book in America,* 17; Reese, "The First Hundred Years of Printing," 345.

local legislation, which was not subject to external control except for the King or proprietor. Trying to control thirteen separate entities was a complicated process, especially given the distance between the colonies and London. At the same time, though, the colonies often disagreed with each other. However, the American colonists did share one significant similarity: they brought with them a great literary tradition. During the colonial period, English literary figures expanded upon this common heritage. The early colonists passed on cultural knowledge to their children and grandchildren, who took part in the expansion of the colonial press in the 1720s and 1730s.[5]

The first press to open in the American colonies was the Cambridge Press in 1638. The primary works of the Cambridge Press fell into two categories: religious and government documents. Accordingly, the colonial authorities in Massachusetts were suspicious of the press and its potential power. Both civil and religious leaders there feared that an unrestricted press would create unrest among the citizenry. While the early colonial legislature did not pass specific legislation against the press, the government was aware of the need to control the press and prevent the printing of anything considered dangerous. The ruling class of colonial Massachusetts did not want dissenting voices questioning their authority. [6]

In 1640, printer Stephan Daye published *The Bay Psalm Book* in response to a demand from the parishioners. *The Bay Psalm Book* was a Hebrew to English translation

[5] Lehmann-Haupt, *The Book in America,* 3-5.

[6] Isaiah Thomas, *The History of Printing in America, with a Biography of Printers & an Account of Newspapers* (1874; repr. Barre, MA: Imprint Society, 1970), 5-6.

of the Psalms printed in meter. This was the first book printed in the American colonies.[7] Cotton Mather, in *Magnalia Christi Americana*, wrote, "About the year 1639, the New-English reformers, considering that their churches enjoyed the other ordinances of heaven in their scriptural purity, were willing that the other ordinances of the singing of the psalms, should be restored among them."[8] Translated by Richard Mather, John Eliot, and Thomas Wells, *The Bay Psalm Book* symbolized a significant moment in the early history of printing in the North American Colonies. The work was the first book printed in the colonies, by its first printer on the first press imported into the colonies.[9] The printing of *The Bay Psalm Book* showed that colonial printers could handle the responsibility of printing jobs for the public, not just governmental items.

The printing of religious works remained the primary task of the Cambridge Press, but later it added almanacs and colonial laws. Cambridge maintained an active press until 1692. During its fifty-four-year existence, the press accounted for more than two hundred books, pamphlets, and broadsides. The Cambridge Press was a significant achievement in the history of the British Empire as its founding predates the opening of

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[7] George Parker Winship, *The Cambridge Press, 1639-1692: A Reexamination of the Evidence Concerning the Bay Psalm Book and the Eliot Indian Bible, as well as Other Contemporary Books and People* (Philadelphia: University of Pennsylvania Press, 1945), 21-22.

[8] Cotton Mather, *Magnalia Christi Americana: Or, The Ecclesiastical History of New-England, from its First Planting in the Year 1620, unto the Year of Our Lord, 1698, 2 Vols.* (Hartford: Roberts & Burr, 1820), 1:367.

[9] Charles Evans, *American Bibliography: A Chronological Dictionary of all Books, Pamphlets and Periodical Publications Printed in the United States of America From the Genesis of Printing in 1639 Down To and Including the Year 1820 with Bibliographical and Biographical Notes,* 14 Vols. edited by Charles Evans (1903-1934; rep. New York: Peter Smith, 1941-1959), 1:3.

printing houses in many of the major cities of England and Scotland, except for London.[10]

New England became the dominant printing center in the American colonies. By 1700, it was the second largest publishing center in the British Empire based upon the amount of material printed, surpassing long established printers in Cambridge and Oxford.[11] The dominance of New England was not an anomaly. It had a more stable social, economic, and political structure with more emphasis on building roads than the middle and southern colonies, making it better suited for the establishment of printing presses. The reliance on cash crop agriculture and the individualism of settlers in the middle and southern colonies hindered growth of the press in those areas. In New England, the Puritans arrived in family groups and settled into towns, rather than dispersing to scattered individual farms. This organization allowed an easier path for the introduction and progression of the print industry in this region. [12]

The reality of colonial life meant that American printers and publishers were minor players in a commercial and intellectual movement controlled from outside of the colonies. This necessitated that the colonists generally experienced the same copyright development as those members of the print industry in England. The colonists understood the censorship and licensing laws passed in the seventeenth century as well as the Statute of Anne passed in 1710. In the seventeenth and eighteenth centuries, the colonial

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[10] John Tebbel, *A History of Book Publishing in the United States,* 2 vols. (New York: R. R. Bowker, 1972), 1:12.

[11] Ibid.

[12] Lehmann-Haupt, et al., The *Book in America*, 5-6.

assemblies passed similar laws. This shared Anglo-American experience meant that the foundation of copyright law in colonial North America progressed from the same ideological foundation as that of England.[13]

The development of copyright in the American colonies, while ideologically similar, occurred independently from England. The American colonies never formed anything equivalent to the Stationers' Company of London, and there was no protection like that offered by the Statute of Anne. However, the colonists did bring with them English legal thought including the printing patent.[14] In the colonies, the assemblies granted patents to printers, just as the monarch did with royal patents in England. However, as the majority of material printed in the colonies was government work, these patents were not as complicated as their English counterparts. The problem that existed in the colonies was that each one was a separate entity, which made printing in the colonies harder to control because there was not a single entity in place controlling all the colonies. The Stationers' Company managed to control the book trade in London because the laws limited the number of presses and printers. The different nature of each colony made it difficult for there to be one ruling body like the Stationers' Company, which meant that the enforcement of laws was a far more complicated task.

Virginia and Massachusetts provide two examples of press control, or limitation, in regards to colonial printing. In Virginia, William Nuthead set up his press in 1683 and

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[13] David D. Hall, introduction to *A History of the Book in America Volume I: The Colonial Book in the Atlantic World*, 8.

[14] Oren Bracha, "Owning Ideas: A History of Anglo-American Intellectual Property," (J.S.D. thesis, Harvard Law School, 2005), 245.

began printing various laws passed by the House of Burgesses. When the new governor, Lord Howard Effingham, arrived in 1684, he carried instructions forbidding the use of any printing press, which was most likely an attempt to quell any unrest against the Crown and government following the events of Bacon's Rebellion.[15] This law remained in place until 1730, except for a modification in 1690 that allowed printing with the permission of the governor.[16] In 1685, Massachusetts passed a law that allowed a printing press to exist only in Cambridge, and stated that no printer could print without first obtaining permission from the colonial authority.[17] Massachusetts's attempt to control the press is reminiscent of the English licensing laws of the sixteenth and seventeenth centuries. These laws provided for a press limited to a certain group of people, who gained approval from high-ranking governmental or, in some instances, religious officials, making the early American copyright system similar to the one in England. These laws were essentially copies of the licensing acts enacted in England in the seventeenth century, and they were an attempt to control printing in the colonies to suppress the publication of licentious or seditious texts.

In the other colonies, the introduction of the press created the same desire for control—to avoid the use of the press as a tool against the government. In general, the press was an important public resource that provided a valuable product to the colonists.

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[15] "Additional instructions to Lord Howard of Effingham (1684)," in *Calendar of State Papers, Colonial Series, America and West Indies, 1681-1686,* edited by J. W. Fortescue (London: Eyre and Spottiswoode, 1898), 558.

[16] Bracha, "Owning Ideas," 247.

[17] *Usher's Printing Privilege* (1685), in *Records of the Governor and Company of the Massachusetts Bay in New England 1661-1674,* 5 vols., edited by Nathaniel B. Shurtleff (Boston: William White, 1854), 4:141.

However, it was also a technology in need of regulation and control, to avoid its becoming a threat.[18] This suggests that the government understood the importance of printing as a whole, but only if what was printed did not affect their control. While these circumstances resembled the situation in England during the same period, the distance separating the colonies and England and the presence of thirteen different colonial assemblies complicated the process.

While Cambridge was the first established press in the colonies, the first colonial printing privilege granted in the American colonies was in 1672, to the bookseller John Usher of Massachusetts. In that year, Usher proposed to the colonial assembly that he publish colonial laws at his own expense, rather than the task going to a public-funded authority.[19] In response, the General Court passed a law that protected the rights of copyright owners. At this time, like in England, the definition of copyright generally identified the individual printing the material as the owner of that copy. The General Court's response to John Usher prevented other printers from reprinting any of Usher's works without his agreement, essentially granting him a perpetual copyright on the printing of Massachusetts colonial laws. Usher received the protection he asked for; he gained security against other printers. The punishment for reprinting protected works, according to the Massachusetts Assembly, was a penalty of triple the cost of printing the pirated work paid to the copyright owner, which ensured Usher's access to

[18] Bracha, "Owning Ideas," 248.

[19] Oren Bracha, "Early American Printing Privileges: The Ambivalent Origins of Authors' Copyright in America," in *Privilege and Property: Essays on the History of Copyright* edited by Ronan Deazley, Martin Kretschmer, and Lionel Bently (Cambridge: Open Book Publishers, 2010), 96.

compensation.[20] He received such a good deal from the assembly because he offered to pay the cost of printing, saving the government from paying that cost. In return, the government ensured that Usher profited from his labors.

The patent granted to John Usher constituted a monopoly, the first literary monopoly in the American colonies. In 1673, the General Court adjusted the Usher patent by adding a time limitation, making the patent a limited right not a perpetual one. The revised patent granted Usher a seven-year term, unless he sold the rights before the end of the term.[21] The transition from a perpetual copyright to a limited copyright represented the common law versus statutory law debate occurring in England. While not an authorial copyright per se, the Usher Patent, and the 1673 adjustment, set the foundation for the development of American copyright law. Unlike in England, where the Stationers' Company dominated the book industry for over 150 years, the idea of a limited copyright appeared early in the history of North American copyright as a result of its understanding of the history of copyright in England.

The printing patent remained the primary tool of copyright in British North America for the remainder of the colonial era, but its usage varied from colony to colony. In 1696, William Bladen, a Maryland printer, proposed the creation of a press to print colonial laws. The request argued that a press would be advantageous as it ensured the printing and distribution of colonial laws among the citizenry.[22] Bladen then petitioned

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[20] *Answer to John Usher's Petition* (1672), in *Records of the Governor and Company of the Massachusetts Bay,* 4:527.

[21] *Usher's Printing Privilege (1673),* in ibid., 559.

[22] *Proposal of William Bladen* in William Hand Browne ed., *Archives of Maryland, U. H. J., October 2, 1696* (Baltimore: Maryland Historical Society, 1899), 19: 466-67.

for the right to print colonial laws, arguing that the printing of the laws would benefit all citizens. However, as a businessman, Bladen had other ideas. The petition requested that each county pay for one copy of each work printed. As an entrepreneur, he planned the printing of handsomely bound copies of the laws, meaning the finished product would be of a higher quality and, therefore, more expensive. In the end, the colonial assembly accepted and agreed with Bladen's request. The assembly resolved that he would send each county one copy of the laws of the colony in return for two thousand pounds of tobacco.[23] Bladen's printing privilege made him wealthy. While arranged differently than the Usher patent, Bladen's privilege accomplished the same purpose; it provided a monopoly to a single individual.

In 1746, the North Carolina colonial legislature enacted a law that ordered the printing of colonial laws. Unlike the privileges granted to Usher and Bladen, no individual printer or bookseller received the grant. Instead, the colonial assembly formed a commission comprised of four printers tasked with revising and printing colonial laws.[24] Rather than place the power to print colonial laws in the hands of a single individual, North Carolina formed the commission as a tool to ensure completion of the task. It also created competition among the printers that assured the task was done well as each printer tried to outdo the others.

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[23] *Bladen's Privilege (1700),* in *Archives of Maryland,* 24: 83-84.

[24] *An Act, for Appointing Commissioners to Revise and Print the Laws of the Province, and for Granting to His Majesty, for Defraying the Charge Thereof, a Duty on Wine, Rum, and Distilled Liquors, and Rice, Imported into This Province (1746),* in *Collection of All the Public Acts of Assembly, of the Province of North-Carolina: Now in Force and Use* (Newbern: James Davis, 1751), 241.

The North Carolina legislature protected the commission's authority to print the laws by instituting both a time limit and a punishment for piracy. First, the passage of new laws annually meant new editions of colonial laws appeared every few years. The reason new editions did not appear every year was a result of time it took to compile the laws and finish revised copies of the laws. It was the duty of the Secretary of the Province to provide the commission with a copy of the new laws and all repealed or obsolete laws. This process ensured the laws remained updated, but it also meant the printing of new editions, extending the protection of the commission's privilege. To protect against piracy, the colonial assembly set a five-year limit on the life of the commission's copies. The law granted protection against importation or reprinting of any of the commission's titles for five years, with a penalty of five pounds. [25]

New York followed North Carolina in the passage of legislation supporting the printing of colonial laws. The major issue that the New York legislature faced was the poor quality and irregularity of printing before 1750. Like North Carolina, Maryland, and Massachusetts, New York deemed it beneficial to the public for the laws to be printed. With that in mind, *An Act to Revise, Digest & Print the Laws of this Colony* granted William Livingston and William Smith, Jr. full authority to print the laws of New York. While Livingston and Smith agreed to revise and collect the laws, the printing fell to an associate of theirs, James Parker. However, the law did not guarantee the right to print without certain guidelines. The legislature required Livingston and Smith to complete their work by the first day of September 1751, or the contract was void. It also meant that

[25] Ibid., 242

that privilege was not an exclusive one; if Livingston and Smith failed, the privilege would pass to someone else. As the owners of the privilege, Livingston and Smith received 208 pounds, while Parker received twenty shillings per printed page.[26]

New York passed a second law in 1772. Like the 1750 law, it compensated any person willing to compile and print the laws of the colony. Apparently, the twenty-two-year time span between the two New York privileges lead to some discrepancies in the compilation and printing of the laws. According to the act, entitled *An Act to Revise, Digest, and Print the Laws of this Colony,* irregularities in the printing schedule, and a failure of those printings to meet the demanded standards, created inconveniences for the legislature. The major one was the erratic printing of the laws in the previous twenty-two years. The 1750 law did not grant exclusive privilege; rather it granted compensation to anyone who compiled and printed the laws. The time between printing privileges in New York suggests that the actual number of printed copies of the laws, or the demand for copies, was small. If there was no demand, the print runs were few in number, and the profit was low. The irregular publishing pattern of the laws prior to 1772 suggests that the compensation was not large enough to entice printers to take on the task. Another option was that the legislature became lax about ordering new copies of the laws. Despite the reasons for the inconsistencies, in 1772, the legislature authorized Peter Van Schaack to print the laws, for which he received 250 pounds. Van Schaack employed printer Hugh

[26] *An Act to Revise, Digest & Print the Laws of This Colony (1750)*, in *The Colonial Laws of New York from the Year 1664 to the Revolution,* 5 vols. (Albany: James Lyon, 1894) 3:833-835.

Gaine at twenty shillings per printed sheet. The law required Gaine to send five printed copies to the Governor and the Council, and four to the General Assembly.[27]

The New York privileges represented attempts by a colonial government to encourage printing of the colonial laws, and while these privileges differed from Massachusetts, Maryland, and North Carolina, the laws were similar in purpose: to control and encourage printing. Such attempts in the years before the American Revolution were limited because early colonial printers only printed materials that were inconvenient to import from England. The majority of works printed were laws, newspapers, almanacs, pamphlets, and occasionally short books, but for the most part, it was material for local use.[28] The mercantilist policies of England limited what goods entered the colonies to avoid any undue competition. Therefore, the quantity and quality of paper, ink, and presses in the colonies were generally poorer than those available in England.[29] However, the printing privileges enacted between 1672 and 1772 laid the foundation for the development of American copyright law after the Revolution. All of the colonial printing privileges went to booksellers, publishers, and printers, not authors. The rise of authorial copyright came after the independence from the British Empire. There was, however, one pre-Revolution example of an author attempting to gain exclusive rights for his work.

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[27] *An Act to Revise, Digest, and Print the Laws of this Colony (1772)*, ibid., 5:356.

[28] Reese, "The First Hundred Years of Printing," 346.

[29] Lehmann-Haupt, *The Book in America*, 16-23.

American composer William Billings published his *New-England Psalm-Singer* in 1770. This publication represented a significant moment in American copyright history. Billing was the first artist to publish a compilation of American music produced by a single composer.[30] The printing of Billings's work connected him to the conflict between the American colonies and England because he refused to print his work until he could get American paper. At the time, paper fell under the purview of the Stamp Act and the Townshend Acts, so his desire to wait and print his work on American paper represented Billings's patriotism.[31] It is fitting that the first work of American music would come at the time of the American Revolution, but the publication of the *New-England Psalm-Singer* was important to the history of American copyright law as well.

Billings's efforts to gain protection for his book were the first attempt by an American author to garner exclusive rights for literary property. In 1770, after the work's publication, Billings petitioned the Massachusetts assembly for copyright protection.[32] Based on the popularity of the work, he requested an exclusive privilege for *New-England Psalm-Singer.* The petition came before the assembly, but the House postponed the decision because of some uncertainty regarding the originality of the text.[33] In a second petition, in May 1772, Billings stated that he had since written a second volume that corresponded with the *New-England Psalm-Singer.* In the petition, Billings

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[30] David P. McKay and Richard Crawford, *William Billings of Boston: Eighteen-century Composer* (Princeton: Princeton University Press, 1975), 41.

[31] Ibid., 62.

[32] Rollo G. Silver, "Prologue to Copyright in America: 1772," *Papers of the Bibliographical Society of the University of Virginia* 11 (1958), 259.

[33] Ibid., 261.

suggested the assembly not granting him protection would be economically and morally damaging to his person; he opposed others profiting from his labors.[34]

It is clear that Billings's work was popular, and his fear of piracy grew the longer the Massachusetts assembly waited to respond to his petition. Foreshadowing the development of a limited American copyright, Billings did not ask for a perpetual right. He simply asked that he receive guaranteed protections for a set number of years.[35] It is unclear what he meant specifically, but it is evident that he was not demanding rights in perpetuity. In response, the Massachusetts House of Representatives awarded Billings a seven-year term of protection.[36] However, his victory was short lived. After passing the Council, the bill ended at the desk of Governor Thomas Hutchinson, who refused to sign it. In the end, Billings failed; but, he went on to join the Sons of Liberty, and his song "Chester," first printed in the *Psalm-Singer,* became a popular marching tune among patriots.[37]

The first authorial copyright granted in the United States came eleven years later—only five years after the Declaration of Independence. The state of Connecticut granted the first authorial copyright to Andrew Law in 1781. Law petitioned the Connecticut General Assembly stating that he had compiled a large collection of music,

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[34] *William Billings' Second Petition, Massachusetts* (1772), Primary Sources on Copyright (1450-1900), eds. L. Bently & M. Kretschmer, www.copyrighthistory.org.

[35] Ibid.

[36] *William Billings' Printing Privilege, Massachusetts* (1772), Primary Sources on Copyright (1450-1900).

[37] Russell Sanjek, *American Popular Music and Its Business: The First Four Hundred Years, 3 Volumes* (New York: Oxford University Press, 1988) 1:282.

all purchased from the original composers or taken from books printed in England. He suggested that it would be useful to the public if these collections were printed and made available.[38] Law's petition emphasized the amount of his labor, as well as the quality of the work. His acquisition of the various tunes is important. It foreshadowed a prominent post-Revolution issue: the pirating of English works to sell in the United States.[39] Literary piracy was not new in the colonies; in fact, it had occurred throughout the colonial era, but following the Revolution, it took on a new form. Piracy quickly became a mainstay of a young American nation that had not yet developed its own unique literary identity. When asking for his copyright, Law proposed that the legislature grant him a five-year privilege to print and sell his collection.[40] Like Billings, Law requested an exclusive protection, but a limited one.

The Connecticut legislature granted Law his request.[41] With the success of the first authorial copyright in the United States, Law published several more books and began making plans for his future. He embarked upon a tour of the country during which he organized music schools, trained instructors, peddled his catalogue of books, established business hubs outside of New England, and, with the assistance of Noah Webster, advocated for the extension of his copyright outside of Connecticut.[42] Within

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[38] Andrew Law's Petition (1781), Primary Sources on Copyright (1450-1900).

[39] Sanjek, *American Popular Music and Its Business*, 287-288.

[40] Andrew Law's Petition (1781), Primary Sources on Copyright (1450-1900).

[41] *Andrew Law's Privilege* (1781) in *The Public Records of the State of Connecticut from May, 1780, to October, 1781, Inclusive with the Journal of the Council of Safety from May 15, 1780 to December 27, 1780, Inclusive and an Appendix,* compiled by Charles J. Hoadly (Hartford: Press of the Case, Lockwood & Brainard Company, 1922), 537.

[42] Sanjek, *American Popular Music and Its Business*, 287-289.

two years of Law's acquisition of a copyright, the newly-independent states began adopting new copyright laws.

During the Revolution, the absence of legal copyright, or a tradition of copyright in the colonies, became a source of frustration to American writers, as seen in the cases of Billings and Law. However, proponents of copyright were not quite unified in their attempts to create such a system. Thomas Paine, in his *Letter to the Abbe Raynal* argued for copyright writing, "It may, with propriety, be remarked, that in all countries where literature is (protected, and it never can flourish where it is not,) the works of an author are his legal property." Paine, in addressing the legal rights of authors, references the theft and illegal printing of Abbe Raynal's work, *The Revolution of America, by the Abbe Raynal* in both London and Philadelphia, which he described as criminal. Using this letter to advocate for copyright, he advocated for legislative action dealing with the protection of literature in America arguing, "the country will deprive itself of the honour and service of letters, and the improvement of science, unless sufficient laws are made to prevent depredation on literary property."[43] Paine was not alone in his advocating for copyright in the United States.

Among the loudest American proponents of copyright laws was Noah Webster. The author advocated copyright legislation for more than fifty years earning himself the title of "The Father of American Copyright."[44] Webster began his campaign early in

[43] Thomas Paine, *Letter to the Abbe Raynal, on the Affairs of North America; in which the Mistakes in the Abbes Account of the Revolution of America are Corrected and Cleared up(1782)* (London: J. Ridgeway, 1795), iv-v.

[44] Lehmann-Haupt, *The Book in America*, 106-107.

1782, after he started compiling his own textbook and dictionary, projects that served two purposes: to provide a profit and to build the foundation for a unique American literature. Thomas Paine, whose *Letter to the Abbe Raynal* appeared in 1782, aided Webster in his campaign. Paine's letter declared that the works of an author were his/her legal property. Paine argued that literature needed protection to develop. The United States, according to Paine and Webster, needed to protect literature. Paine suggested that copyright was a subject worthy of legislative consideration.[45]

According to Webster, his journey began in Goshen, New York. It was there in 1782 that Webster first developed his textbooks for teaching English. He wrote the textbooks because the Revolution interrupted trade with Great Britain and textbooks were scarce. Upon the completion of his texts, Webster embarked on his quest to gain copyright protection. Meeting with little success in Pennsylvania and New Jersey, Webster showed his manuscripts to Reverend Samuel Stanhope Smith, a theologian at Nassau Hall in New Jersey. Smith read Webster's manuscript and penned a response that praised the work and offered support. Smith argued that men should have the right of property in their productions, and a law to secure those rights would encourage men to create new products.[46]

The passage of the first state copyright law occurred in 1783. Copyright in the United States rested on four main beliefs: the protection of the author's rights, the

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[45] Thomas Paine, *Letter to the Abbe Raynal, on the Affairs of North America; in which the Mistakes in the Abbes Account of the Revolution of America Are Corrected and Cleared Up* (1782; repr. Rockville, MD: Arc Manor, 2008), 8; 9n1.

[46] Noah Webster, "On the Origin of the Copy-right Laws of the United States," in *A Collection of Papers on Political, Literary and Moral Subjects* (New York: Webster & Clark, 1843), 173-174.

promotion of learning, providing order in the book trade, and the avoidance of monopolies.[47] All of the states, except Delaware, passed copyright laws prior to the writing of the Constitution. Connecticut was the first to pass its own copyright law. In January 1783, John Ledyard petitioned the Connecticut Assembly for an exclusive privilege for a book detailing the last voyage of Captain Cook. Ledyard proposed to publish a work beneficial to the American public by providing information to assist in trade across the Pacific Ocean. The petition focused primarily on the benefits the copyright offered the country, not just for Ledyard. [48]

Like other petitions in previous years, Ledyard downplayed personal gain to emphasize the greater good. However, the copyright laws were beneficial for the men demanding protection, especially as each state created its own law; an author potentially had the opportunity to obtain several different lucrative copyrights as they could apply in multiple states. The response of the Connecticut legislature was two-fold. In the opinion of the legislature, Ledyard's book appeared beneficial to both the United States and the world, and it seemed reasonable that the author should enjoy some term of protection. Furthermore, the legislature recognized the larger importance of its action. The legislature agreed that as several other authors had also submitted petitions, it seemed practical for the legislature to pass a general copyright law for the state.[49]

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[47] Lyman Ray Patterson, *Copyright in Historical Perspective* (Nashville: Vanderbilt University Press, 1968), 181.

[48] *Petition of John Ledyard* (1783), Primary Sources on Copyright (1450-1900).

[49] *Ledyard Petition Committee Report, Connecticut* (1783), Ibid.

In January 1783, the Connecticut legislature passed *An Act for the Encouragement of Literature and Genius,* which became the first general copyright law in the United States. The statute provided the author of any text, including books, pamphlets, and maps, the sole right to print their work for a fourteen-year term, a limit copied from the Statute of Anne. Connecticut's statute encouraged learning and protected the author's rights, all through the use of a governmental grant. The statute also provided additional protection to authors who might sell their rights after receiving their privilege. When the original fourteen-year term ended, a second fourteen-year term became available if the original owner or heir petitioned for renewal. Modeled after the Statute of Anne, the Connecticut statute provided an author up to twenty-eight years of protection if the author applied to renew their right. The last portion of the statute was a reciprocity clause that allowed the right to extend to other states only when those states passed a similar law. This portion of the law was vital to the development of copyright laws because it forced the other states to act. No author could receive a copyright outside their home state unless other states passed reciprocal laws.[50]

While Ledyard petitioned and received a copyright, others advocated for copyright in other states and in the Continental Congress. Joel Barlow, a Connecticut poet and politician, wrote a letter in 1783 to Elias Boudinot of the Continental Congress, in which Barlow addressed an issue that he believed was of great concern to the American public: copyright. Barlow referred to copyright as a subject of minor importance during the Revolution, but now that the war was over it was a subject worthy

[50] *An Act for the Encouragement of Literature and Genius (1783),* in *Acts and Laws of the State of Connecticut in America* (New London, CT: Timothy Green, 1784), 133-134.

of consideration by state legislatures and Congress. The public required some legislation to promote learning and protect the property rights of Americans, especially men of letters. The United States needed a literature that defined the nation's character. According to Barlow and other petitioners to Congress, the government needed to do something to allow that character to develop. To do so required the passage of a copyright law that allowed the American book trade to grow. [51]

The states, however, did not wait for the Continental Congress to act. Following the passage of a copyright law in Connecticut, both Massachusetts and Maryland passed their own laws. While similar in nature to the Connecticut copyright, the laws varied slightly. For example, the Massachusetts statute, entitled *An Act for the Purpose of Securing to Authors the Exclusive Right and Benefit of Publishing Their Literary Productions, for Twenty-One Years*, maintained a different term than the Connecticut statute. The statute established that all books, treatises, and other literary works were the sole property of the author for a single term of twenty-one years. There was no renewal. Additionally, Massachusetts required that authors present two printed copies of their works to the university library at Harvard. This represented registration by deposit, which encouraged learning by making copies of all published works available. The Massachusetts law also included a reciprocity clause.[52]

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[51] *Letter from Joel Barlow to the Continental Congress* (January 1783), Primary Sources on Copyright.

[52] *An Act for the Purpose of Securing to Authors the Exclusive Right and Benefit of Publishing their Literary Productions, for Twenty-One Years* (1783), in *The Perpetual Laws of the Commonwealth of Massachusetts, From the Establishment of Its Constitution, in the Year 1780, To the End of the Year1800; with the Constitutions of the United States of America, and the Commonwealth, Prefixed,* 3 vols. (Boston: I. Thomas and E. T. Andrews, 1801), 1:94-95.

Maryland's statute, *An Act Respecting Literary Property*, passed in April 1783. The statute provided protection for fourteen years, with the option to renew for a second fourteen-year term. The inclusion of a renewable fourteen-year term, an infringement policy to protect against illegal reprinting, a limitations clause that clearly defined what was protected, and a registration clause that ordered the author to register the work with the local clerk's office were all portions of the law that Maryland copied nearly verbatim from the Statute of Anne. Maryland, however, made some unique alterations. First, it doubled the fines listed in the infringement policy, in the hopes of discouraging piracy. Second, the limitations clause changed from three to twelve months, meaning an individual had one year to take a case to court if someone infringed on their copyright. Where Maryland differed was in its strict reciprocity clause; it stated that enactment of the law would occur only when all other states passed similar laws. The Maryland law never went into effect because not all of the other states passed laws of their own; Delaware failed to pass a copyright statute. [53]

While the state legislatures in Connecticut, Massachusetts, and Maryland introduced copyright legislation, the Continental Congress debated the issue, trying to decide how to approach copyright legislation nationally. While the printing privilege appeared in colonial America there was no guarantee of protection under colonial law, as protection depended on the whims of the local assembly. Following the Revolution, the

[53] *An Act Respecting Literary Property* (1783), in Laws *of Maryland, Made Since 1763, Consisting of Acts of the Assembly Under the Proprietary Government, Resolves of the Convention, the Declaration of Rights, the Constitution and Form of Government, the Articles of Confederation, and, Acts of Assembly Since the Revolution* (Annapolis: Frederick Green, 1787), ch. 34; Bugbee, *Genesis of American Patent and Copyright Law,* 115-116.

nation recognized the importance of providing copyright protection.[54] The passage of state laws in the early months of 1783 and a number of petitions presented pushed the Continental Congress to take action. Congress passed a resolution that recommended that each state create its own copyright legislation. The committee assigned to handle the issue of literary property consisted of Hugh Williamson of North Carolina, Ralph Izard of South Carolina, and James Madison of Virginia. Upon completion of their task, the committee found that the right of men to own their intellectual property was proper and that legislation protecting literary property would encourage American authors. The country needed a unique literary persona and required laws that motivated American authors to separate American literature from its European origins. However, the authors and printers who were motivated to build that literary character also desired the ability to profit, at least partially, from their endeavors. The Continental Congress had several suggestions for the states: the law should pertain only to material not already in print, the authors must be citizens of the United States, and the term limit should be no less than fourteen years, with an option to renew.[55]

New Jersey was the first state to respond to the congressional resolution, passing *An Act for the Promotion and Encouragement of Literature* in 1783. The new law provided for a fourteen-year renewable copyright to any resident who registered their name and work's title with the secretary of state. Unlike earlier state statutes, New Jersey did not include a reciprocity clause, meaning that it did not rely on other states to enact

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[54] Patterson, *Copyright in Historical Perspective,* 183.

[55] *Continental Congress Resolution* (1783) in *Journals of the Continental Congress 1774-1789,* 34 vols., edited by Gaillard Hunt (Washington, DC: Government Printing Office, 1922) 24:326-327.

similar laws first. New Jersey, following the recommendation of Congress, included a clause stating that the copyright protection was renewable for a second term, but New Jersey limited the protection to new books only. Books published before the passage of the statute received no protection as the law stipulated that copyright went to the author of any book or pamphlet not yet published. [56]

New Hampshire and Rhode Island were the last two states to pass copyright laws in 1783. New Hampshire's law provided a twenty-year privilege, but no renewal. The New Hampshire law included a reciprocity clause stating authors from outside New Hampshire would receive a copyright if their home state passed a similar law that guaranteed protection to citizens of New Hampshire. New Hampshire did not limit which kinds of books gained protection, opening the law to all books and other literary works as long as the author printed their name clearly inside the work. [57] This allowed authors who published their works before the passage of the law to benefit from copyright protection. Rhode Island's statute granted authors the exclusive right to publish their works for a period of twenty-one years, dependent on their home state also passing a copyright law.[58] Like New Hampshire, Rhode Island allowed protection for works printed before the passage of the statute. Both New Hampshire and Rhode Island included a reciprocity

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[56] *New Jersey Copyright Statute* (1783), in *Acts of the General Assembly of the State of New Jersey, from the Establishment of the Present Government of Independence, to the End of the First Sitting of the Eight Session, on the 24th Day of December, 1783* (Trenton: Peter Wilson, 1784), 326.

[57] *New Hampshire Copyright Statute (*1783) in *The Perpetual Laws of the State of New Hampshire, from the Session of the General-Court, July 1776, to the Session in December 1788, Continued into the Present Year 1789* (Portsmouth, NH: John Melcher, 1789), 162.

[58] *An Act for the Purpose of Securing to Authors the Exclusive Right and Benefit of Publishing Literary Productions for Twenty-one Years* (1783) in *Records of the State of Rhode Island and Providence Plantations in New England,* 10 vols., edited by John Russell Bartlett, (Providence: Alfred Anthony: 1864), 9:737.

clause so that citizens from other states would not receive protection until their citizens received the same. In addition, both states avoided a renewal clause, settling on a longer, single term, rather than two fourteen-year terms.[59]

Pennsylvania and South Carolina followed the lead of other states and passed their state laws in 1784. Pennsylvania's law provided protection to all American citizens for a renewable fourteen-year term and limited protection to works not yet printed. The law also required registration with the state and the deposit of a copy of the certificate of registration printed inside the work. Protection under the Pennsylvanian statute began only after the passage of a similar law in all of the other states.[60] South Carolina's law, which offered a fourteen-year renewable copyright to the author of any book published or unpublished, included no reciprocity clause, but was unique because it included a clause that granted protection to inventors. The law granted the inventors of useful machines the privilege of making and selling their machines for fourteen years under the same legal regulations as the authors of books.[61] South Carolina's law was the only state statute that extended outside the literary field, predicting the development of patent laws.

In 1785, Virginia and North Carolina passed their state laws in accordance with the 1783 congressional resolution. Virginia passed its copyright statute providing citizens of the United States protection for both old and new books for twenty-one years. While

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[59] Bugbee, *Genesis of American Patent and Copyright Law*, 116-117.

[60] *Pennsylvania Copyright Statute* (1784) in *The Statutes of Pennsylvania from 1682 to 1801,* 18 vols. (Harrisburg: Harrisburg Publishing Co., 1906), 11:272-273.

[61] *South Carolina Copyright Statute (1784)* in *Acts, Ordinances, and Resolves of the General Assembly of the State of South Carolina, Passed in the Year 1784* (Charleston: J. Miller, 1784), 51.

Virginia had no reciprocity clause, it did require registration with the clerk of the council before protection began.[62] Following Virginia, North Carolina passed its law, offering protection to any citizen of the United States for a single fourteen-year term. The North Carolina law required an author to register his name along with the title of the work with the secretary of state before the protection began, and it included a reciprocity clause that limited the protection to citizens of states that had similar laws.[63]

In 1786, Georgia and New York became the last two states to pass their copyright statutes prior to the writing of the Constitution. Georgia enacted a renewable fourteen-year term for any author who was a resident of the United States as long as the author registered his or her name and the work's title with the secretary of state.[64] The Georgia law included the now familiar reciprocity clause banning protection to authors from states without a similar law. The New York statute enacted a renewable fourteen-year term, required registration for protection, and included a reciprocity clause.[65] Like the Georgia law, the New York law was a close copy of the Connecticut law passed in 1783. The similarities among Georgia, New York, and the other states seemed to result in a desire

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[62] *Virginia Copyright Statute (1785)* in William *The Statutes at Large; Being a Collection of All the Laws of Virginia from the First Session of the Legislature, in the Year 1619,* 13 Vols., edited by Waller Henning (New York: R. & W. & G. Bartow, 1823), 31-32.

[63] *North Carolina Copyright Statute* (1785), in *The Public Acts of the General Assembly of North Carolina*, 2 vols., edited by Francois-Xavier Martin (Newbern, NC: Martin and Ogden, 1804), 1:403-404.

[64] *Georgia Copyright Statute* (1786) in *A Digest of the Laws of the State of Georgia, from Its First Establishment as a British Province down to the Year 1798, inclusive, and the Principal Acts of 1799: In Which Is Comprehended the Declaration of Independence; the State Constitutions of 1777 and 1789, with Alterations and Amendments in 1794. Also the Constitution of 1798*, edited by Robert Watkins and George Watkins (Philadelphia: R. Aitken, 1800), 323-325.

[65] *New York Copyright Statute* (1786) in *Laws of the State of New York Passed at the Sessions of the Legislature Held in the Years 1785, 1786, 1787, and 1788, Inclusive, Being the Eighth, Ninth, Tenth, and Eleventh Sessions,* 2 vols. (Albany: Weed Parsons and Company, 1886), 2:298-300.

for stronger interstate collaboration not provided by the weak central government under the Articles of Confederation.[66]

While the state copyright laws presented different views of copyright, there were several commonalities. The twelve individual state copyright laws attempted to protect the interests of authors, booksellers, and printers to secure their rights, promote learning, stabilize the book trade, and prevent monopolies. All twelve copyright laws accomplished these goals. All safeguarded the rights of authors for a period of fourteen to twenty-eight years. Securing the rights of authors allowed them to benefit from their work, but it also promoted learning because publication of their work brought knowledge to readers across the country. The laws limited the rights of the authors to printing, publishing, and selling.[67] The passage of copyright laws promoted learning because it allowed readers to use the book for any purpose, as long as they did not infringe upon the author's right to print, publish, or sell. The similarities in the laws worked to stabilize the book trade as all states included severe punishments for the infringement of copyrights. In most cases, the state laws allowed owners to recover double the value of any illegal copies made of their works. Finally, the state laws prevented long-term monopolies by limiting the terms of protection to no longer than twenty-eight years.[68]

Instead of restructuring the government under the Articles of Confederation, the convention, taking place in Philadelphia in1787, established a new government for the

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[66] Bugbee, *The Genesis of American Patent and Copyright Law,* 123.

[67] Patterson, *Copyright in Historical Perspective*, 181-190.

[68] Crawford, "Pre-Constitutional Copyright Statutes," 31.

United States. The delegates to the Constitutional Convention did not forget the debates over copyright laws of the 1780s; they built upon them and incorporated them in the new Constitution. However, copyright law was not a topic discussed in length at the Convention. In fact, no mention of the intellectual property clause appeared in any of the early proposals at the Convention. The first reference to copyright did not occur until August. The movement in the 1780s for each state to pass laws suggests the importance of copyright law for the United States. Men like Noah Webster, Joel Barlow, James Madison, and Charles Pinckney wanted to create a system that would not only benefit authors, but also the public.[69]

On Saturday, August 18, James Madison of Virginia and Charles Pinckney of South Carolina introduced a list of proposed congressional powers for discussion. Their proposal included the powers to secure copyright to authors and to encourage the advancement of knowledge.[70] The recommendation for intellectual property, along with others not acted upon, went to the Committee of Eleven, whose membership consisted of one member from each of the states represented at the Convention. On September 5, the committee reported its revised list of proposed congressional powers.[71] The last of these powers, "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,"

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[69] Edward C. Walterscheid, *The Nature of the Intellectual Property Clause: A Study in Historical Perspective* (Buffalo: William S. Hein and Co., Inc., 2002), 1.

[70] Max Farrand, ed. *Records of the Federal Convention of 1787,* 3 vols. (New Haven: Yale University Press, 1911), 2:321.

[71] Edward C. Walterscheid, *The Nature of the Intellectual Property Clause: A Study in Historical Perspective* (Buffalo, NY: William S. Hein and Co., Inc., 2002), 107.

became the patent and copyright clause of the Constitution.[72] The clause empowered Congress to establish copyright and patent laws.[73] The Convention completed its work on September 17, with the intellectual property clause included in the list of congressional powers, and the document went first to the Continental Congress and then the states for approval.

The ratification process for the Constitution is a well-documented event, and *The Federalist No. 43* is the most famous attempt to justification of the patent and copyright clause. In it, Madison suggested that the existence of both copyrights and patents was an acknowledged fact. He wrote, "The public good fully coincides in both cases with the claims of individuals. The States cannot separately make effectual provision for either of the cases, and most of them have anticipated the decision of this point by laws passed at the instance of Congress."[74] Madison's argument suggested that while the states had passed their own copyright laws, it was in the best interest of the states to allow the national government to control the process. By providing the national government the sole power to create and enact copyright law, the constitutional provision promoted learning, secured rights for authors and inventors, provided order in the book trade, and prevented monopolies by making copyright available for a limited time.[75] While the state

[72] Farrand, ed., *Records of the Federal Convention of 1787*, 2:509.

[73] L. Ray Patterson and Craig Joyce, "Copyright in 1791: An Essay Concerning the Founder's View on Copyright Granted to Congress in Article I, Section 8, Clause 8 of the U.S. Constitution," in *Emory Law Journal* 52 (Spring 2003), 937.

[74] *Federalist no.* 43, in *The Federalist Papers Signet Classic Edition*, edited by Clinton Rossiter (New York: Penguin, 2003), 268.

[75] Patterson, *Copyright in Historical Perspective*, 181.

laws accomplished the same task, one national law was clearly preferential to thirteen distinct laws. The ratification of the Constitution, therefore, created a single copyright process for the United States.

The patent and copyright clause represented the culmination of over 250 years of Anglo-American copyright evolution, dating back to the early proclamations of Henry VIII in the 1530s. The clause showed the founders' awareness of copyright and its history. They understood common Anglo-America experience that led to the establishment of statutory copyright under the Statute of Anne, and that statutory law was antimonopolistic in nature. It was understandable that the founders granted Congress the power to institute a limited time copyright.[76] To this end, the founders made sure to use the words "limited times" in the clause. While they granted Congress the power to create copyright law, the limited time constraint offered more benefits to the public than the initial owners of the rights, which coincided with the founders' desire to promote learning. When New Hampshire became the ninth state to ratify the Constitution in 1788, the document became the law of the land and with it the intellectual property clause. The United States' Congress held the power to control copyrights—a power it would use by passing the first national copyright law in 1790.

The development of American copyright from the colonial era to the Constitutional Convention was similar to the development in England. The colonial assemblies used printing patents to control the various colonial presses, providing monopolies to certain printers as long as those printers maintained favor with the

[76] Patterson and Joyce, "Copyright in 1791," 938.

assemblies. After the Revolution, the new states enacted copyright laws that granted limited monopolies to authors, similar to the Statute of Anne in England. The United States' Constitution centralized the power to create copyright in the hands of Congress, but it also restricted Congress to the passage of limited term limits for copyrights, preventing the creation of a monopolistic authority.

# CHAPTER III

## ENCOURAGING SCIENCE AND LITERATURE WITH THE FIRST AMERICAN COPYRIGHT LAW

The ratification of the Constitution replaced the Confederation with a federal government that balanced the power more between the states and the new central government. The founders, based upon their placement of the intellectual property clause in the Constitution, understood copyright as an important aspect of the nation-building process. Article I, Section 8, Clause 8 of the United States' Constitution grants Congress the 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." The importance of copyright is two-fold. First, the promotion of science and the arts appealed to intellectuals influenced by the Enlightenment. Second, the placement of the intellectual property clause alongside the power to collect taxes, borrow money, regulate interstate commerce, and coin money suggested the importance the founders placed on copyright.[1]

[1] United States Constitution, Art. I, Sec. 8.

Defining copyright as a power of the central government enabled the United States to avoid multiple laws regulating the book trade. The Constitution ensured that American authors and publishers controlled the distribution of their property while dealing with one law, not numerous state laws.[1] Proving that the founders understood the historical development of copyright, the Constitution allowed authors and publishers a limited copyright term. This meant that an organization like the Stationers' Company of London would never emerge in the United States. The founders believed that a limited term of protection would encourage authors to compose, publish, and prevent monopolies.[2] However, as the Constitution only gave Congress the power to enact copyright laws, it was the responsibility of Congress to construct and pass the appropriate legislation. The first copyright law, and its subsequent revisions during the nineteenth century, proved that copyright failed to fulfill it antimonopolistic origins as the term limit doubled and the list of covered material grew, which expanded the power of the law rather than limiting it as the initial law attempted to do.

The first session of the United States' Congress began on March 4, 1789. While the various state laws passed during the 1780s created an awareness of copyright law among the American citizenry, no national copyright statute existed when the first Congress convened. The ratification of the Constitution usurped the state laws and removed control of copyrights from the states. However, there were few changes made to the status quo. In fact, the state statutes were vital in the development of the first national

[1] Meredith L. McGill, "Copyright," in *A History of the Book in America Volume 2: An Extensive Republic: Print, Culture, and Society in the New Nation, 1790-1840,* eds. Robert A. Gross and Mary Kelley (Chapel Hill: The University of North Carolina Press, 2010), 198.

[2] Ibid.

copyright law. The state policies set precedents for the outline of national legislation and proved informative for the men who assumed national offices. Many of the architects of the national copyright were men involved in the passage of state laws during the 1780s.[3]

The first Congress had the responsibility of implementing the Constitution and using the powers outlined to create the new American government. As Congress implemented the new government, the passage of a copyright law was not a priority. However, it did not take long for the topic of copyright law to come up in Congress. As Congress began dealing with the issue, the writing and passage of the first American copyright law relied heavily on established state laws. Like the authors of the state statutes, the writers of the first national copyright law drew upon the English copyright law, the Statute of Anne. Congress also received numerous petitions on intellectual property during its first session. Eighteen petitioners, enquiring about some form of exclusive privilege based upon the patent and copyright clause in the Constitution, presented requests to the House of Representatives.[4]

In April 1789, the House of Representatives heard the petition of South Carolinian David Ramsey. His, biographer, Arthur Shaffer, credits David Ramsay as the first American historian as he was the first to write histories that addressed the needs of the newly-developing American nationalism.[5] Ramsay submitted the first copyright

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[3] Bruce W. Bugbee, *Genesis of American Patent and Copyright Law* (Washington, DC: Public Affairs Press, 1967), 128.

[4] Ibid.

[5] Arthur H. Shaffer, *To Be an American: David Ramsay and the Making of the American Consciousness* (Columbia: University of South Carolina Press, 1991), 1.

petition to Congress, asking for exclusive rights in his works *The History of the Revolution of South Carolina from a British Province to an Independent State* (1785), and *The History of the American Revolution* (1789). In seeking copyright protection, Ramsay followed the procedure as outlined in the South Carolina statute. In his petition, Ramsay requested the passage of a law that secured to petitioners, their heirs, and assignees the right to publish and sell their literary property in the United States for a specified term of years. On April 20, 1789, the committee created to consider Ramsay's petition reported its findings to the House. The report endorsed the passage of a law to secure Ramsay the right to print and sell his works for a term of at least fourteen years.[6]

After the House approved the committee's report, the body ordered the creation of a bill, or multiple bills, creating a general provision that secured rights for authors and inventors. Congress needed to pass a law to establish a process by which citizens could claim legal protection of their intellectual property. Congress' approach in 1789 was to write a law that dealt with both patents and copyrights.[7] Ramsay, while not alone in petitioning Congress, was the instigator of the movement for a federal law on intellectual property. According to Arthur Shaffer, men of letters in the United States favored a stronger national government because they desired better rights and benefits from their labors. Many of these men had advocated for state laws during the Confederation Era and understood the importance of centralizing control over intellectual property in the federal

[6] *U.S. House Journal*, 1st Cong., 1st Sess., 15 April 1789, 14-15.

[7] Ibid., 20 April 1789, 18.

government. They knew it was better to have a single national law than thirteen individual state laws.[8]

From May to September 1789, sixteen additional intellectual property petitions appeared before Congress. Of the sixteen, three were from authors requesting exclusive privileges for their works. On May 12, the House heard the petition of Jedidiah Morse. Morse argued that he compiled and published a geographical and historical treatise of the United States at great expense. The work, entitled *The American Geography, or a View of the present Situation of the United States of America,* included two original maps of Morse's design. Morse requested an exclusive right for the publishing of his work for a limited time.[9] On June 8, the House heard the petition of Nicholas Pike of Massachusetts asking for an exclusive, yet limited, privilege granting him the right of publication of his work, entitled *A New and Complete System of Arithmetic.* Pike's argument rested on the fact that the system presented in his work was original.[10] The third petition was significant because of the author's gender. Hannah Adams, the first woman to petition Congress for copyright protection, requested a limited privilege for her work entitled *An Alphabetical compendium of the Various Sects Which have Appeared in the World from the Beginning of the Christian Era, to the Present Day, with an Appendix, Containing a Brief Account of the Different Schemes of Religion now Embraced Among Mankind.*[11] One similarity between the petitions was they requested a limited term of protection.

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[8] Shaffer, *To Be an American*, 98.

[9] *U.S. House Journal,* 1st Cong., 1st Sess., 12 May 1789, 33.

[10] Ibid., 8 June 1789, 46.

[11] Ibid., 22 July 1789, 64.

They did not request a perpetual monopoly in their works. The fact that the overwhelming number of petitions were from inventors, and not authors, does not detract from the importance of copyright law. The intellectual property clause of the Constitution placed both writers and inventers in the same category; Congress did not initially differentiate between the two.

A joint copyright/patent bill appeared before Congress on June 23, with the sole purpose of promoting the "progress of science and useful arts, by securing to authors and inventors the exclusive right to their respective writings and inventions."[12] The bill addressed both copyright law and patent law, an issue only one state, South Carolina, had attempted to do during the 1780s. Congress sought to resolve both problems at once. The title the committee chose for the bill merely copied the wording of the constitutional clause that granted Congress the right to legislate. The differences between a copyright and a patent were minimal; both were rights belonging to an originator or creator of an object.[13]

In August 1789, the House postponed consideration of the bill until the next session. The postponement did not detract from the importance of the issue; rather, copyright became a casualty of the process of setting up a new government. Copyright failed in the first session because of the time spent debating the proposed Bill of Rights.[14] The joint bill, H.R. Bill No. 10, was the first federal legislation to consider the copyright

[12] *Annals of Congress* 1st Cong., 23 June 1789, 608.

[13] Bugbee, *Genesis of American Patent and Copyright Law*, 135.

[14] ibid.

issue. While the bill presented a process for copyright, the majority of the text dealt with patents. Following the model of the state statutes passed prior to 1787, the bill provided authors who were citizens of the United States the right to print and sell their works for fourteen years. The bill also outlined the process for punishing offenders, registry requirements, and the renewal process. The remainder of the bill dealt with patents.[15]

On January 8, 1790, George Washington addressed the issue of intellectual property during his first annual message.[16] The president stressed the importance of both copyright and patent laws in relation to the other issues. Washington contended:

> The advancement of Agriculture, commerce and Manufacturing, by all proper means, will not, I trust, need recommendation. But I cannot forbear intimating to the expediency of giving effectual encouragement as well to the introduction of new and useful inventions from abroad, as to the exertions of skill and genius in producing them at home; and of facilitating the intercourse between the distant parts of our country by a due attention to the Post-Office and Post Roads.
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> Nor am I less persuaded, that you will agree with me in opinion, that there is nothing, which can better deserve your patronage, than the promotion of Science and Literature. Knowledge is in every Country the surest basis of public happiness. In one, in which the measures of Government receive their impression so immediately from the sense of Community as in ours it is proportionably essential.[17]

Washington's message was important. Placing the development of intellectual property alongside other great issues of the day gave an increased importance to the passage of a

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[15] *Joint Copyright Patent Bill [H.R. 10]*, New York (1789), Primary Sources on Copyright (1450-1900), eds. L. Bently & M. Kretschmer, www.copyrighthistory.org.

[16] Dorothy Twohig, ed., *The Papers of George Washington, Presidential Series, September 1788-1797*, 16 vols. (Charlottesville: University of Virginia Press, 1987- ), 4:543.

[17] Ibid., 545.

copyright law. At the same time, Washington pressed for the introduction of new inventions from both domestic and international sources. Perhaps the most important part of his statement was the connection between intellectual property and the post office and the national road system. The development of the post office and roads was essential to the growth of intellectual property; the nation needed a reliable distribution network to disperse information to the people.

Washington continued to point out reasons why legislative action on intellectual property was vital. He listed the ways that intellectual property provided security for a free country. Additionally, the president suggested that the promotion of science and literature aided the nation:

> By convincing those who are entrusted with the public administration, that every valuable end of Government is best answered by the enlightened confidence of the people: And by teaching the people themselves to know and to value their own rights; to discern and provide against invasions of them; to distinguish between oppression and the necessary exercise of lawful authority; between burthens proceeding from a disregard to their convenience and those resulting from the inevitable exigencies of Society; to discriminate the spirit of liberty from that of licentiousness, cherishing first, avoiding last, and uniting a speedy, but temperate vigilance against encroachments, with inviolable respect to the laws. [18]

Washington defined the importance of both the copyright and patent systems for the young nation. Both provided an incentive to authors and inventors to generate new works and inventions that could make life better for the average American. However, without proper incentive, American authors and inventors would avoid introducing their new ideas. Washington's address facilitated the passage of the copyright law. He had already

[18] Ibid.

assisted Noah Webster in gaining copyright protection in Virginia, and Washington's address was an attempt to promote the enactment of a national copyright.[19]

The question of copyright appeared again early in the next session of Congress. On January 15, Thomas Hartley of Pennsylvania demanded to know what was to happen with the legislation held over from the previous session. Hartley identified the joint copyright/patent bill. He argued that several ingenious men introduced the legislation to secure protection for the labor of authors and inventors. Additionally, Congress ordered the bill in the previous session and it would have become law had not the debate over the Bill of Rights occurred.[20]

Following a discussion of unfinished business from the previous session and Hartley's demand, the House resolved itself into a Committee of the Whole House to discuss its response to Washington's annual message. Abraham Baldwin of Georgia presented the committee's findings. The report stated that the matters recommended in Washington's address—the encouragement of learning, the establishment of the Post Office, and the promotion of science and literature—be referred to the appropriate committees to present bills providing for each purpose.[21] On January 25, Aedanus Burke of South Carolina called for a committee to consider and propose a bill to secure the copyright of authors in their literary works.[22] Burke's motion was important because it

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[19] Bugbee, *Genesis of American Patent and Copyright Law*, 137.

[20] *Annals of Congress* 1st Cong., 2nd Sess., 15 January 1790, 1093.

[21] *U.S. House Journal*, 1st Cong., 2st. Sess., 15 January 1790, 141.

[22] Charlene Bangs Bickford and Helen E. Veit, eds., *Documentary History of the First Federal Congress of the United States of America, March 4, 1789-March 3, 1791,* 20 vols. (Baltimore: The Johns Hopkins University Press, 1972- ), 4:520.

specifically called for an authorial copyright; inventors were not included. This was the moment when the intellectual property movement split, separating copyright and patent laws. Burke reasoned that as the two were different legal philosophies Congress should deal with both separately.[23]

On January 28, a committee, consisting of Burke, Benjamin Huntington of Connecticut, and Lambert Cadwalader of New Jersey, presented the Copyright Bill, HR 39. While the content of the bill followed the language of the Copyright and Patent Bill presented in the previous session, the language of the bill was lost, as no copy of the HR 39 survived.[24] In February, the Committee of the Whole received the bill and a series of amendments. During the debates, members of the House agreed with a motion made by William Smith of South Carolina to remove the provision that extended copyright to an author's estate, but disagreed with an another motion that created a fourteen-year copyright term.[25] Then, the House ordered that the bill be engrossed with amendments and be read a third time the following day.[26] After the third reading, it went back to committee for further consideration. That committee consisted of Elias Boudinot of New Jersey, Roger Sherman of Connecticut, and Peter Silvester of New York. The bill was the

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[23] Bugbee, *Genesis of American Patent and Copyright Law*, 140.

[24] Oren Bracha, "Owning Ideas: A History of Anglo-American Intellectual Property" (J.S.D. diss., Harvard Law School, 2005), 282n13.

[25] Bickford and Veit, eds., *Documentary History of the First Federal Congress of the United States of America,* 4:520.

[26] *U.S. House Journal*, 1st Cong., 2st. Sess., 1 February 1790, 150.

first attempt at a copyright statute, but its failure to make it past the committee phase did not weaken the call for legislation.[27]

The copyright bill returned from committee in late February, when the committee presented a revised copyright bill, HR 43. In April, the Committee of the Whole House debated and agreed upon amendments. The House then read the bill for a third time and approved *An Act for the Encouragement of Learning, by Securing the Copies of Maps, Charts, Books and Other Writings, to the Authors and Proprietors of Such Copies, during the Times therein Mentioned.* The Senate received the Copyright Bill, as approved by the House, on the same day, and passed it in May. The bill became law when President Washington signed it on May 31, 1790, bringing the movement for a national copyright law to a successful conclusion.[28]

The Copyright Act of 1790 granted an author the sole right to publish and vend their property for fourteen years.[29] The bill represented the culmination of over two centuries of Anglo-American copyright experience. The founders' understanding of English copyright and the perpetual monopolies that preceded the Statute of Anne allowed them the opportunity to prevent that practice in the United States. The limited term of copyright ensured the encouragement of learning by guaranteeing that new works would be available to the public in a timely fashion. There were historical and cultural

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[27] Bugbee, *Genesis of American Patent and Copyright Law*, 140.

[28] Bickford and Veit, eds., *Documentary History of the First Federal Congress of the United States of America,* 4:525-526.

[29] *Copyright Act of 1790,* May 31, 1790, in *The Public Statutes at Large of the United States of America,* 1789–1873, 17 vols. (Boston: Little, Brown and Company, 1845–73), 1:124.

connections to the Statute of Anne. Like the British copyright law, the new American law protected authors of books already printed, authors of works written but not published, and individuals who owned copyrights purchased from the works' creators, but not printed. While this created a monopoly, it was a restricted one.[30] The right was monopolistic because it gave the author/owner exclusive possession or control of the supply or trade in their work. Like many of the state laws passed during the colonial era and under the Articles of Confederation, Americans, following the writing of the Constitution, maintained the belief in a limited copyright law. In addition, the cultural, economic, and political connections that existed between the United States and Great Britain created nearly identical American and English laws.[31]

The Copyright Act of 1790 outlined the first national copyright law of the United States. The statute consisted of seven sections that defined the process for obtaining a copyright. Section 1 provided copyright to any citizens of the United States, their executors or assignees, as long as the right was not transferred to another person. For works already published, the law covered a range of items, but it limited the right to citizens of the United States. This was not, however, an extraordinary limitation, as the idea behind the copyright law was to provide incentives and benefits to citizens. The exclusion prevented foreigners from benefitting from the printing of any copyrightable work, with the hope that it would create a vacuum for citizens to fill with their own intellectual product. It also allowed American printers to pirate the works of foreigners

[30] L. Ray Patterson and Craig Joyce, "Copyright in 1791: An Essay Concerning the Founders' Views of the Copyright Power Granted to Congress in Article I, Section 8, Clause 8 of the U.S. Constitution," *Emory Law Journal* 52 (Spring 2003): 938-939.

[31] Bracha, "Owning Ideas," 282.

and sell them as their own in the United States. This section of the law benefited men like David Ramsay, whose *The History of the Revolution of South Carolina from a British Province to an Independent State (1785)* and *The History of the American Revolution (1789)* were already published and available. In addition, Section 1 of the copyright law recognized one other group of people as eligible for protection. The law granted copyright protection to any person who purchased or legally acquired the copyright from the creator of the work. Much as the Stationers' Company of London held the rights in reprinting the Greek classics, this portion of the law allowed American citizens who purchased or acquired the rights to older works to reprint them.[32]

Copyright recipients gained protection for fourteen years beginning from the time the author recorded the title of their work with the clerk's office, with a guaranteed renewal for an additional fourteen years if the author was still alive. This prevented heirs or assignees of the original owner from benefiting from the copyright protection. This ensured that if an author passed, the work would go into the public domain as soon as possible and not be denied to the public by someone who was not the works creator. To gain the renewal term, the law also required authors to reregister their title six months before the expiration of their first term.[33] If an author or creator was not alive at the end of the original term the work would move into the public domain, but if the law allowed heirs or assignees control then it would remain out of the hands of the people. It can be inferred then that his portion of the law was designed to ensure the quicker passage of

[32] *Copyright Act of 1790,* May 31, 1790, in *The Public Statutes at Large of the United States*, 1:124.

[33] Ibid.

works into the public domain, making public interest, not individual benefits and ownership, the original intent of the law.

Section 2 outlined the punishments. The question that arose was what constituted infringement? There were three ways of infringing upon a copyright: (1) reprinting a copyrighted work without permission; (2) importing foreign copies of a copyrighted work; and (3) selling an illegally reprinted work.[34] The law required that anyone who infringed upon a copyright pay fifty cents for every page of the pirated work printed. The law stipulated that any such action needed to occur within one year of the infringement.[35] While the law protected the rights of the copyright owner, it also split any fines between both the copyright owner and the United States government.[36]

Section 3 and 4 sketched the conditions by which authors obtained the benefits of the law. The acquisition of benefits appeared in two categories: those works already published and those not yet published. Section 3 required deposit of the work in the clerk's office of the district court of the area in which the author resided. It was the responsibility of the author to complete this process, if they wished to receive the benefits of a copyright. However, there was an additional step involved after depositing a copy of a work. The law required an author or proprietor to obtain a copy of the clerk's record and publish it in multiple newspapers in the United States, for no less than four weeks to make people aware of the granted copyright. Authors and proprietors who failed to do so

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[34] Lyman Ray Patterson, *Copyright in Historical Perspective* (Nashville: Vanderbilt University Press, 1968), 197.

[35] *Copyright Act of 1790, in The Public Statutes at Large of the United States,* 1:125.

[36] Ibid.; Patterson, *Copyright in Historical Perspective*, 197.

forfeited any benefits provided under the law. Section 4 also required that individuals delivered a copy of their text to the Secretary of State within six months of publication. Much as the Statute of Anne required deposit of copies in various libraries and universities, this portion of the American law provided the federal government with copies of newly-protected works to build a national library. [37]

Section 5 explained the rights of foreign authors in the United States. In short, they had no rights. As stated in the first section, only citizens of the United States were eligible to receive copyright protection. While the law protected American authors against the importation of copies of their works printed outside the United States, foreign authors received no such protection. Section 5 stated that the act did not prohibit the importation or reprinting of any work published by a noncitizen of the United States. Herein was an ironic twist to American copyright law. It protected American copyright owners against the threat of piracy, but at the same time, acknowledged and supported the American piracy of foreign works, but really was just a justification of protecting American printing houses from foreign competition. [38]

Section 6 outlined the penalty for publishing manuscripts without the consent of the author. Like Section 2, the publishing of manuscripts was only illegal without the consent of the author or proprietor. However, the law required that the author or proprietor be a citizen of the United States. If an individual met these prerequisites, then, any person infringing on these rights would pay damages. The last portion of the law

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[37] *Copyright Act of 1790,* in *The Public Statutes at Large of the United States,* 1:125.

[38] Ibid.

provided rights to those sued or prosecuted persons involved in infringement cases under the Copyright Act. This simply allowed individuals to defend themselves against the accusation of piracy.[39]

While the copyright law provided coverage for maps, charts, and books, it did not include items considered ephemeral, such as newspapers, magazines, broadsides, or sermons. These items were not copyrightable because they were local in nature and deemed valueless, as most did not retain their value over time.[40] The authors of the copyright legislation intended for it to complete a specific task. As the title suggests, it was to encourage learning, so it was limited to maps, charts, and practical books. The legislators viewed copyright as an opportunity to unite the nation, but to do so they needed a national image. This is why the copyright law initially ignored newspapers, magazines, and other items printed for local use. The usefulness of these items was short lived. The copyright creators deemed practical books, such as textbooks and manuals, useful because their knowledge promoted learning.[41]

In many ways, the first American law resembled the English law passed eighty years earlier. Americans were familiar with the Statute of Anne, as the authors of the state statues of the 1780s relied upon it as a model. However, differences existed between British and American laws. For example, the American Copyright Act did not create a mechanism for price control or provide protection to authors of unpublished

[39] Ibid., 125-126.

[40] McGill, "Copyright," 199.

[41] Gilreath, *Federal Copyright Records, 1790-1800*, xxii.

manuscripts.[42] In the end, though, the two laws were more similar than different. Both delivered protective rights to authors and/or proprietors of a work. The Statute of Anne provided for the rights of authors and broke the monopoly of the Stationers' Company, empowering authors to take greater control of their work. Despite this apparent bias against printers, the Statute of Anne entitled copyright owners the right of publishing and vending their protected works, or the same rights previously granted to the Stationers just more restricted.[43] Both laws, then, gave authors the limited rights of a publisher. These rights provided an author or proprietor with a limited monopoly. Although restricted by the law, authors or proprietors had total control over their property for the set term. After that, the work entered the public domain and became the property of the people, which was the goal as stated in the Constitution. Surprisingly, while some authors quickly took advantage of the new copyright system, in fact, many actually ignored it. In the law's first ten years, there were approximately fifteen thousand imprints published, but only about eight hundred copyrighted. The primary reason for this statistic is the strictness of the law over types of works protected. Many of the early staples of the American presses, like almanacs, broadsides, newspapers, government documents, and other short-lived works, were not copyrightable materials.[44]

The major problem with the first copyright law, then, was it narrowed list of protected works; maps, charts, and useful books. Other items, such as almanacs,

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[42] Bracha, "Owning Ideas," 285.

[43] *The Public Statutes at Large of the United States,* 1:124.

[44] James Gilreath, "American Literature, Public Policy and the Copyright Law before 1800," in *Federal Copyright Records, 1790-1800* (Washington, DC: Library of Congress, 1987), xxii.

broadsides, speeches, newspapers, works of fiction, and government documents did not fall under the purview of copyright because they were not viewed as holding any long-term value. This created a problem because these categories of print media, especially newspapers and government documents, constituted the majority of the work of presses in the United States. Many people of the time deemed these as fleeting works, and considered them foolish fancies that provided no encouragement for learning. The government documents fell into this category because they were public policy and already available to the people. These classifications constituted a very small portion of the titles receiving copyrights in the early years. Therefore, while the print industry was very active, much of the printed material did not receive copyright. Making up the majority of the early American copyright entries were works of a more practical or commercial use.[45] The federal copyright, then, in the years after its implementation, worked to the benefit of a small percentage of the individuals creating useful, instructional works, rather than printing novels or other imaginative works. Thomas Jefferson, himself, provided evidence of this prejudice against novels in his writings. In an 1818 letter to Nathaniel Burwell, Jefferson, writing about the ill effect of novels, wrote, "When this poison infects the mind, it destroys its tone and revolts it against wholesome reading."[46] Jefferson's views remained popular at the time, and the novel remained stigmatized as frivolous in the early nineteenth century.

[45] Gilreath, *Federal Copyright Records, 1790-1800,* xxii.

[46] Thomas Jefferson to Nathaniel Burwell (1818), in *The Writings of Thomas Jefferson,* 19 vols., ed. A. A. Lipscomb and A. E. Berg (Washington, DC: The Thomas Jefferson Memorial Association of the United States, 1903), 15:166.

The small number of impractical works copyrighted and the prejudice against novels represented the restricted character of a limited statutory copyright. Originally, the limited statutory copyright was anti-monopolistic because it limited ownership to a set time before granting free access to the public in an attempt to promote the expansion of knowledge while still providing benefits to authors. The law protected authors and proprietors; however, its view of the novel narrowed its protection to a very specific set of intellectual properties. American copyright law protected practical works, as seen in historian James Gilreath's *Federal Copyright Records, 1790-1800*, in which he compiled copyright records from eleven of the thirteen states. According to Gilreath, half of the first hundred copyright entries in Pennsylvania were textbooks and manuals, while there were twice as many instructional works listed in the last hundred entries.[47] Historian Joseph Felcone, looking at the early copyright records for New Jersey, stated, that more than half the works registered in New Jersey were instructive in nature, divided between textbooks, treatises, and theological literature.[48] Clearly, the focus of copyright was to protect works encouraging learning rather than leisure.[49]

Another issue the new copyright faced was the pre-existing state copyright laws. The federal government replaced the state copyright laws with a single standardized law. However, while the new national authority superseded the older state laws, they were not

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[47] Gilreath, *Federal Copyright Records, 1790-1800,* xxii.

[48] Joseph J. Felcone, "New Jersey Copyright Registrations, 1792-1845," *Proceedings of the American Antiquarian Society* 104 (April 1994):54.

[49] Elizabeth Barnes, "Novels," in *A History of the Book in America Volume 2: An Extensive Republic: Print, Culture, and Society in the New Nation, 1790-1840,* eds. Robert A. Gross and Mary Kelley (Chapel Hill: The University of North Carolina Press, 2010), 444.

all retracted.[50] While most state laws gave way to the national system, some states continued to accept registrations for new copyrights. This suggests some distrust of the new copyright regime, but it also makes some sense. As Gilreath and Felcone make clear in their studies of early federal copyright records, there was an underrepresentation of certain forms of literature. The continued existence of state copyrights created the possibility that authors or proprietors of works not receiving federal copyright protection requested it from state governments. If individuals registered for a state, rather than a federal, copyright their protection would be limited to the state in which they registered. However, the state copyrights did not exist much longer; New Jersey repealed its law in 1799 and Connecticut followed in 1812 officially ending the existence of state laws.[51]

An example of the perseverance of state laws was the copyright granted to Joseph Purcell by South Carolina in 1792. Interestingly enough, David Ramsay, who had petitioned Congress three years earlier for copyright protection, was the President of the South Carolina Senate at the time of Purcell's petition. Purcell's request was more than just a printing privilege. The South Carolina legislature granted him the authority to survey all the rivers, creeks, roads, state lines, district lines, county lines, and parish lines of the state with the intention of creating a detailed map. Accordingly, South Carolina granted Purcell the right to publish and sell his maps for twenty years from the time of first printing.[52] The fact that Purcell's privilege focused solely on South Carolina might

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[50] Bugbee, *Genesis of American Patent and Copyright Law*, 124.

[51] Ibid., 124.

[52] Thomas Cooper, ed. *Statutes at Large of South Carolina,* 10 vols. (Columbia, SC: A. S. Johnston, 1837-1841), 5: 219.

explain the state's granting of a right, as it was not national in nature. The existence of state copyright laws paralleled the new federal law. However, the federal law reduced the need for the state laws, and replaced the necessity of gaining rights in multiple states. Citizens avoided the problem of differing state registration, deposit, and renewal requirements.[53]

The first federal law remained in place for forty years; the first adjustment was an 1802 amendment that changed the copyright process and extended copyright protection to additional texts. Divided into four sections, the 1802 law added additional prerequisites for receiving a copyright, expanded the types of material covered by the law, and redefined the punishments for infringement. It was now the responsibility of the authors to prove ownership of a copyright by printing their copyright information alongside the title page of works. [54] The second section of the 1802 amendment extended copyright protection beyond maps, charts, and books to include prints invented, designed, engraved, or etched by an artist or author.[55] Extending protection to prints provided authors additional copyright benefits because the amendment allowed them to protect images inserted in their works. The law also benefited artists who made a living making prints. The third and fourth sections of the 1802 amendment assigned punishments for infringing an individual's copyright. Anyone discovered pirating a copyrighted work forfeited the

[53] McGill, "Copyright," 201.

[54] *An Act Supplementary to an act, 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 time therein mentioned," and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints*, April 28, 1802, in *The Public Statutes at Large of the United States*, 2:171.

[55] Ibid.

plates used to print the illegal copies. In addition, offenders paid a fine of one dollar per printed page found in their possession. The last section listed the penalties for printing a work without acquiring a copyright. The law stated that the wrongdoer would pay one-hundred dollars, split between the victim and the United States. The 1802 law was significant because it expanded the authority of copyright in the United States.[56]

A second amendment passed by Congress, in 1819, granted jurisdiction over copyright and patent cases to the federal courts, which meant that the state courts could no longer hear cases involving federal copyright law. The act stated that circuit courts possessed the jurisdiction to rule on copyright cases. This was the last change made to the first American copyright law before a major revision in 1831.[57]

The primary concern in the 1820s was the length of copyright protection, as authors sought an extension of the twenty-eight year term. As an example, Congress granted author John Rowlett several private copyrights that set his privilege outside the national law as Congress extended the rights of specific individuals rather than revising the law for everyone. Congress continued to provide private copyrights, and in doing so, it extended the monopoly of the copyright owner, stopping free public access to material by preventing its entry into the public domain. The Senate provided John Rowlett with a copyright extension in April 1828, which extended his benefits past the maximum

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[56] Ibid., 171-172.

[57] William F. Patry, *Copyright Law and Practice* 3 vols. (Washington, DC: The Bureau of National Affairs, Inc., 1994), 1:38; *An Act to extend the jurisdiction of the circuit courts of the United States to cases arising under the law relating to* patents, February 15, 1819, in *The Public Statutes at Large of the United States*, 3:481.

twenty-eight years granted by law.[58] The bill, which protected *Rowlett's Tables of Discount or Interest*, continued the author's protection for fourteen years from the passage of the act, with all the rights and privileges provided for under the copyright law. This bill represented the first private copyright passed by the United States Congress.[59]

Coinciding with the passage of these private copyright acts was a debate amongst American literary figures over the existence of a common law right in copyright. This debate, while not as drawn out as the English example, was similar to the so-called "Battle of the Booksellers" that occurred in England during the mid-eighteenth century. There, the combatants were the London printers attempting to maintain control over the trade, and the Scottish printers, looking to benefit from the reprinting of books after the terms defined in the Statute of Anne ended.[60] Noah Webster, who began sponsoring copyright legislation in 1782, advocated in favor of copyright legislation for more than fifty years earning himself the moniker, "The Father of American Copyright."[61] In 1824, Webster went to England to conduct research at Cambridge and Oxford. There he interacted with renowned professors, along with huge collections of dictionaries and

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[58] Thorvald Solberg, ed., *Copyright in Congress, 1789-1904* (Washington, DC: Government Printing Office, 1905), 32.

[59] *An Act to continue a copy-right to John Rowlett*, May 24, 1828, in *The Public Statutes at Large of the United States*, 6:389.

[60] Gwyn Walters, "The Booksellers in 1759 and 1774: The Battle for Literary Property" *Library* 29 (September 1974), 287-311.

[61] Hellmut Lehmann-Haupt, Lawrence C. Wroth, and Rollo G. Silver, *The Book in America: A History of the Making and Selling of Books in the United States* 2nd Edition (New York: R. R. Bowker Company, 1951), 106-107.

encyclopedias not available in the United States. Returning home in 1825, Webster brought with him many ideas about how to change the American copyright system.[62]

In his movement to alter the copyright system, Webster turned to his cousin Daniel Webster for assistance. The major change, Noah advocated, was the extension of the initial copyright term from fourteen to twenty-eight years, as in Britain. In addition, he sought to grant an author's heirs copyright protection in the event of death.[63] Regarding the issue of perpetual common law copyright versus statutory copyright, Noah Webster reminded the American legislators of the decision made by the House of Lords in *Donaldson v. Beckett (1774)*, which ended common law copyright in England. Webster wrote:

> As I firmly believe this decision to be contrary to all our best established principles of right and property; and as I have reason to think such a decision would not now be sanctioned by the authorities of this country, I sincerely desire that while you are a member of the House of Representatives in Congress, your talents may be exerted in placing this species of property in the same footing as all other property, as to exclusive right and permanence of possession.[64]

Using property rights as the focus of his argument, Webster decried the fact that there was a statute limiting protection of his literary property. He placed literary properties as

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[62] Harlow Giles Unger, *Noah Webster: The Life and Times of an American Patriot* (New York: John Wiley and Sons, Inc., 1998), 289.

[63] Joshua Kendall, *The Forgotten Founding Father: Noah Webster's Obsession and the Creation of an American Culture* (New York: G. P. Putnam's Sons, 2010), 313.

[64] Noah Webster to Daniel Webster, September 30, 1826, in *A Collection of Papers on Political, Literary, and Moral Subjects* (New York: Burt Franklin, 1843), 175.

equal with the productions of farmers and artists, neither of whom had laws limiting their right to profit from their property.[65]

Along with advocating for a perpetual common-law copyright, Webster called for additional rights for an author's dependents and heirs. Webster sought additional protection because his situation had changed. In the 1820s, his family had grown, and he hoped to provide for his family's future. In the summer of 1825, after finding a publisher for the most recent edition of his dictionary, Webster believed only he and his heirs should profit from a work to which he devoted most of his life.[66] In a letter to his cousin Daniel, Noah expressed his interest in the question of copyright. Noah demanded that his cousin propose legislation for a new act that "shall admit the principle that an author has, by common law, or natural justice, the sole and permanent right to make profit by his own labor, and that his heirs and assigns shall enjoy the right, unclogged with conditions." In response, Daniel replied, "I confess frankly, that I see, or think I see, objections to make it [copyright] perpetual. At the same time, I am willing to extend it further than at present, and am fully persuaded that it ought to be relieved from all charges, such as depositing copies, &c."[67] While Daniel disagreed with his cousin on the existence of a perpetual copyright, he agreed that the law needed revision.

Noah Webster continued his argument for a perpetual copyright. The fact that the American copyright law was structurally similar to its English predecessor worked

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[65] Ibid.

[66] Unger, *Noah Webster: The Life and Times of an American Patriot*, 300.

[67] Daniel Webster to Noah Webster, October 14, 1826, in *A Collection of Papers on Political, Literary, and Moral Subjects*, 176-177.

against Noah Webster. The decision in the case of *Donaldson v. Beckett* in 1774 ended the debate over the existence of perpetual common-law copyright by saying it did not exist; rather, copyright was a limited right controlled by legal statute. Therefore, in suggesting, fifty years later, that a perpetual copyright existed in the United States, Webster was fighting a losing battle.[68] As the writers of the national copyright law took English precedents into consideration, the existence of a perpetual right in the United States seemed farfetched. While he did not get a perpetual copyright, Webster was successful in his effort to change the copyright system in the United States. In 1828, Congress entertained a bill to amend the Copyright Act of 1790. This bill represented the end of the first period of American copyright law. The petitioning of Noah Webster and the debate over copyright in the late 1820s led to the first major revision of the American copyright system. The bill presented to Congress in 1828 failed to become law, but led to further debate and eventually the passage of the second copyright act in the United States.

During the first forty years of federal copyright in the United States, Congress created a law that provided a limited monopoly to an author of any map, chart, or book. In general, American copyright law was similar to the Statute of Anne, even to the extent of using term limits that were multiples of seven years.[69] Much as their English counterparts had amended the Statute of Anne in the eighteenth century, Americans adapted their law. The changes were important to the development of the law in the United States. The changes began the transformation of the American copyright system

[68] David Micklethwait, *Noah Webster and the American Dictionary* (Jefferson, NC: McFarland & Company, Inc., Publishers, 2000), 213.

[69] Ibid., 80.

away from its antimonopolistic roots as the rights expanded with every change. The development of the first American monopoly took many years. American authors and publishers sought to increase their control of intellectual property rights in the United States as the value of their property increased because of the "market revolution." The increase in the market for their products meant more profits for copyright owners. With the value of their properties increasing, American copyright owners, led by men like Noah Webster, sought ways to increase their control. This search for additional protection led to the debate over the existence of a perpetual copyright in the United States. While this debate took place during eighteenth-century court cases in England, nothing similar occurred in the United States under the term of the first copyright act. As seen in the actions of Noah Webster in the late 1820s, the position of copyright in the United States, its process and its legality, were up for debate. Webster played an integral role in beginning the movement for copyright in the United States in the 1780s and played an equally important role in the revising of it over forty years later.

# CHAPTER IV

## THE EXTENSION OF DOMESTIC COPYRIGHT AND THE DEBATE OVER INTERNATIONAL COPYRIGHT

Noah Webster played an integral role in the development of American copyright. In the 1820s, he travelled across the country promoting laws to protect the literary interests of authors; self-interest inspired his action. It is clear that Webster's purpose was to secure special privileges for his own literary property. He again advocated copyright legislation, but this time he sought general changes. His actions led to an expanded American copyright law from its limited anti-monopolistic origins into a monopoly that provided extended benefits for the copyright's owner.

Noah Webster advocated changes beneficial to authors, but more importantly changes favorable to him and his family. While he was not the only advocate for change, he was the most prominent, and his campaign succeeded. Congress began debating modifications to the copyright system in the late 1820s at the behest of Webster and others. These changes had a great effect on the copyright system, as they extended the monopolistic privileges of the copyright system. Copyright owners gained additional term limits as well as additional rights for their families. The campaign to reform copyright in the 1820s began a process that continued throughout the century. It extended

the rights of authors and copyright owners through longer-term limits and the extension to others materials, at the expense of the reading public. The revisions and amendments to the copyright law hurt the citizenry because changes to the law meant they had to wait longer for materials to enter into the public domain.

The copyright reform movement began in 1826 with a letter from Noah Webster to his cousin, Daniel Webster, calling for legislation supporting the idea that authors had the right to profit from their labor and their heirs should enjoy the same rights.[1] In his letter, Noah appealed for a new law to ensure his family would benefit from his work even after his death. His request sounded the call for a perpetual copyright. Under the first copyright law, only the original author, or owner, held the right to receive a fourteen-year term of copyright renewal. In response, Daniel Webster confessed his opposition to a perpetual copyright, but supported an extension of the current term. While opposed to a perpetual common law copyright, Daniel agreed that the law needed revision and that some of the prerequisites for securing the right should be eliminated.[2]

In February 1828, Virginian Phillip P. Barbour, from the Committee on the Judiciary, reported H.R. Bill 140: *A Bill to Amend the 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.* The changes requested were simple. The bill stated that the copyright term would be extended to twenty-eight years, rather than fourteen, with an additional fourteen-year renewal. The major

[1] Noah Webster to Daniel Webster, September 30, 1826, in Noah Webster, *A Collection of Papers on Political, Literary, and Moral Subjects* (New York: Burt Franklin, 1843), 176.

[2] Daniel Webster to Noah Webster, October 14, 1826, ibid., 176-177.

regulation this bill changed, then, was the length of the term of protection. In addition, the bill grandfathered any author already in ownership of a copyright entitling them the benefits of the new legislation for a period of time comprised of the amount of time already elapsed on their current period plus the number of years required to make the total term twenty-eight years.[3]

This first attempt at reform responded to the issue of term length; Great Britain had extended their copyright term to twenty-eight years in 1814. The amended British copyright system continued protection for an author's lifetime if they remained alive after the first twenty-eight-year term. To men like Noah Webster, who sought additional copyright protection, this was more beneficial than the protection offered by the United States.[4] While Barbour's law did not call for a life time term, the extension of the term limit was important to men of letters because they hoped to maximize their benefit through control of their intellectual property. H.R. 140 moved to a Committee of the Whole House, but there is no record of any further action.[5]

The reform campaign continued when H.R. 140 reappeared later in February 1828, revised and retitled as, *Amendment to a Bill to Amend and Consolidate the Acts Respecting Copy-Rights*. According to Noah Webster, this redrafted bill embraced the provisions of previous laws, the bill presented by the Judiciary Committee earlier that

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[3] *H.R. 140 Committee Bill*, Washington D.C. (1828), Primary Sources on Copyright (1450-1900) eds L. Bently & M. Kretschmer, www.copyrighthistory.org.

[4] David Micklethwait, *Noah Webster and the American Dictionary* (Jefferson, NC: McFarland and Company Inc., Publishers, 2000), 211.

[5] *H.R. 140 Committee Bill*.

month, as well as additional enhancements.[6] As he suggested, this bill, as presented by Gulian Verplanck of New York was more detailed than the one submitted by Barbour. The new bill amended the copyright law in its entirety, including the twenty-eight-year term, as well as a list of requirements, requisites, and duties for authors and clerks, rules for the depositing of works, and punishments for infringing of a copyright.[7] While there were some changes made to the process of gaining a copyright in this bill, for the most part these alterations were minor. This second attempt at revision again failed to gain passage in Congress.[8]

William Ellsworth of Connecticut presented a third bill in an attempt to reform the copyright system. Noah Webster played a more direct role in this attempt; Ellsworth was his son-in-law. However, Congress again failed to pass any reform. In response, Noah Webster decided to take a more direct approach.[9] He went to Washington, D.C. to lobby more actively for copyright reform. In December 1830, at the start of the second session of the Twenty-First Congress, Ellsworth, at the prompting of his father-in-law, presented his report to Congress. In it, Ellsworth argued that the United States had fallen behind Europe in copyright protection and the benefits granted to authors. In comparison with the United States, England had a twenty-eight-year term and, if the author survived

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[6] Webster, "Origins of the Copy-Right Laws in the United States," in *A Collection of Papers on Political, Literary, and Moral Subjects*, 177.

[7] *H.R. 140 Consolidated Bill,* Washington D.C. (1828), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org.

[8] Webster, "Origins of the Copy-Right Laws in the United States," in *A Collection of Papers on Political, Literary, and Moral Subjects*, 177.

[9] Joshua Kendall, *The Forgotten Founding Father: Noah Webster's Obsession and the Creation of an American Culture* (New York: G. P. Putnam's Sons, 2010), 313.

the first term, he or she received a lifetime term. By 1826, French law granted a lifetime term, with an additional fifty-year term granted to the author's widow and children after the author's death. Russia provided a lifetime term, with a twenty-year limit after the author's death. Additionally, according to the report, the laws in Germany, Norway, and Sweden provided for perpetual copyrights.[10]

Defending the demand for an extension of the term limit, Ellsworth pointed out that this remained less than what authors received in Europe. He argued that the committees reviewing copyright legislation had no reason to deny the extension of copyright protection. The question was not about granting a monopoly; rather it questioned whether authors were due the rewards of their labor. Ellsworth ended by presenting to the House another bill for amending copyright law. The bill provided a twenty-eight-year term along with a fourteen-year renewal if the author was alive at the end of the first term, or left behind a family. Refuting the idea that this created a monopoly, Ellsworth suggested that the terms provided were less than those granted in many European states.[11]

Congress spent the rest of December debating the proposed bill. In the end, it took the personal intervention of Noah Webster to push the bill successfully through Congress. In January 1831, he personally addressed the House of Representatives. According to

[10] Judiciary Committee Report, Washington D.C. (1830), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org

[11] Ibid.

him, the lecture "was well attended, and as my friends informed me, had no little effect in promoting the object of obtaining a law for securing copy-rights."[12]

The maneuverings of Webster and his allies, P.P. Barbour, William Ellsworth, and Daniel Webster, to secure copyright reform succeeded as the House passed the bill. However, it was not without opposition. During the House debate, William Ellsworth of Connecticut proposed an amendment that allowed the heirs of a copyright owner to inherit the benefits. Ellsworth moved that the wives, children, and/or assigned executors of a copyright owner receive the right to renew a copyright after its first twenty-eight year term. The amendment included the same rights for the heirs or executors of any author who was not alive at the time of the new bill's passage.[13] This was a radical change from the Copyright Act of 1790, which required an author to be alive to renew the copyright for a second fourteen-year term. The extension of copyright to the heirs of the original owners expanded the monopolistic power of copyright in the United States. Granting rights to the heirs extended the copyright monopoly because it maintained the author's right after his/her death. The change also ensured that copyright terms existed for the maximum duration, which slowed the transfer of materials into the public domain.

In opposition, New York Representative Michael Hoffman argued that the legislation created a monopoly for authors at the detriment of the public. Constructing his argument against the extension of the term limit for works already published, Hoffman

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[12] Webster, "Origins of the Copy-Right Laws in the United States," in *A Collection of Papers on Political, Literary, and Moral Subjects*, 178.

[13] William Ellsworth, speaking on copyright, on January 6, 1831, in *Register of Debates*, 21st Cong., 2nd Sess., 1831, 422-423.

used the example of the United States patent process, which made all inventions public property after the expiration of the patentee's fourteen-year term. Hoffman argued that there was a contract between the author and the public, as authors sold their books to the public at a high rate, therefore, the public had the right to avail themselves of the work when the copyright expired.[14] Hoffman's anti-monopoly argument made sense, historically. Looking back at the history of copyright, statutory copyright was originally anti-monopolistic, as the Statute of Anne broke the monopoly of the Stationers' Company of London and created set specific limits for copyright protection. Hoffman approached the idea of copyright as a mutually-beneficial arrangement between the author and the public. The authors benefited for the period of the copyright, but the public interest was residual and began after the expiration of the copyright. Lengthening the copyright term diminished the rights of the public by limiting free, public access to the library of works printed in the United States. The revision of copyright law was an attack against the people because the extension safeguarded the owner's monopoly.[15]

Responses to Hoffman's argument focused on the rights of the author. Ellsworth argued that passage of the bill enhanced the literary character of the nation by granting additional benefits to authors for the time devoted to their labors. Jabez Huntington of Connecticut supported the measure as a promotion of the advancement of intellectual labors. Gulian Verplanck of New York considered the bill a necessary act of justice for authors and copyright holders.[16] Those in favor of the law maintained it was an action to

[14] Michael Hoffman, Ibid.

[15] Thomas B. Nachbar, "Constructing Copyright's Mythology," *Green Bag* 6 (Autumn 2002): 39.

[16] William Ellsworth, Jabez Huntington, and Gulian Verplanck, speaking on copyright, on January 6, 1831, in *Register of Debates,* 21st Cong., 2nd Sess., 1831, 423-424.

encourage the further advancement of knowledge in the United States by providing authors additional benefits. The advocates of copyright understood that by lengthening the copyright term and extending the rights beyond that of the author, or owner of the copyright, they were depriving the American people access to public property—going against the antimonopolistic nature of the original copyright law. While still limited in nature, the extension of copyright in 1831 represented a process that continued throughout the nineteenth century of expanding the rights of individual authors over the interest of the public.

The bill passed the House and moved onto the Senate. Where it was passed without debate.[17] The passage of the law represented the culmination of over five years of lobbying by Noah Webster, with the help of his son-in-law William Ellsworth, Jabez Huntington, and Gulian Verplanck. It was the first major revision of the United States copyright law; its passage repealed the Copyright Act of 1790 and the Amendatory Act of 1802. Congress now legally recognized the extension of the copyright monopoly by providing authors/owners longer copyright terms and the added benefit of an expanded list of covered materials.

The Copyright Act of 1831 incorporated new genres of work and extended the length of the initial copyright, it did not change the length of time for renewal. Authors were eligible to receive a renewal once they completed all the regulations listed in the law. The major requirement was the recording of the protected work's title six months

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[17] Webster, "Origins of the Copy-Right Laws in the United States," in *A Collection of Papers on Political, Literary, and Moral Subjects*, 178.

before the expiration of the original term. To gain the renewal, the process required that the owners repeat the copyright procedure and prove that they followed the copyright process the first time. In addition, the law ordered that authors publish their renewal in a newspaper for a four-week period. Failure to complete these requirements meant no renewal and the loss of copyright benefits. [18]

The requirement of deposit was a central provision of the copyright law. To receive a copyright, the law required authors to deposit a copy of the title of their work with the clerk of the court in the district where they resided. It was the duty of the court clerk to submit an annual list of all recorded titles to the Secretary of State as well as the deposited copies of each registered work for preservation. The requirement that county clerks submit annual lists of deposited works to the State Department was an addition to copyright law. Additionally, the law required authors to print all copyright information inside each copy of their work, usually on the title page or an adjoining page.[19] Under the Copyright Act of 1790, it was the responsibility of the author to deliver a copy of the work to the Secretary of State.

The Copyright Act of 1831 expanded the discussion of what constituted copyright infringement and the penalty for such action. The first form of infringement was the act of reprinting any copyrighted material without the consent of the owner. The second form was knowingly publishing, selling, or attempting to sell any copyrighted work without written consent of the author/owner. Consent, as defined by the law, was only given if the

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[18] *Copyright Act of 1831,* February 3, 1831, in *The Public Statutes at Large of the United States of America,* 1789–1873, 17 vols. (Boston: Little, Brown and Company, 1845–73) 4:436-439.

[19] Ibid., 437.

person obtained the permission of the owner in writing in the presence of two or more credible witnesses. These definitions protected copyrighted works in two ways. First, it defined the pirating and illegal reprinting of copyrighted works as a crime. Second, it decreed that the sale of any pirated work was criminal. The distinction between the two was that the first focused on printers and the second on booksellers. The most striking change made in the 1831 law was that lawmakers differentiated between books and prints, maps, and musical compositions. One section of the law dealt with the penalties for books, and another section dealt with the penalties for prints, cuts, engravings, maps, charts, and musical compositions.[20]

For books, the penalty for any such actions was the forfeiture of any copies, complete or incomplete, of the infringed work and a fee of fifty cents per sheet found in the possession of the offender. The penalty for infringement on the second category of material was the forfeiture of all plates used to copy the infringed works, as well as all copies already printed, and a fee of one dollar per printed sheet. Both penalties returned the copyrighted materials to their owner. However, despite the infringement upon their property, copyright owners did not receive monetary reimbursement. This portion of the law actually worked against the copyright owner, as they had to file suit in court to recover financial reimbursement from an infringement case. Upon the successful completion of the suit, one half of any financial settlement went to the copyright owner and the other half went to the United States government. While the law protected the

[20] Ibid., 437-438.

rights of the owners, granting them an extended monopoly over their work, the government did not grant them full financial protection from infringement. [21]

The Copyright Act of 1831 officially repealed the Act of 1790 and the 1802 Amendment. Repealing the earlier law raised the question of what to do with works protected under the previous law. The 1831 law guaranteed protection and extended all legal rights to the proprietor(s) of copyrights currently in existence. It provided for an extended twenty-eight-year term with the right of renewal granted to the family and heirs of the original author, upon his/her deaths. This was particularly advantageous to those heirs and executors of copyrights owned by individuals who had died since the passage of their copyrights; under the previous law, they had no renewal rights. The extension of copyrights, however, did not include protection for those works with an expired copyright; those works now belonged to the public.[22]

Despite the fact that Noah Webster failed in his quest for perpetual copyright, the passage of the Copyright Act of 1831 and the extended copyright term transformed American copyright from a right granted for a limited time to a single individual into a right granted to a person and his or her heirs for an extended, albeit still limited, term. The extension of the term length provided government support for a monopoly. Copyright granted the owner exclusive control over their property, as well as its marketing and production. The decade of the 1830s represented a pivotal time in the history of American copyright law. The passage of the first major revision to the

[21] Ibid., 438-439.

[22] Ibid.

copyright system created lasting changes that remained in place until the next revision in 1870.

The second major event to shape American copyright in the 1830s was the Supreme Court ruling in the case of *Wheaton v. Peters* in 1834. Henry Wheaton and Richard Peters, Jr. both held the position of reporter of the Supreme Court. Wheaton served as the third reporter from 1816 to 1827 and Peters served as the fourth reporter from 1828 to 1842; both published the rulings made by the Supreme Court. In their position, the men relied on the profits from the sale of their works to supplement their salaries.[23] Unfortunately, for Wheaton, his *Reports* were too expensive for the average citizen to purchase, due to their size and binding. Consequently, he resigned and accepted a diplomatic post in Europe. When the Supreme Court appointed Richard Peters reporter, he decided to reprint the decisions of earlier sessions of the Court in a cheaper, condensed format, to make them more accessible. When Peters printed his condensed version of Wheaton's *Reports*, Wheaton took action to protect his interests, seeking an injunction against Peters's condensed reports.[24]

Judge Joseph Hopkinson initially heard the case in the circuit court of Pennsylvania. Living in Europe, Wheaton was not present for the circuit court hearing; instead, his publisher, Robert Donaldson, represented Wheaton's interests. Donaldson, in the complaint against Peters and his publisher John Grigg, argued that Peters's work,

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[23] Meredith L. McGill, *American Literature and the Culture of Reprinting, 1834-1853* (Philadelphia: University of Pennsylvania Press, 2003), 49.

[24] Howard B. Abrams, "The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright," *Wayne Law Review* 29 (Spring 1983): 1178.

*Condensed Reports of Cases in the Supreme Court of the United States*, copied without alteration all of the reports from the first volume of Wheaton's *Reports*. The circuit court judge ruled in favor of Peters, finding that Wheaton had not secured the copyright of his work. Peters alleged that Wheaton failed to deposit a copy of his published volumes. The court ruled that the failure to fulfill the deposit requirement nullified Wheaton's copyright, and, therefore, Peters work was not an infringement. Wheaton then appealed to the Supreme Court. [25]

The three major issues in this case were statutory right versus natural law, the importance of statutory formalities, and the issue of who owns the law reports.[26] In regards to the issue of statutory right versus natural law, Wheaton's lawyers, Elijah Paine and Daniel Webster, argued that a perpetual common law copyright existed in the United States separate from the laws of the Constitution. In essence, the idea of a common law copyright was based in the idea that copyright was a natural right and that creators had a perpetual right to control the publication of their works. The passage of the Copyright Act of 1790 removed the author's natural law right and replaced it with a limited, statutory right. The common law argument rested on the belief that before the passage of the first statutory copyright, the Statute of Anne, the author held a perpetual right as the creator of the work. Wheaton's lawyer used this argument in their appeal to characterize Peters's action as an infringement. Commenting on the issue of statutory formalities, Paine contended that Wheaton's failure to follow the requirements set down in federal

[25] Ibid., 1178-1179; *Wheaton v. Peters*, 33 U.S. 591 (1834), 595.

[26] Craig Joyce, "'A Curious Chapter in the History of Judicature:' *Wheaton v. Peters* and the Rest of the Story (of Copyright in the New Republic)," *Houston Law Review* 42 (July 2005): 360-362.

copyright law did not deprive him of rights and that, contrary to the circuit court ruling, Wheaton had meet the statutory requirements. Lastly, Paine and Webster argued that law reports were literary objects just like any other literary work and were, therefore, eligible for copyright protection; Peters's work was an infringement of Wheaton's copyright.[27]

In response, Peters's lawyers, Joseph Ingersoll and Thomas Sergeant, argued that Wheaton's book, because it compiled United States legal precedent, was not literary property subject to copyright because decisions of the Supreme Court were not covered by the provisions of the copyright law. Favoring statutory copyright over common law copyright, Peters's defense suggested that ownership of literary material could only occur through laws passed by Congress, and Wheaton did not follow those provisions. Lastly, Sergeant contended that Peters's work did not infringe upon the rights of Wheaton *Reports*.[28]

After hearing the case, the Justices ruled 4-2 in favor of Peters. In their decision, the majority opinion stated that court reporters could not acquire a copyright for the written opinions of the court; nor could judges confer such a right to any reporter. As the decisions of the Supreme Court were not copyrightable, it was clear that no one person could benefit financially from printing them. This ruling provided the citizens unfettered access the court decisions and other government documents of the United States.[29]

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[27] *Wheaton v. Peters*, 595-617.

[28] Ibid., 617-638

[29] Ibid., 668.

However, the issue of ownership was the least significant of the three issues dealt with in *Wheaton v. Peters*. Peters's victory guaranteed the superiority of statutory copyright in the United States. First, the majority of Supreme Court justices ruled that no common law copyright existed in the United States because it was not embodied in the Constitution or the laws of the Union.[30] This is vital to the history of copyright because Wheaton argued that he held a common law right in the state of Pennsylvania, despite the existence of the Constitution. The ruling, written by John McLean, argued that the Copyright Act of 1790 granted individual copyright protection on published material only. This meant that under federal law, a published worked was subject to the limitations of the copyright law, and the act of publication ended any common law right in the work. In addition, the majority's discussion of statutory requirements suggested that all conditions needed to be met to guarantee protection.[31]

While the majority ruled against the existence of any post-publication common law right, the minority ruling took a different view. The ruling, written by Smith Thompson, argued that a common law right did exist alongside the statutory. Thompson argued that an author's common law right continued at the expiration of the time limited by the federal copyright act. This meant that following the end of a copyright term, the author maintained his/her rights in their work, without the legal protections of the law. If, according to Thompson, the common law right remained following the end of the

[30] Ibid., 658.

[31] Ibid., 665.

statutory term, it meant that the work would not pass into the public domain, but remain with the author in perpetuity.[32]

This ruling strengthened the power of the federal copyright, making it a requirement to follow all the steps to maintain one's protection. *Wheaton v. Peters* strengthened the American copyright system by defining congressional authority in the formation of statutory law. In essence, the Supreme Court sanctioned the extension of copyright as a monopoly, albeit a monopoly with set limits. However, as seen in the Copyright Act of 1831, Congress had the authority to change the period of these limited monopolies, and extend them in favor of the rights of copyright owners over the rights of the public.

While *Wheaton v. Peters* altered the landscape for American copyright law, it was not the only modification to occur. Another minor change occurred in 1834 with the passage of an amendment to the 1831 act. In June 1834, the Recordation Amendment required that all copyright transfers or assignments be acknowledged in the same manner as deeds for the transference of land. This amendment recognized a copyright as property. In addition, probably in response to *Wheaton v. Peters*, it suggested that a common law right in copyrights did not exist as they could be transferred as easily as a piece of land. Again, it reinforced the point that statutory law, not common law, was the basis for control of intellectual property.[33]

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[32] Ibid., 685.

[33] *An Act supplementary to the act to amend the several acts respecting copyrights,* June 30, 1834, in *The Public Statutes at Large,* 4:728.

The Copyright Law of 1831 maintained that copyright privilege was available only to American citizens. The law denied foreign authors any rights in the United States. But, the American print industry relied heavily on the reprinting of foreign works, especially those from England. In the early nineteenth century, there was an extensive market for the works of English authors, due to the limited number of American literary figures. This did not mean that there were no great American authors, because there were; but the popularity of English authors created a demand for their works. In response to that demand, many American publishing houses, Carey & Lea, Carey & Hart, and Harper & Brothers, for example, reprinted foreign works.[34]

To maintain order in American publishing, most publishers agreed to follow an honor system, referred to as courtesy of the trade, to balance competition between publishing houses. There were two opposing views on courtesy of the trade. On one side, were those firms that followed the system and saw it as a positive agreement between publishers, who acknowledged the rights of foreign authors. On the other side, were those who described it as a trust that benefited the older, established print houses that formed it, rather than the newer houses trying to open. The first group recognized the rights of foreign authors by attempting to provide some financial benefit to them, usually through a one-time payment for the rights to reprint their work. The second group used the courtesy of the trade as a tool to ensure that one house did not dominate the reprinting business. While courtesy of the trade suggests that some printing house made deals with foreign authors to print their works in the United States, American copyright law still

[34] Meredith McGill, *American Literature and the Culture of Reprinting, 1834-1853* (Philadelphia: University of Pennsylvania Press, 2003), 1.

denied those authors any protection or benefits for their works published in the United States. However, courtesy of the trade brought some organization to the American printing houses, in theory, as trade courtesy prohibited unfair dealings.[35]

Foreign publishers and authors were aware of the demand for their works in the United States. However, the American copyright system kept them from securing anything other than what the courtesy of trade system provided. However, in the late 1830s, England attempted to acquire copyright protection for its authors in the United States by advocating changes to the American copyright system. In 1836, a British publishing firm, Saunders & Otley, opened an office in the New York with the hope that it would be able to control the trade in English reprints, by republishing books printed by their firm in England. While it was able to reprint the books, Saunders & Otley was unable to gain any copyright benefits because they were not citizens of the United States. The firm then advocated amending the American copyright system by gathering the signatures of various British authors and petitioning Congress. The petitioners found an ally in Congress in the person of Senator Henry Clay, who advocated for an international copyright agreement until his death.[36]

Henry Clay introduced a petition signed by various British literary figures to Congress in February 1837, and highlighted the grievances that British authors held

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[35] Jeffrey D. Groves, 'Courtesy of the Trade," in *A History of the Book in America, Volume 3: The Industrial Book, 1840-1880,* eds. Scott E. Casper, Jeffrey D. Groves, Stephen W. Nissenbaum, & Michael Winship (Chapel Hill: The University of North Carolina Press, 2007), 139-148.

[36] Meredith L. McGill, "Copyright," in *A History of the Book in America, Volume 2: An Extensive Republic: Print, Culture, and Society in the New Nation, 1790-1840,* eds. Robert A. Gross and Mary Kelley (Chapel Hill: The University of North Carolina Press, 2010), 209-211

against the American system. This plea was an appeal for justice and good faith between the two nations. In their request, the British petitioners argued that the lack of an international copyright agreement between the United States and Great Britain injured the reputation and property of British authors. The petitioners suggested that American booksellers alter their reprints in an attempt to reduce the costs; American publishers often changed margins to fit more text on each page, which meant fewer pages and a lower reprinting cost.[37]

The petition also contended that both American authors and the American people suffered due to the lack of an international agreement. This affected American authors because publishers in the United States, who found it less expensive to reprint English works, ignored American authors. The lack of international cooperation affected the American people because they were not receiving the complete work of British authors. The petition suggested that if an international agreement existed between the two nations, the remunerations that Walter Scott received might have eased the debts he faced in his last years. The petition sparked much debate, with opponents and supporters presenting counter petitions and memorials to Congress arguing for or against any alteration to the existing law. [38]

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[37] *Petition of Thomas Moore, and Other Authors of Great Britain, Prying Congress to grant them the Exclusive benefit of their Writings within the United States*, February 2, 1837, Serial Set Vol. No. 298, Session Vol. No. 2, 24th Cong., 2nd Sess., S. Doc. 134, United States Congressional Serial Set, 1817-1994, http://infoweb.newsbank.com.

[38] Ibid.; Aubert J. Clark, *The Movement for International Copyright in Nineteenth Century America* (1960; Westport, CT: Greenwood Press, 1973), vii-ix.

Proponents of an international copyright bill represented a small segment of society, generally writers, foreign publishers, and the growing body of intellectuals interested in justice for foreign authors and printers.[39]Advocates of international copyright believed that such an agreement would benefit American authors, as publishers in the United States would no longer have access to cheaper English works. This would encourage them to print more works of American authors. Additionally, the law would protect foreign authors against piracy and guarantee the rights of American authors abroad. Initially, it appeared that proponents for change would be successful. Just two days after the presentation of the British petition, Congress received a petition signed by thirty American citizens, including Henry Longfellow and Samuel F. B. Morse. Their petition argued that, due to the current American copyright law, American authors could not compete against the less expensive foreign works, which publishers were able to print cheaper because they did not pay foreign authors. Advocating change, the petitioners requested alterations to ensure American authors protection of their personal property, and a minimal, yet reasonable, protection for foreigners. In addition, a modification of the law would protect the public against a monopoly, maintain access to the library of American literature, and lay the groundwork for an international copyright law.[40]

Under the guidance of Henry Clay, the British petition moved to a committee comprised of Clay, William Preston, James Buchanan, Daniel Webster, and Thomas

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[39] Clark, *The Movement for International Copyright,* 44.

[40] *Memorial of a Number of Citizens of the United States, Praying an Alteration of the Law Regulating Copyrights* , February 4, 1837, Serial Set Vol. No. 298, Session Vol. No. 2, 24th Cong., 2nd Sess., S. Doc. 141, United States Congressional Serial Set, 1817-1994, http://infoweb.newsbank.com.

Ewing, who presented Congress with a bill that extended copyright benefits to residents of Great Britain, Ireland, and France.[41] The bill included a manufacturing clause that stated authors needed to print their work in the United States to qualify for the benefits. The inclusion of this clause sought to appease the opposition, who argued that an international copyright meant a loss of jobs for American printers. The manufacturing clause guaranteed that men, who were pirating and printing cheap copies of foreign works, would be able to maintain their trade. If the bill passed, legally printing foreign works would cost the printers more than pirating the works. Unfortunately, for the proponents of the bill, events occurred that prevented Congress from dealing with the issue of international copyright. Instead, Congress turned its attention to coping with the Panic of 1837.[42]

Clay reintroduced the bill when the 25th Congress met in December 1837, however, the delay caused by the Panic gave the opposition time to prepare and offer counter-petitions.[43] A representative example was the January 15 petition of the citizens of Philadelphia that argued the passage of an international copyright threatened the American print industry. The petition stated that the American book industry engaged nearly thirty million dollars in the manufacture of its products, including the production

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[41] *A Bill to Amend the Act Entitled "An Act to Amend the Several Acts Respecting Copy-Right,"* S. 233, February 16, 1837, 24th Cong., 2nd Sess., A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774-1875, http://memory.loc.gov/ammem/amlaw/lawhome.html.

[42] Clark, *The Movement for International Copyright,* 43-44.

[43] James J. Barnes, *Authors, Publishers and Politicians: The Quest for an Anglo-American Copyright Agreement, 1815-1854* (Columbus: Ohio State University Press, 1974), 66.

of paper, printing, binding, selling, and periodical publishing. The industry opposed international copyright because it was a threat to their profits.[44]

Despite the inclusion of the manufacturing clause, opponents argued that an international agreement was a dangerous proposition for the stability of the American printing industry. The Philadelphia petition stated that the passage of the law would lead to the unemployment of thousands of workers. An international agreement opened the United States market to a competitive force that would break the control of the American market held by domestic printing houses. The petitioners rejected the idea that they were protecting a monopoly, describing the local printing establishments as the creations of individual enterprise.[45] While the petition suggested it was not trying to extend a monopolistic control of the American industry, their real fear was just that. If Congress agreed to an international agreement, then English publishers could export the works of English authors with authors receiving full protective benefits. This meant that American publishers would no longer be able to print cheap, pirated copies for their own financial benefit. Despite the system of trade courtesy that existed, and the fact that many of the larger print houses often paid English authors for copies of their works to print, an international agreement would limit the American print industry.[46]

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[44] *Memorial of a Number of Citizens of Philadelphia, Against the Passage of an International Copyright Law*, January 15, 1838, Serial Set No. 315, Session Vol. No. 2, 25th Cong., 2nd sess., S. Doc. 102, United States Congressional Serial Set, 1817-1994, http://infoweb.newsbank.com.

[45] Ibid.

[46] Meredith McGill, *American Literature and the Culture of Reprinting, 1834-1853* (Philadelphia: University of Pennsylvania Press, 2003), 81-82.

In the end, the opposition won, as the committee formed to consider the bill as submitted in December 1837 presented their findings to Congress the next summer. The committee, after weighing the arguments of both sides, found that the benefits of this law favored foreign publishers and manufacturers to the detriment of the American print industry. The committee recommended against the passage. By maintaining copyright as a benefit for American citizens only, Congress condoned the piracy of foreign works.[47]

The defeat of an international agreement brought about the end of the first real contentious era of American copyright law. Whereas the Copyright Act of 1790 passed Congress with very little debate, the Copyright Act of 1831 and the possibility of an international copyright law generated more debate in Congress and among the American people. One explanation for this was the growth of the American print industry between 1790 and 1830. In addition, authors began outliving the copyright terms provided in the original law and sought the additional protections debated in the 1830s. The print industry gained the expansion of the statutory copyright, providing both authors and publishers more control.[48]

The process of expanding and defending the powers and benefits of copyright continued in the years after the 1838 international copyright debate. In 1841, the Massachusetts Circuit Court heard the case of *Folsom v. Marsh.* The two works involved in this case were Jared Sparks's twelve volume *The Writings of George Washington* and

[47] The Committee on Patents and the Patent Office, June 25, 1838, Serial Set No. 319, Session Vol. No. 6, 25th Cong., 2nd sess., 1838, S. Doc. 494, United States Congressional Serial Set, 1817-1994, http://infoweb.newsbank.com.

[48] Robert A. Gross, introduction to *A History of the Book in America Volume 2,* 49-50.

Charles Upham's two volumes *The Life of Washington.* Sparks's collection included a biography of George Washington and eleven volumes of Washington's writings. Under the copyright law, Sparks, who published his work prior to Upham, owned a copyright. Sparks argued that Upham's *The Life of Washington* was an infringement because Upham copied 255 pages of his work.[49] The material Sparks accused Upham of copying was the actual writings of George Washington, not a part of Sparks's biography. In his defense, Upham argued three points: "I. The papers of George Washington are not subjects of copyright…. II. Mr. Sparks is not the owner of these papers, but they belong to the United States, and may be published by any one. III. An author has the right to quote, select, extract or abridge another in the composition of a work essentially new." Furthermore, as the federal government had purchased Washington's correspondence from his estate those papers were the property of the nation and available for use by the public.[50]

In his decision, Justice Joseph Story ruled that Upham's work infringed upon Sparks's copyright. Arguing that the Upham's work was a piracy, Story stated that even though Upham's work was essentially a new work, as an abridgement it copied verbatim portions of material from Sparks's work. Story ignored Upham's argument that the writings of Washington were public. The ruling stated that to prove piracy, the infringed individual had to prove that the copied material diminished the value of the pirated work.[51] In this instance, Story ruled that the amount of material used by Upham, 255

[49] John Tehranian, "Et Tu, Fair Use? The Triumph of Natural-Law Copyright," *UC Davis Law Review* 38 (February 2005): 482.

[50] *Folsom v. Marsh*, 9 F. Cas. 344 (1841), 344-345.

[51] Ibid., 342.

pages, was sufficient to consider his work a financial threat to Sparks's collection. This ruling expanded the protection of copyright by changing the legal definition of infringement or piracy. Earlier, individuals could translate or abridge a work without infringing upon it. However, Story's ruling meant that now it depended on how much of the original work appeared in the abridgement or translation.[52]

Prior to 1841, an infringement of a copyright meant the illegal copying of a copyrighted work. Following *Folsom v. Marsh*, an infringement did not need to be a complete duplication. Instead, the copying of a portion of the original work indicated piracy. Significantly, the court case laid the groundwork for the fair use policy that exists in modern copyright law, which provided a defense against copyright infringement.[53] Generally, this meant the use of a published work by another for the purpose of criticism, comment, or review.[54] The Story ruling, and the development of fair use, expanded the rights of a copyright owner. By expanding the definition of infringement, owners needed only prove that someone copied the most valuable portions, not the entirety, of their work.

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[52] Tehranian, "Et Tu, Fair Use? The Triumph of Natural-Law Copyright," 482.

[53] Fair Use, as defined by United States Code Title 17, Chapter 1, Section 17, states that "the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include— (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyright work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors."

[54] William F. Patry, *Copyright Law and Practice,* 3 vols. (Washington, DC: The Bureau of National Affairs, Inc., 1994) 1:718.

Ironically, this ruling occurred at a time when most American publishers, thanks to the courtesy of trade system, published large numbers of works pirated from foreign authors. The international copyright movement, which began in the late 1830s, continued throughout the nineteenth century. In 1842, Charles Dickens came to the United States and campaigned for an international copyright agreement. Like the petition of British authors in 1836, Dickens looked to protect his own interests and gain protection for his works printed in the United States. American publishers reprinting his work without his consent meant a financial loss for Dickens.[55] The international copyright movement in the 1840s repeated that of the late 1830s, with memorials and petitions sent to Congress. However, Dickens's actions in 1842 gave the push for international copyright additional intensity, due to his literary status.[56]

In March 1842, Henry Clay reintroduced the debate over an international copyright when he presented a memorial written by Washington Irving and others endorsing an international law.[57] In June, printers and publishers petitioned against an international copyright recycling the same arguments used earlier; an international copyright would be hazardous to those employed in the print industry, as well as those who invested in the print industry.[58] Proponents continued to argue for international

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[55] Clark, *The Movement for International Copyright,* 59.

[56] Sidney P. Moss, *Charles Dickens' Quarrel with America* (Troy, NY: The Whitson Publishing Company, 1984), 2-3.

[57] Henry Clay speaking on international copyright, on March 30, 1842, in *Journal of the Senate,* 27th Cong., 2nd sess., 1842, 256.

[58] *Memorial of a Number of Persons Concerned in Printing and Publishing Praying an alteration in the mode of levying duties on certain books, and remonstrating against the enactment of an international copyright law,* June 13, 1842, Serial Set Vol. No. 398, Session Vol. No. 4, 27th Cong., 2nd Sess., S. Doc. 323, United States Congressional Serial Set, 1817-1994, http://infoweb.newsbank.com.

copyright because it was both fair and practical, reiterating arguments made during the 1830s.

The American Copyright Club, a pro-international copyright group formed in 1843, believed that a book was property, just like land or a house, and that the location of its publication did not change its status.[59] The formation of the American Copyright Club, one of the more significant events in the international movement, gave the proponents of internationalism an organization to sound their arguments. However, as with previous attempts, there was no legislation passed on international agreement. Proponents of an international agreement remained hopeful, though, as the 1840s saw the United States and Great Britain peacefully settle the boundary disputes in both Maine and Oregon. The Webster-Ashburton Treaty and the Oregon Treaty eased some of the tensions that existed between the two nations, and provided hope for a more peaceful future.[60]

The only other activity regarding copyright in the 1840s was an amendment that dealt with the deposit requirement. This amendment appeared in the bill that established the Smithsonian Institution. Section 10 of the bill ordered that any individual seeking a copyright had to deposit a copy with the Smithsonian Institute and the Congressional Library.[61] This condition was in addition to the existing requirement to deposit one copy with the Secretary of State. While this did not grant, or take away, any power of the

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[59] American Copyright Club, *An Address to the People of the United States* (New York: Published by the Club, 1843), 5.

[60] Sean Wilentz, *The Rise of American Democracy* (New York: W. W. Norton & Company, 2005), 571, 580-581.

[61] *An Act to establish the "Smithsonian Institution," for the Increase and Diffusion of Knowledge among Men* August 10, 1846, 29th Cong., 1 sess., in *The Public Statutes at Large,* 9:102.

copyright owner, it was a significant moment in the history of American copyright law. The deposit with the Smithsonian and Library of Congress made copyright law responsible for the transition of these two institutions into national libraries.

The debate over international copyright again reappeared in Congress in 1853 and 1854. In 1853, at the request of five publishing houses, Secretary of State Edward Everett began negotiations with the British for a joint American-British copyright law. Everett and the English Minister to the United States, John Crampton, completed a treaty in February 1853. The treaty stipulated that American and British authors owning copyrights in either nation would be entitled to exercise those same rights in the other nation.[62] Authors and copyright owners gained the right to take their copyright protection across the Atlantic without any loss of benefits. The treaty, like the copyright laws already in place, protected against piracy and the importation of pirated works, provided a legal process for grievances, and required registration and deposit in both countries. Opponents of the treaty quickly attacked it using the familiar argument that it would negatively affect the American print industry.[63]

The most significant opposition to the treaty was Henry C. Carey, who wrote *Letters on International Copyright* in 1853. Carey added to the old arguments by attacking the treaty as a plan to bypass the will of the people of the United States by signing a treaty, rather than passing legislation. The treaty did not need approval of the House of Representatives, and Carey decried this as an attempt by the President to

[62] British-American Copyright Convention Draft, Washington (1853), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org.

[63] Clark, *The Movement for International Copyright,* 81-83.

circumvent Congress. Carey's argument suggested that as Congress rejected an international agreement in both the 1830s and 1840s, the proponents of international copyright sought to use the Senate, which he describes as an extension of executive authority, to make a treaty without the consent of the House.[64]

Repeating the argument that international copyright would wreak havoc on the American print industry, Carey suggested that if the United States signed the treaty it would become a literary province of England. Carey's opposition, along with many other petitions decrying the treaty, led to its defeat. When the Senate Committee of Foreign Relations presented the treaty, it was tabled.[65] In the end, those opposed to the treaty were able to maintain their rights and continue to reprint cheap copies of foreign works without benefit to foreign authors and preserve the American print industry.

Ironically, as the debate over the British-American Convention raged, Harriet Beecher Stowe found herself in a court battle involving *Uncle Tom's Cabin* and the international copyright debate. First, Stowe received a letter from an English publisher in regards to an edition of *Uncle Tom's Cabin* he was printing for sale in England. Thomas Bosworth offered compensation. Horace Greeley, the editor of the *New York Daily Tribune*, used this letter to promote an international copyright agreement. Applauding Bosworth's action, Greeley wrote, "It is a great shame, a great wrong, a great mischief

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[64] Henry C. Carey, "Letter I," in *Letters on International Copyright* (Philadelphia: A. Hart, 1853), 5.

[65] Thorvald Solberg, *International Copyright in the Congress of the United States, 1837-1886* (Boston: Rockwell and Churchill, 1889), 13; Richard R. Bowker, *Copyright: Its History and Its Law* (Boston: Houghton Mifflin Company, 1912), 347.

that an Author's rights to the fruits of their labor or genius are not recognized by our laws."[66]

When Stowe presented Bosworth's letter to Greely, she was embroiled in a court case that involved an unapproved German translation of *Uncle Tom's Cabin.* Stowe worked with Hugo Rudolph Hutton to print a German translation of *Uncle Tom's Cabin*. Hutton, working with Stowe's husband, translated and printed the approved German translation. The problem arose after Hutton printed a second, unapproved, copy in the Philadelphia daily newspaper, *Die Freie Presse*. According to American copyright law, this second publication was an infringement because it did not have the approval of the author. The central question was whether a translation was in fact an infringement of copyright law. *Folsom v. Marsh* proved that an abridgement was an infringement if it extracted essential or valuable portions of the work. Stowe's lawyers argued that translations were also an infringement, because the translator conveyed the thoughts of the author in a new language. This argument suggested that the translation extracted the most valuable parts of the original. In addition, the translation in question appeared without the approval of the copyright owner, a direct violation of the law. [67]

The defense agreed that the copyright law prohibited the reprinting of a copy of a protected book. Accordingly, they maintained, that a translation was not a copy because the subject of a book, slavery in this case, was not capable of gaining a copyright; therefore, a translation was not an infringement. The defense claimed that the decision of

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[66] "Copyright and Natural Right—Letter from Harriet Beecher Stowe," *New York Daily Tribune*, September 16, 1852.

[67] *Stowe v. Thomas,* 23 F. Cas. 201 (1853), 201-202.

infringement turned upon the issue of the originality because authors could not copyright the subject of a work. Using the argument of originality, the defense reasoned that the translation was an original work; the defense contended there was no injury to Stowe.[68]

The ruling came down from the Circuit Court of the Eastern District of Pennsylvania in 1853. Justice Robert Grier, ruled that a translation was not an infringement of copyright; it was an original work. Grier stated, "To make a good translation of a work, often requires more learning, talent and judgment, than was required to write the original.… To call the translation of an author's ideas and conceptions into another language, a copy of his book, would be an abuse of terms, and arbitrary judicial legislation."[69] The decision was interesting, especially when compared to *Folsom v. Marsh*. Hutton's unapproved edition of *Uncle Tom's Cabin* infringed upon Stowe's copyright because it copied the original verbatim, a fact that the defense did not deny.

While the international copyright movement generated debate, Congress dealt with domestic copyright during the 1850s. In the midst of the decade's sectional strife, members of Congress quietly amended the existing copyright law. First, in 1855, Congress approved a law that allowed authors to mail copies of their work to the State Department, Smithsonian, and Library of Congress free of charge.[70] This did not represent a major change, but it symbolized Congress' willingness to provide copyright

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[68] Ibid., 205.

[69] Ibid., 207.

[70] United States Congress, *An Act for the making of Appropriations for the Service of the Post-Office Department during the fiscal year, ending the thirtieth of June, one thousand eight hundred and fifty-six* March 3, 1855, 33rd Cong., 2nd sess., in *The Public Statutes at Large,* 10:685.

owners with additional benefits. An actual extension of copyright authority became law in 1856, when Congress provided copyright protection for dramatic compositions. This protected plays and staged works performed in public for the term of the copyright with damages in all infringement cases to be no less than one hundred dollars for the first offense, and fifty dollars for subsequent performances.[71] This seemed a logical extension of the copyright law, as musical compositions had gained protection in 1831. The extension of the right of performance gave owners of musical copyrights additional protection, but also provided playwrights protection for their intellectual property. The amendment to include copyright for dramatic compositions and first performance rights formed a significant change and represented the natural evolution of copyrights' growth to include different genres of intellectual property. Finally, an amendment in 1859 shifted the responsibility of recording and holding the titles of deposited works from the State Department to the Patent Office.[72]

The expansion of material covered by the copyright law in 1856 was the last significant change to the copyright law in the 1850s. Copyright was not a forgotten topic, though, as the leaders of the new Confederate States of America included a copyright clause in their 1861 constitution. This action represented the influence of copyright upon American society, as the Confederacy deemed it important enough to be included in its constitution. The Confederate States of America Copyright Act was nearly verbatim of

[71] United States, Congress, *An Act supplemental to an Act entitled "An Act to amend the several acts respecting Copyright," approved February third, eighteen hundred and thirty-one*, August 18, 1856, ibid., 11:139.

[72] United States Congress, *An Act providing for keeping and distributing all Public Documents*, February 5, 1859, ibid., 11:380.

the United States law. There were many ideological differences between the North and the South, but one idea that did not change was copyright. The Confederate law provided for a twenty-eight-year term, with a fourteen-year renewal. It also included the deposit clause, requiring the author to apply and deposit one copy with the county clerk, who then sent the material on to the State Department.[73] The Confederate States of America Copyright Act was amended in 1863. Citizens of the Confederacy, who held copyrights in the United States prior to secession, received the same rights from this amendment.[74] With this amendment, the Congress of the Confederate States of America recognized the laws of the United States, in regards to copyrights, as continuing under the Confederacy. The amendment allowed Confederate citizens to prevent piracy of their works published prior to secession, by extending the protection authors already held in the United States.

The Confederate Congress authorized the President to open talks with European countries about possible international copyright agreements.[75] This was an attempt to win support in Europe, in the hopes of finding allies against the United States. The United States Congress had declined international agreements since the 1830s; it is possible the Confederacy saw copyright as a tool to garner diplomatic and/or military support.

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[73] Congress of the Confederate States of America, *An Act to secure copy rights to authors and composers* May 21, 1861, in *The Statutes at Large of the Provisional Government of the Confederate States of America, from the Institution of the Government, February 8, 1861, to its Termination, February 18, 1862* (Richmond: R. M. Smith, 1864), 157-161.

[74] Congress of the Confederate States of America, *An Act to amend An Act entitled "An Act to secure copyrights to authors and composers,"* April 18, 1863, ibid, 113-114.

[75] Congress of the Confederate States of America, *Provisional and Permanent Constitutions of the Confederate States* (Richmond: Tyler, Wise, Allegre and Smith, 1861), 81.

The Civil War was the direct cause of the passage of the last amendments to the second American copyright law. The first, an 1865 amendment expanded the coverage of American copyright law by including photography. A vital factor in this amendment was Mathew Brady, who was among the most well-known Civil War photographers, and whose actions made this new technology a national sensation.[76] The significance of this amendment was that it defined photographers as authors and granted them the same rights as authors. It also meant that photography needed to be registered and deposited. In addition, the 1865 amendment stipulated that all authors deposit their works in the Library of Congress, replacing the Patent Office as the repository for copyright deposits.[77] Changing the location to the Library of Congress ensured the preservation of copyrighted material for the use of the American people. The second, in 1867, was a minor amendment that imposed a fine of twenty-five dollars for authors who failed to deposit their works within a month of publication.[78]

The second American Copyright Law of 1831replaced the first and remained the law of the land until Congress revised the law in 1870. During that forty-year period, copyright in the United States became a significant political issue. The first major revision came about because of the demand of authors, especially Noah Webster, to extend the benefits and safeguard the compensation provided by copyrights. After 1831,

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[76] Christine Haight Farley, "The Lingering Effects of Copyright's Response to the Invention of Photography," *University of Pittsburgh Law Review* 65 (September 2004): 400.

[77] United States Congress, *An Act supplemental to an Act entitled "An Act to amend the several Acts respecting copyright," approved February third, eighteen hundred and thirty-one, and to the Acts in Addition thereto and Amendment thereof*, March 3, 1865, in *The Public Statutes at Large,* 13:540.

[78] United States Congress, *An Act amendatory of the several Acts respecting Copyrights*, February 18, 1867, ibid., 14:395.

international copyright divided the American print industry, with proponents arguing that it was the right thing to do and opponents arguing that it would cripple the American print industry. Furthermore, American courts defined and interpreted copyright. The Supreme Court, in *Wheaton v. Peters*, ruled no common law right existed in the United States, only statutory law passed by Congress. The extension of copyright coverage guaranteed protection to musical and dramatic compositions and photographs and expanded the influence of copyright. Through all of this, the influence of copyright expanded the rights of authors/owners at the expense of public rights. Despite this move away from the intent of the Founding Fathers, copyright advocates continued to call for changes that led to another major revision in 1870.

# CHAPTER V

## THE THIRD AMERICAN COPYRIGHT LAW AND THE FIRST INTERNATIONAL COPYRIGHT

During Reconstruction, Congress enacted the second major revision of American copyright law. This alteration, which passed in 1871, represented the foundation upon which the print industry grew during the cultural, political, and economic expansion of the last quarter of the nineteenth century. Similar to the changes advocated by Noah Webster in the late 1820s, this revision came about because of copyright proponents demanding adjustments to the law. The post-Civil War appeals dealt with the petitioners' rights in copyright and their extension. However, copyright debates after the Civil War also dealt with the issue of internationalization, as well as domestic evolution.

The new copyright law looked remarkably similar to earlier laws, but made changes that expanded the extent of copyright in the United States. The process of revision, and the law it formed, produced the circumstances for the copyright debates, both domestic and international, of the postbellum era. The new law expanded the coverage and authority of the American copyright law, continuing its development as a legal monopoly, during an era in which anti-monopoly sentiment grew in response to the rise of big business in the United States.

The process of revision began in 1866 when Congress allowed President Andrew Johnson to appoint three men as commissioners who were assigned the duty of revising the general statutes of the United States. President Johnson appointed Caleb Cushing, Charles Pinckney James, and William Johnston and charged them the complicated chore of bringing "together all statutes and parts of statutes which, from similarity of subject, ought to be brought together, omitting redundant or obsolete enactments, and making such alterations that may be necessary to reconcile the contradictions."[1] The impetus for this revision went back nearly fifteen years when Charles Sumner presented a resolution to the Senate requesting the revision, simplification, and reduction to a single text of the general statues for the benefit of the American people.[2] Sumner continued to advocate this process until President Johnson formed the committee 1866. In 1870, during the presidency of Ulysses S. Grant, Congress voted to extend the committee for a second three-year term to complete the process.[3] Grant reappointed Charles Pinckney James, but appointed Benjamin Vaughan and Victor Barringer in place of Cushing and Johnston.[4] While these actions did not deal directly with the issue of copyright, they provided an opportunity for copyright proponents to review the law and petition for amendments or revisions. In 1870,

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[1] United States Congress, *An Act to provide for the Revision and Consolidation of the Statute Laws of the United States,* June 27, 1866, in *Statutes at Large of the United States of America,* 18 vols. *(*Boston: Charles C. Little and James Brown, 1846-1878), 14:74-75.

[2] Charles Sumner, speaking on copyright, on April 24, 1851, Senate Journal, 32nd Cong., 1st Sess., 1851, 339; Charles Sumner, *His Complete Works*, ed. by George Frisbie Hoar, 20 vols. (Boston: Lea and Shepard, 1900) 8:2-5.

[3] United States Congress, *An Act to provide for the Revision and Consolidation of the Statute Laws of the United States,* May 4, 1870, in *Statutes at Large of the United States of America,*16:96.

[4] Charles Sumner, "Speech in the Senate," in *His Complete Works,* 8:5.

legislators attached their proposal for copyright adjustment as an amendment to H.R. Bill 1714, which proposed revision of the existing patent laws.[5] The call for statutes of similar subjects to be brought together led to the lumping together of patent and copyright statutes, a process that was not new. The original patent and copyright laws appeared as a single entity before Congress enacted them separately in 1790.

In April 1870, Representative Thomas Jenckes of Rhode Island presented H.R. Bill 171 to modify the statutes relating to intellectual properties. Following the mandate of President Johnson, the Committee on Patents had reviewed and consolidated the laws relating to both copyrights and patents. The committee faced several concerns when dealing with the revision, consolidation, and amendment of the patent and copyright laws. First, both laws dealt with intellectual property, but represented two distinctly different types of property. Second, between 1790 and 1870, both patent and copyright law had undergone several amendments and general revisions. To complete the mandate given them by Presidents Johnson and Grant, the committee proposed a general revision to rearrange and simplify both copyright and patent laws. [6]

The House of Representatives debated HR 171 in April 1870. When the Senate Committee on Patents presented the bill, a major focus of debate was the franking privilege, or the ability to transmit mail without postage. When opened to debate in June 1870, one Senator from New York, Roscoe Conkling, pointed out that when the bill

[5] William F. Patry, *Copyright Law and Practice,* 3 vols. (Washington, D.C.: The Bureau of National Affairs, Inc., 1994), 1:43-44n137.

[6] Thomas Jenckes, speaking on copyright, on April 7, 1870, *Congressional Globe*, 41st Cong., 2nd Sess., 2502.

passed the House in April, the franking privilege passed by just two votes. The issue of free postage for copyrighted material was a point of concern. On one side, authors and publishers having the ability to mail their required deposits without postage represented a loss of revenue for the United States Postal Service. On the other hand, allowing copyright owners to mail the required copies of their works for deposit free of charge represented an additional incentive for copyright owners to obey the law.[7]

In the past, the deposit requirement was a detriment to the copyright owner because it was an added cost. Essentially, the applicant was required to pay for the printing of the required deposit copies, and many did not send the required texts. Ainsworth Spofford, the Librarian of Congress, writing in 1891, indicated that more than one thousand requests for publications sent to copyright proprietors had gone unanswered in one year. The issue of the franking privilege was important because the purpose of the deposits was to supply the national library. The franking privilege, many hoped, would encourage individuals to complete the deposit requirement. [8]

Following the Senate debate, the majority of which dealt with the patent portion of the bill, an amended bill passed and moved back to the House for approval. The House disagreed with the Senate's amendments, and, after a motion by Jenckes, the House removed the bill and sent it to a committee of conference. While the issue of the franking privilege was important, many of the amendments the House disagreed with involved

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[7] Roscoe Conkling, speaking on copyright, on June 24, 1870, *Congressional Globe*, 41st Cong., 2nd Sess., 4823.

[8] Ainsworth Spofford, "The Copyright System of the United States—Its Origin and Growth," in *Celebrations of the Beginning of the Second Century of the American Patent System* (Washington, DC: Press of Gedney & Roberts Co., 1892), 151.

simple language issues. The committee of Conference met and presented an edited bill in July 1870 with the agreed upon amendments. Jenckes, upon hearing of the Senate's approval that the amendments did not alter the substance of the bill, moved that the body vote and pass the bill immediately. The bill passed, then went to the President, who signed it into law, marking the second major revision of original American Copyright Law of 1790.[9]

The new law maintained the twenty-eight year grant with the possibility of an additional fourteen-year term, but it did change which governmental department was in charge of overseeing the copyright system. Under the Copyright Act of 1870, the Library of Congress took over control of copyrights.[10] In general, this transition was appropriate. The deposit requirement had always been an aspect of the copyright process. Originally, the law required applicants to deposit copies with the district court. It was then the responsibility of the district courts to forward the copies to the Secretary of State. Later amendments changed the responsibility for control of copyrights from the State Department to the Department of the Interior, and required deposit with the Smithsonian Institute rather than district courts.[11] Passing the control to the Library of Congress made

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[9] Thomas Jenckes, speaking on copyright, on June 25, July 2, 1870, *Congressional Globe,* 41st Cong., 2nd Sess., 4858, 5136.

[10] United States Congress, *An Act to revise, consolidate, and amend the Statutes relating to Patents and Copyrights*, July 8, 1870, in *Statutes at Large of the United States of America,*16:212.

[11] United States Congress, *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 ties therein mentioned*, May 31, 1790, in *Statutes at Large of the United States of America,* 1:124; United States Congress, *An Act to establish the "Smithsonian Institution," for the Increase and Diffusion of Knowledge among Men,* August, 10, 1846, in *Statutes at Large of the United States of America,* 9:102; United States Congress, *An Act providing for keeping and distributing all Public Documents,* February 5, 1859, in *Statutes at Large of the United States of America,* 11:380.

the system more efficient, because it made the process simpler and removed intermediaries. The requirement to deposit with the Library of Congress ensured that copies of all works published in the United States became available to the people through the national library.

Opponents of this change argued that transitioning control to the Library of Congress was detrimental for authors and copyright owners. Copyright proponents had unsuccessfully advocated for centralization in 1862. The opposition disagreed, but not with the attempt to simplify the process. Instead, they proposed the idea that the Library of Congress benefitted too much.[12] That opposition seemed illogical. Article 1, Section 8 of the Constitution granted Congress the power to promote science and the useful arts, and the Copyright Act of 1790 attempted to encourage learning by granting protection to authors and inventors. The phrase, "To promote science and encourage learning" seemed to justify centralizing the nation's knowledge in one location. The main problem with the deposit requirement was getting people to do it. To copyright proponents, this resulted from the simple fact that, "Prior to 1870 there were between forty and fifty separate and distinct authorities for issuing copyright," including various district courts and district clerks.[13] While the opposition resisted the transition of authority, the reality was that centralization remained the best solution. The new law resulted in an increase in the number of copyrighted works deposited.[14]

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[12] Patry, *Copyright law and Practice*, 1:44n138.

[13] Spofford, "The Copyright System of the United States," 149.

[14] Ainsworth Spofford, *Report of the Librarian of Congress* (Washington, DC: Government Printing Office, 1897), 12.

The second major alteration in 1870 was the expansion of the scope of material protected. Prior to that year, the law included books, maps, charts, dramatic and musical compositions, engravings, wood cuts, prints, and photographs. After 1870, the expanded protection covered paintings, drawings, statuary and works of fine art.[15] The expansion of copyright protection was indicative of a change in the concept of authorship. Originally, copyright law protected only authors of maps, charts or books. In 1831, Congress added inventors, engravers, and designers. The 1870 revision continued this trend to include painters, photographers, and sculptors working in statuary.

One issue that arose was whether the additions adhered to the original intent for creating copyright law, which was to encourage learning. The expansion of copyright's scope through the nineteenth century moved the law away from the encouragement of learning and toward a desire to protect one's property. The purpose of the first American copyright law was to encourage learning rather than provide long-term protection; hence, the law granted a single fourteen-year term with a renewal policy that stated the owner had to be alive.[16] Previously, the movement to expand the number of coverable materials coincided with the expansion of the coverage term and the transition of rights to the heirs of the original owners. This development represented the growth of copyright as a tool to

[15] United States Congress, *An Act to Revise, Consolidate, and Amend the Statutes Relating to Patents and* Copyrights, July 8, 1870, in *Statutes at Large of the United States of America,*16:212.

[16] *Copyright Act of 1790,* May 31, 1790, in *The Public Statutes at Large of the United States of America, 1789–1873,* 17 vols. (Boston: Little, Brown and Company, 1845–73) 1:124.

maintain control of one's property for a longer period of time, at the expense of the American people. This action went against the original intent of the law passed in 1790.[17]

The 1870 Copyright Act also dealt with the authors' rights in the translation or dramatization of their works. The law stated that copyright owners had the right to publicly perform, or allow its performance, as well as the right to dramatize and/or translate their own works.[18] The right of dramatization was not new, as an amendment in 1856 granted the first rights in public performance, but that law was limited to dramatic compositions only.[19] In addition, the issue of translation raised attention in the 1850s when Harriet Beecher Stowe lost her court case against another publisher who printed a German translation of *Uncle Tom's Cabin.* The expansion of rights in dramatizations and translations extended the powers of copyright law and granted owners more control of their property. This seemed a logical extension of the original copyright law, as it provided authors protection of their property. The law protected them from the theft of their intellectual creations for the length of the copyright term. Granting the right to control the dramatization or translation of a work did not interfere with the intent to encourage learning.

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[17] Meredith L. McGill, "Copyright," in *A History of the Book in America, Volume 2: An Extensive Republic: Print, Culture, and Society in the New Nation, 1790-1840,* eds. Robert A. Gross and Mary Kelley (Chapel Hill: The University of North Carolina Press, 2010), 198.

[18] United States Congress, *An Act to Revise, Consolidate, and Amend the Statutes Relating to Patents and* Copyrights, July 8, 1870, in *Statutes at Large of the United States of America*, 16:212.

[19] United States Congress, *An Act Supplemental to an Act entitled "An Act to Amend the Several Acts Respecting Copyright," Approved February third, Eighteen Hundred and Thirty-One*, August 18, 1856, in ibid., 11:138.

The last major change made by the 1870 law involved the deposit requirement. Prior to publication, an author needed to mail a copy of the title of the literary work, or a description of the piece of art. When an author submitted the title, or description, of the work, it guaranteed that individual protection for their literary or art works. Failure to submit this notice meant an author lost their right. The enforcement of the notice requirement provided the Library of Congress with the material it needed to increase its collection.[20] In addition to the notice requirement, authors were required to send two copies "of the best edition issued" to the Librarian of Congress within ten days of the publication. While the deposit requirement was not new in 1870, the ten-day time limit was; previously it was one month. This change assured a timely submission of copyrighted material. For the newly protected categories of painting, drawings, statuary, and other works of fine art, the law required creators to submit a photograph, as requiring a second copy of their piece was much too complicated.[21] Individuals were allowed to submit their deposits through the mail free of charge provided they included the words "Copyright Matter" written on the package.[22]

Other aspects of the bill dealt with penalties for infringement, denial of protection to noncitizens, jurisdiction in copyright cases, and the repeal of all previous laws.[23] Despite not extending the term of coverage for copyrights, the 1870 law embodied a

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[20] United States Congress, *An Act to Revise, Consolidate, and Amend the Statutes Relating to Patents and* Copyrights, July 8, 1870, in ibid., 16:213.

[21] Ibid.

[22] Ibid.

[23] Ibid., 214-216.

significant alteration of copyright in the United States. The expansion of material, including photographs, shows the law kept up to date with technological developments.

One portion of the law that remained the same, despite its contentiousness was the question of international copyright. The Copyright Act of 1870 maintained the policy of banning non-citizens from access to copyright protection. The debate over international copyright began in the 1830s with the growth in the American reprint industry; many of the larger American publishers reprinted cheap copies of books written by foreign authors. American publishers, or "pirates" as foreign authors referred to them, created a system that revolved around a courtesy wherein civil agreements between printers guaranteed the rights to certain works to different houses without the fear of other publishers reprinting them. Many of the large publishing houses followed this process, and some even made financial agreements with the authors; but others ignored the courtesy and reprinted cheap editions that insured the original author would not benefit financially.[24] Beginning in the 1830s, foreign authors, most prominently Charles Dickens, and their American supporters called for an international agreement granting protection to noncitizens, which would also protect American authors abroad.[25]

Following the Civil War, the debate over international copyright resumed, as proponents renewed their struggle for international copyright. George Palmer Putnam, founder of *Putnam's Magazine*, resurrected the movement when he and his associates

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[24] Scott E. Casper, introduction to *A History of the Book in America Volume 3,* 24; Aubert J. Clark, *The Movement for International Copyright in Nineteenth Century America* (1960; repr., Westport, CT: Greenwood Press, 1973), 94-99.

[25] Sidney P. Moss, *Charles Dickens' Quarrel with America* (Troy, NY: The Whitson Publishing Company, 1984), 1.

founded the International Copyright Association in 1866. Between February and April 1866, the International Copyright Association submitted twelve petitions to Congress, including memorials from Henry Wadsworth Longfellow and William Cullen Bryant. These petitions and memorials attracted no support.[26] The movement did not collapse, though, as the appearance of Charles Dickens, who returned to tour the United States in 1867, revitalized the International Copyright Association. At a meeting of the association in 1868, William Cullen Bryant advocated the passage of an international agreement. Bryant stated, "we protect the goods of a traveller landing on our coast … Yet … we have, nevertheless, so framed our laws that the foreigner is robbed of that property here and our own citizens plundered abroad."[27] The arguments in favor of an international copyright agreement had changed little since the 1830s. They reiterated that it was wrong for the United States to deny rights to foreign authors because those men and women held rights to their property just as American authors. In addition, proponents of international copyright continued to fight for an international agreement that included protection for American authors abroad.

The international copyright movement rejuvenated by the International Copyright Association advocated change. The mission of the association was "to promote the enactment of a just and suitable international copyright law for the benefit of authors and artists in all parts of the world."[28] To complete its mission, the Association continued

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[26] Clark, *The Movement for International Copyright in Nineteenth Century America*, 87.

[27] William Cullen Bryant, "Speech of William Cullen Bryant" in *International Copyright* by International Association for the Protection and Advancement of Literature and Art (New York: International Copyright Association, 1868), 13.

[28] George Haven Putnam, comp., *The Question of Copyright* (New York: G. P. Putnam's Sons, 1891), 68.

submitting petitions to Congress and agitated using pamphlets written and published by Association members. Richard Grant White presented such a pamphlet in which he argued the United States and Great Britain needed to repeal their copyright laws. White maintained that until the law recognized the authorial right, authors could have no claim in their rights except to appeal to the legislature of either nation.[29] The meeting of the International Copyright Association in April 1868 produced a petition to Congress signed by 153 authors, artists, and publishers demanding a change in the law. Congress continued to ignore the petitions and took no action.[30]

Congress failed to take any action regarding international copyright until 1872. Senate Bill 688, presented in February 1872 by Ohioan John Sherman, and House Bill 1667, presented by Kentuckian James Beck, proposed expanding copyright protection to foreign authors. The key feature of both bills was the demand for reciprocity, meaning that the home nations of all foreign authors gaining copyright protection in the United States were required to grant the same rights to American authors abroad. Sherman and Beck envisioned an international copyright that allowed Americans to reprint any copyrighted work provided the publishers paid royalties to the copyright owner or their assignee; and, the law would not prevent the importation of foreign editions.[31] The reciprocity requirement had been a staple of the international copyright movement since the 1830s, as it seemed pointless to grant rights to foreign authors and not receive them in

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[29] Richard Grant White, "The Copyright Question as it Stands," in *International Copyright*, 40.

[30] Thorvald Solberg, *International Copyright in the Congress of the United States, 1837-1886* (Boston: Press of Rockwell and Churchill, 1886), 16.

[31] John Sherman (February 21, 1872), on copyright, S. 688, 42nd Cong., 2nd Sess.; James Beck (February 21, 1872), HR 1667, 42nd Cong., 2nd Sess.

return. The most important part of the law, for opponents of an international agreement, was the stipulations regarding manufacturing and importation. The main argument against an international law was that it negatively affected American publishing. If foreign authors imported protected works, it would reduce the number of copies printed in the United States. The law tried to circumvent this by allowing American printers to publish copies of the work provided they paid royalties. While some publishing houses already had agreements with foreign authors, many did not, and the requirement to pay royalties meant a loss of profit for those publishing houses that were publishing cheap, pirated copies of foreign works.[32]

The international copyright legislation presented in 1872 moved to the Committee on the Library for additional consideration. The topic proved contentious, and the Committee delayed reporting on the matter until the next congressional session. At that time, it rejected any attempt to pass international copyright legislation. The committee report stated, "at the outset of the examination much embarrassing contrariety of opinion between those who demand the measure as a just recognition of the rights of authors to their works and those representing the manifold interests, occupations, and domestic industries involved in the contemplated legislation became conspicuous."[33] This statement defined the opposing views. Since the 1830s, proponents advocated protection of an individual's rights, while opponents argued that it would hurt the American publishing industry and cost American citizens jobs.

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[32] Casper, introduction to *A History of the Book in America Volume 3,* 24.

[33] Senate Committee on the Library, *Committee on the Library Report*, 42nd Cong., 3rd Sess., 1873, S. Rep. 409, 1.

This divisiveness remained throughout the committee's consideration of the legislation. During those debates, E. L. Andrews, a private citizen who attended a public meeting held by the Joint Committee of the Library to hear testimony on the copyright issue, argued the Constitution empowered Congress to protect literary and scientific creations, but that protection was not limited to citizens of the United States. In fact, he argued that Congress was failing its duty by limiting protection to only citizens.[34] If the right were given to foreign authors, it would increase the amount of materials available to American citizens. In response to Andrews's argument, Lot M. Morrill of Maine argued that the founders created the Constitution for the interests of the American people, and, therefore, had no responsibility to protect the rights of noncitizens.[35] In the end, the opponents of internationalism prevailed, continuing the trend begun in the 1830s. Denouncing internationalism, the report questioned the purpose of international copyright. Morrill specified that the question was whether foreign authors should enjoy monopolistic rights, granted to them by their own nation, in other countries.[36]

The issue of foreigners maintaining monopolistic rights in the United States became the central focus of those opposed to the internationalization of American copyright. However, this argument also worked to protect American jobs, which opponents argued were in jeopardy with the passage of an international agreement. The Committee of the Library seemed to agree with the print industry that saw international copyright as detrimental to its interests. Whether these people believed granting foreign

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[34] Solberg, *International Copyright in the Congress of the United States*, 19.

[35] *Committee on the Library Report*, 42nd Cong., 3rd Sess., 1873, S. Rep. 409, 3.

[36] Ibid., 4.

authors rights to be unfavorable or if they were simply monopolists, who feared their loss of control over the book trade was inconsequential. The committee, with congressional support, denied the expansion of rights to foreign authors, deciding, instead, to side with American publishers. With its decision made, the committee report did not recommend an international agreement. The report stated that such an agreement would be disadvantageous to American authors, injurious to its publishing houses, and a hindrance to the dissemination of knowledge.[37] However, despite the committee's report, proponents and opponents continued advocating their positions.

Two events occurred in the 1870s that would define copyright. In 1874, Congress passed an amendment to the Copyright Act of 1870 dealing with the notices authors were required to print in their books. The amendment provided a second option. Previously, the law required authors to print, "Entered according to the act of Congress, in the year—, by A. B. in the office of the Librarian of Congress at Washington." The option provided by the 1874 amendment allowed authors to print a shorter notice reading, "Copyright, 18—, by A.B."[38] The amendment also changed the statute to read, "the words 'Engraving,' 'cut' and 'print' shall be applied only to pictorial illustrations or works connected with the fine arts, and no prints or labels designed for any other articles of manufacture shall be entered under the copyright law, but may be registered in the Patent Office."[39] This law differentiated works created for literary, or fine arts, purposes and

[37] Ibid., 8.

[38] United States Congress, Act of June 18, 1874, 43rd Cong., 1st Sess., in *Statutes at Large of the United States of America,* 18:78

[39] Ibid.

works created for manufactured goods. Copyright lawyer William F. Patry argues that this law allowed the Patent Office to issue copyright certificates for images created for use with manufactured goods.[40]

Following the 1874 amendment, a Supreme Court case arose that led to a ruling that defined the subject matter protected by copyright. *Baker v. Selden* (1879) dealt with litigation over a bookkeeping system that Charles Selden developed and publicized in the 1850s and 1860s. Charles Selden was an accountant in Hamilton County, Ohio and the author of six books describing his bookkeeping system, which he called the condensed ledger system. In 1865, Selden signed a contract with Hamilton County to use his new system and he hoped to sell his process to the United States' Treasury. Selden's system allowed for journals and ledgers to be condensed into one book, which made it easier to determine the amount to be carried forward, allowing for the faster discovery of errors or fraud. Selden ran into problems though, when W. C. M. Baker published a book outlining his bookkeeping system, which was very similar to Selden's. Baker sold his for less. In 1871, Selden died and the copyrights of his books were the family's only assets. It was Selden's wife, Elizabeth, who initiated the case against Baker.[41]

The decision distinguished between a copyright and a patent. Justice Joseph Bradley gave the Court's opinion in the case. In the opinion, he stated, "There is no doubt that a work on the subject of book-keeping, though only explanatory of well-known

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[40] Patry, *Copyright Law and Practice*, 47.

[41] Pamela Samuelson, "The Story of *Baker v. Selden*: Sharpening the Distinction Between Authorship and Invention," in *Intellectual Property Stories,* eds. Jane C. Ginsburg and Rochelle Cooper Dreyfuss (New York: Foundation Press, 2006), 159-162.

systems, may be the subject of copyright.… But there is a distinction between the books, as such, and the art which it is intended to illustrate." This distinction was pivotal in the case because it decided the validity of Selden's copyrights and the benefits of those protections. Based on Bradley's opinion, Selden held copyrights for the sections of his books that explained his process. However, Selden did not hold a copyright on the artwork in the books. Bradley's opinion continued, "To give to the author of the book an exclusive property in the art or manufacture described therein, when no examination of its novelty has ever been officially made, would be a surprise and a fraud upon the public. That is the province of letters-patent, not a copyright." Selden's process was a method of operation and while his explanation of that method was protected, he did not hold a protective right in the actual process.[42]

Justice Bradley provided three scenarios that explained the differences between copyrights and patents. First, a discoverer of a new medicine can write a book about his discovery, but the copyright in the book does not guarantee any rights in the production or sale of the new medicine. Second, a book about perspective, which contains drawings and illustrations, gives the author no rights to the techniques of drawing described. Lastly, a book on mathematical science does not grant copyright protection to the methods of operation propounded in the book. In Selden's case, his copyright protection meant no one could legally reprint any of the material in his book; but because his book explained an unpatented process, anyone could make use of the ledger system. The Court's opinion read, "The copyright of a book on book-keeping cannot secure the

[42] *Baker v. Selden,* 101 U.S. 102 (1879).

exclusive right to make, sell, and use account-books prepared upon the plan set forth in the work." In hindsight, Selden needed to apply for a patent rather than a copyright if he desired to benefit financially from his work.[43]

The 1874 Print and Notice Amendment and *Baker v. Selden* both defined the parameters of materials available for copyright. While not specifically mentioned in the ruling, both sides involved in *Baker v. Selden* were aware of the changes to copyright law in 1874. The illustrations that Selden included in his book were not connected to the fine arts; instead, they were illustrations dealing with a product. While Selden received his copyright protection prior to the passage of the amendment, the repeal of all previous laws by the 1870 Copyright Act subjected Selden to the changes in the new law. Based upon this amendment and Bradley's explanation, it seems clear that the appropriate decision was made. *Baker v. Selden* defined useful arts as uncopyrightable material, as it ruled, "copyright protection for drawings of useful articles does not extend to the useful articles depicted in the drawings.[44] *Baker v. Selden* ruling affected the course of copyright law because it limited the monopoly in regards to the arts. The case itself, however, did not affect the copyright monopoly granted to literary works, only a few types of illustrations used in literature.

The legacy of *Baker v. Selden* was its effect on the definition of copyright materials. The process of the judiciary limiting copyrightable materials continued into the 1880s with the cases of *Burrow-Giles Lithographic Co. v. Sarony,* which dealt with

[43] Ibid., 102-104.

[44] Samuelson, "The Story of *Baker v. Selden,"* 181.

photographs, and *Carte v. Duff*, which dealt with the public performance of musical works. As the *Baker* case defined Selden's process as not eligible for copyright, so *Burrow-Giles Lithographic Co. v. Sarony* dealt with the issue of how to define photography. Was it simply the transmission of light, or did the product reflect the genius of an author?[45] The case involved Napoleon Sarony's portrait of Oscar Wilde entitled, "Oscar Wilde No. 18," taken in 1882. Sarony initiated the case by suing Burrow-Giles Lithographic Co. for infringing upon his copyright of the Wilde photograph. The Burrow-Giles Co. denied the existence of any congressional power to confer the rights of authorship on a photographer. Essentially, the company made the case in a hearing to judge the constitutionality of copyright protection for photographs, which had been protected since 1865.[46]

The debate centered on whether Sarony was the author, the term used to define who gained a copyright, of the photograph, or just an operator of a machine. The defense argued, "that an engraving, a painting, a print, does embody the intellectual conception of the author … while the photograph is the mere mechanical reproduction of the physical features or outlines of some object animate or inanimate." The defense suggested that a photograph was not original and, therefore, did not meet the requirements for copyright protection. However, the Supreme Court ruled that the photograph was original because the positioning and décor Sarony selected for the photo were "from his own original conception, to which he gave visible form by posing Oscar Wilde in front of the camera."

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[45] Christine Haight Farley, "The Lingering Effect of Copyright's Response to the Invention of Photography," *University of Pittsburgh Law Review* 65 (January 2004): 406.

[46] *Burrow-Giles Lithographic Co. v. Sarony* 111 U.S. 53 (1883), 53-54.

An interesting part of the decision was that the Court ruled in favor of Sarony and his copyright, but did not suggest that all photographs held the same right. Essentially, gaining a copyright for a photograph relied upon the author proving the originality of the photo. The case also successfully defined a photographer as the author of a work when they meet the requirement of originality. This represented both an expansion and a constriction of American copyright law. It expanded the field of photography as a subject matter for copyright, successfully defending for the first time the benefits granted to photography. However, it limited copyright, requiring that photographs be original in nature to gain copyright benefits, a process based on a case-by-case basis.[47]

In 1885, another court case dealing with the copyright of a public performance of musical composition came before the New York circuit court. The case of *Carte v. Duff* dealt with an American version of William Gilbert and Arthur Sullivan's, *The Mikado.* Gilbert and Sullivan were unable to attain copyright protection because they were English. However, American composer George Lowell Tracy copyrighted the orchestral score. Apparently, in an attempt to circumvent the copyright law, Gilbert and Sullivan allowed Tracy to write the score as he could legally copyright the musical composition in the United States. This granted Gilbert and Sullivan protection, through Tracy's copyright, against any unauthorized performances of their work. As the work in question was copyrighted in the United States, the question turned toward the legality of

[47] Ibid., 58-60.

performing a copyrighted piece of music.[48] Richard Carte purchased the right of public representation of *The Mikado* in the United States from Gilbert, Sullivan, and Tracy. James Duff, after purchasing a copy of the vocal score and pianoforte, attempted to produce the opera in New York City.[49] Under the 1870 Copyright Act, musical compositions were among the material listed as available for protection. However, the law only granted protection to public performances of dramatic compositions, not musical compositions. A. J. Dittenhoefer, who represented Duff, argued that copyright law did not protect the public performance of music.[50]

The ruling in *Carte v. Duff*, like the *Baker* and *Burrow-Giles* decisions, further defined the limits of copyright in the United States. In his ruling, Judge William James Wallace invoked the specter of common-law copyright, arguing that common-law copyrights of authors existed until the time of publication. Wallace set a precedent with this ruling, harkening back to the decision made in *Wheaton v. Peters* (1834), which ruled that common-law protection ended upon publication. This issue then relied on the ability of the work to gain protection under statutory law, which Carte argued existed because George Tracy held the copyright. Wallace ruled that Carte lost because performing a musical composition on stage was not the same as a dramatic piece, and his copyright protected his right to print copies of the material, not perform it in public. In short,

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[48] Zvi Rosen, "The Twilight of the Opera Pirates: A Prehistory of the Exclusive Right of Public Performance for Musical Compositions" *Cardozo Arts & Entertainment Law Journal* 24 (February 2007): 1173.

[49] *Carte v. Duff*, 25 F. 183 (C.C.S.D.N.Y. 1885), 183.

[50] Rosen, "The Twilight of the Opera Pirates," 1177.

copyright law did not protect the public performance of a musical composition. The only protection that Tracy, and through him Gilbert and Sullivan, held was the protection against the pirating of the printed document, the same rights given to the author of a book.[51]

While the courts avoided the issue of international copyright in the *Carte v. Duff* case, pressure for an international copyright continued. While the court heard *Carte v. Duff*, there was an international meeting in Berne, Switzerland to discuss copyright agreements among the nations of the world. Writing in 1886, Richard Rogers Bowker, the publisher of *Publishers Weekly*, acknowledged that the international copyright movement in Europe was more successful than in the United States. Prussia passed the first international copyright provision in 1836, which provided copyright to foreign authors in Prussia if their nations reciprocated.[52] The difference between what Prussia called for and what occurred in the United States was the reciprocity clause. In the United States, the major demand was for a manufacturing clause, which would ensure that foreign authors gaining copyright in the United States published their works with American publishers. By demanding publication in the United States, it guaranteed work for American publishing houses and avoided competition from imported works. Following Prussia, other nations enacted similar forms of legislation culminating in the Berne Convention in 1886. The International Copyright Union formed in Berne represented the culmination of over fifty years of work and included the nations of

[51] *Carte v. Duff*, 25 F. 183 (C.C.S.D.N.Y. 1885), 184-187.

[52] R. R. Bowker, *Copyright: Its Law and Its Literature* (New York: The Publishers' Weekly, 1886), 25.

Belgium, France, Germany, Great Britain, Haiti, Italy, Spain, Switzerland, and Tunis. These nations agreed to protect literary and artistic work, to grant reciprocal rights to union members, to grant the exclusive right of translation, to allow each government the power to exercise supervision over granted copyrights, and to meet and hold additional conferences in the future.[53] While represented, the United States did not join the Convention, and would not do so until 1988, as joining would have required significant changes to the existing copyright system.

In 1886, in response to more petitions and the European international agreement, Congress again addressed the issue of international copyright. Jonathan Chace, a Senator from Rhode Island, presented a report from the Committee on Patents that accompanied Senate Bill 2496. In that report, Chace outlined the changes the committee proposed to the copyright law. He stated, "It cannot be said that the international features of this amendment … would benefit the foreign authors alone. By its provisions we carefully protect the American publishers and the American artisans who make the books in this country." The primary goal of the legislation was to provide protection for foreign authors, while maintaining the monopolistic control of the American authors/publishers. To do this, the committee concluded, "The bill prohibits the importation of copyrighted books. With this provision the operation of this bill would be beneficent in its influence upon all these interests."[54] Protecting the interests of the American print industry, this

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[53] "The Berne Convention of the 9th of September 1886 for the creation of AN International Union for the Protection of Literary and Artistic Works," in *The Law of International Copyright* by William Briggs (London: Steven & Haynes, 1906), 667-698.

[54] Senate Committee on Patents, Report*: [To accompany bill S. 2496]*, May 21, 1886, 49th Cong., 1st Sess., 1886, S. Rep. 1188, iii.

stipulation ensured that the author of any copyrighted work, whether foreign or domestic, published in the United States would assist in maintaining American jobs in the print industry. In short, foreigners gained copyright protection only if they published the book in the United States, as the bill prohibited importation of works copyrighted elsewhere. A second bill, the Hawley Bill, which rested primarily on the grounds of reciprocity, acted as counter to the Chace Bill. The Hawley Bill offered copyright to foreign authors based on reciprocity by repealing the portion of the American law that limited copyright to United States' citizens.[55] Neither bill gained passage in 1886.

The Chace Bill, which appeared with additional amendments in 1888, was similar in its provisions to the earlier bill. The committee made some amendments to appease the demands of the public.[56] The committee argued that an international agreement was beneficial to the American print industry. During the hearings, George Haven Putnam, the New York publisher, spoke in favor of the bill, as did publisher R. R. Bowker and members of the International Copyright Association. The arguments offered in favor of an international agreement included: cheap reprints of foreign works would still be available; the opportunity for wider sales would make American books cheaper than imported works; an increased demand for American works would create jobs for American workers; and introduction of new foreign markets meant increased profits for American authors.[57]

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[55] Bowker, *Copyright*, 32.

[56] Senate Committee on Patents, Report*: [To accompany bill S. 554]*, March 19, 1888, 50th Cong., 1st Sess., 1888, S. Rep. 622, 1-52.

[57] Bowker, *Copyright*, 35-36.

The common arguments against international copyright included: the United States had got along without it so far; it would increase the cost of books hurting the American consumer; foreign publishers would benefit more than foreign authors; and copyright grants a monopoly to a few authors contrary to the interest of the readers.[58] Following the fate of previous international copyright bills, this version of the Chace Bill also failed to pass. Despite the creation of the Berne Convention, the debate over reciprocity and protectionism still split the print industry in the United States. The reason for the failure of the Chace Bill in 1888 was the introduction of a confrontational debate over tariffs and the impending presidential and congressional elections. The tariff was sure to be a significant topic in the upcoming elections as the parties were split over the issue and candidate's speeches over the topic would suggest that person's ability to hold office.[59]

On January 21, 1890, Senator Orville Platt of Connecticut reintroduced the Chace Bill in an amended form. Platt's bill was not new, though, as Representative William Breckinridge of Kentucky introduced a similar bill in the House fifteen days earlier.[60] This version of the Chace Bill passed Congress in March 1891, as the International Copyright Act of 1891, or the Chace Act. Like the Berne Convention, its passage represented the culmination of a struggle that lasted over fifty years. The Chace Act

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[58] Ibid., 35.

[59] Edward Stanwood, *American Tariff Controversies in the Nineteenth Century,* 2 vols. (Boston: Houghton, Mifflin and Company, 1904), 2:234.

[60] Senate on Patents, *Report: [To accompany bills S. 232 and S. 222]*, 51st Cong., 1st Sess., 1890, S. Rep. 142; Clark, *The Movement for International Copyright in Nineteenth Century America,* 157. Thorvald Solberg, *Copyright in Congress* (Washington, DC: Government Printing Office, 1905), 54.

represented a major amendment to American copyright law as it extended copyright protection to foreign authors. It provided them with a twenty-eight year term and a fourteen-year renewal. It seemed as if the United States finally gave into the demands and agreed to an international copyright.

While the law extended the same rights granted to domestic authors, there were three main provisions in the bill. First, all copyrighted items had to be printed in the United States. According to the act, all material "shall be printed from type set within the limits of the United States, or from plates, made therefrom, or from negatives, or drawings on stone made within the limits of the United States, or from transfers made therefrom."[61] Secondly, the bill protected the importation of copyrighted works during the term of the copyright; more expensive foreign copies could not create competition for cheaper American versions. Lastly, the act stated that foreign rights were attainable "when such a foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by terms of which agreement the United States of America may, at its pleasure, become a party to such agreement."[62] Reading the Chace Act is similar to reading the Monroe Doctrine, in that it contains a lot of American chest thumping. Like the Monroe Doctrine, the Chace Act relied on a Europe nation to go along with it and, for the most part, they did. The presence of the manufacturing clause and other protectionist sentiments meant the United States maintained a complicated relationship with the world regarding international copyright.

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[61] United States Congress, *International Copyright Act (The Chace Act)*, March 3, 1891, in *The Statutes at Large of the United States of America* 126 vols. (Washington, DC: Government Printing Office, 1877-2012), 26:1107.

[62] Ibid.

The passage of the Chace Act represented a turning point in American copyright law. It passed Congress almost exactly one hundred years after the first federal copyright law in 1790. American copyright experienced many changes during the nineteenth century including the extension of term limits and an increase in the list of protectable items. Passage of the Chace Act could be considered the first modern version of copyright as it represented a moment of American growth and expansion. While the more significant copyright actions dealt with passage of an international agreement, Congress also expanded copyright to addition materials and the Supreme Court ruled in several court cases to define and expand the list of copyrightable materials further. This third phase of American copyright law remained in place until Congress would again revise the law in 1909. Through all of this, the monopolistic influence of copyright continued to grow, and the progression of domestic and international copyright prepared the United States to deal with the intellectual property issues of the twentieth century.

# CONCLUSION

The creation of a limited term copyright in the United States was intended to make the law beneficial to the entire population, not just specific individuals, as the original intent was to encourage the promotion of science, the arts, and the passage of materials into the public domain in a sensible amount of time. However, the law's expansion during the nineteenth century allowed creators to monopolize the benefits of the copyright system, at least temporarily, at the expense of public interest. This does not mean that authors should not benefit from their efforts, rather the legislature needs to take steps to ensure a return to original intent of the law: the benefit of American society. It is important that creators enjoy the benefits of the law as they labored to produce their works, but what constitutes a reasonable amount of time? How long should an author, or inventor, benefit from their work? Do his or her heirs have the right to benefit? The answer to these questions have changed over the past two hundred years, as seen in the extension of copyright and the increase of the rights of authors and creators.

Modern copyright, following the passage of the Sonny Bono Copyright Term Extension Act of 1998, established a term limit of the life of the author plus seventy years. This was a significant event in the history of copyright because it is the most recent of many revisions to copyright that have occurred since the passage of the Copyright Act of 1790. Critics of this legislation argued that the Disney Corporation, a major advocate

of the extension in an attempt to protect their rights to the image of Mickey Mouse, was simply demanding an extension to avoid their "cash cow" product from passing into the public domain. Opposition in Congress, albeit few in number, pointed out that the extension of copyright terms retroactively would not benefit the public. Senator Hank Brown of Colorado argued, "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." Senator Brown was accurate and spoke to the heart of the copyright issue in the United States; how long should a term be? Brown continued his argument, stating, "The real incentive here is for corporate owners that bought copyright to lobby Congress for another twenty years of revenue—not for creators who will be long dead once this term extension takes hold."[1] The writers of the Constitution understood the need for a balance between the interests of the authors and the public, and so they created limitations on the rights granted to authors and inventors to ensure that their products eventually became available to the public. The continued extension of copyright laws over the centuries since its creation has clearly tipped that balance in favor of individual creators over the public.

Looking at the Constitution's intellectual property clause and the Copyright Act of 1790, the original intent is clearly stated. The policies laid out in both call for the promotion of learning, the providing of public access, and the protection of the public domain. These ideas were an outgrowth of the British and American colonial

[1] United States Congress, *Sonny Bono Copyright Term Extension Act*, October 25, 1998, in *Statutes at Large of the United States of* America, 112:2827-2834; Timothy B. Lee, "15 years ago, Congress kept Mickey Mouse out of the public domain. Will they do it again?," *The Washington Post, October 25, 2013*

experiences. The Americans drew upon the Licensing Act of 1662, which was a final attempt by Parliament to censor the print industry, and the debates that occurred after its passage and its eventual demise. Opposition to the Licensing Act, led by men like John Locke and Daniel Defoe, led to the end of licensing in England and the creation of the Statute of Anne, which the United States used as the basis for its law. The core idea of the promotion of learning was clearly stated in the Statute of Anne, the Copyright Clause of the Constitution, and the Copyright Act of 1790. If the goal, then, was the promotion of learning, the public needs to have access to the works to learn. Copyright law required publication in order to gain the rewards of the copyright system. Publication, then, ensured the people would have access to new works. If an author chose not to publish, then he gained no reward for his labors. All of this protected the public domain by balancing the interests of the creators and the public in intellectual property. The changes that occur after 1790, though, worked to undo the balance that the Founders created with the first copyright law.

The expansion of copyright, however, is not entirely negative. There is no argument that it is not an author's right to benefit from their work. It is important to understand though, as Senator Brown suggested, that it is not the right of a corporation to continue reaping the rewards of an author's work when the individual died. The reason copyright law began to change in the nineteenth century was because the ability of an individual to make a livelihood as a writer led to a desire for those people to benefit from their works for longer periods of time. Congressmen, through their interaction with petitioners and copyright advocates, were willing to change the law because they felt it was their duty to protect the rights of authors. A longer term encouraged them to produce

works that would eventually be released to the public domain. There was some opposition in Congress, though. Many congressmen opposed an international copyright because they believed that it would negatively affect the American public, or hurt the growing American print industry by introducing cheaper foreign printings.

The process of revising copyright in the United States ensured greater protection to copyright owners, but also moved copyright away from its original objective of incentivizing creators to write works that benefitted society. The public was required to wait longer for works to enter the public domain. Originally designed to provide a relatively short-term limit of fourteen to twenty-eight years, the law's authors designed copyright to incentivize writers and promote the publishing of works that benefited the new American nation. Thomas Paine, in a letter to the Abbe Raynal in 1782, argued that, "the country will deprive itself of the honour and service of letters and the improvement of science, unless sufficient laws are made to prevent depredations on literary property." The copyright law, therefore, protected the interest of both the public and the author, but the revisions would transition the focus away from the public and more toward the individual. The central tenet of American copyright from its constitutional origins was to encourage authors to create works beneficial to the public, not for themselves. The idea was to generate works that could teach, or pass on skills and knowledge that advanced education, while limiting materials seen as unnecessary or less constructive. Early laws limited protection to books and excluded works such as almanacs, broadsides, speeches, newspapers, and works of fiction.[2]

[2] Thomas Paine, *Letter to the Abbe Raynal, on the Affairs of North America; in which the Mistakes in the Abbes Account of the Revolution of America are Corrected and*

Overtime, the government granted the requests of individuals appealing for the broadening of copyright legislation as the protection of private property became a legitimate responsibility of the government. Changes included longer-term lengths of copyright, expansion of the list of covered materials, and protection extending to an author's heir, which worked to undo the anti-monopolistic intent of the original law. In the case of copyright, the desirable outcome was the passage of works into the public domain, as the original purpose of the copyright clause was the promotion of works of science and the arts deemed beneficial to society.

The core principle of American copyright law originated in its connection to English history, where the passage of the Statute of Anne created a copyright system that incentivized authors for the first time and broke the monopoly held by the printers of the Stationers Company by creating a limited time protective right. Joel Barlow summed up this belief about copyright in a letter to Elias Boudinot, the President of the Continental Congress, in 1783. Barlow suggested the importance of both the author and the public, arguing that creators of works "have not only been considered among the first ornaments

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*Cleared up(1782)* (London: J. Ridgeway, 1795), iv-v; Gillian Davies, *Copyright and the Public Interest* (London: Sweet and Maxwell, 2002), 3-5, 353; United States Congress, *An Act for the general revision of the Copyright Law, title 17 of the United States Code, and for other purposes*, October 19, 1976, in *Statutes at Large of the United States of America*, 94:2541-2602; Ronan Deazley, *On the Origin of the Right to Copy* (Portland, OR: Hart Publishing, 2004), xxiv-xxv, 226; Also see, Gilreath, James, ed. *Federal Copyright Records, 1790-1800*. Washington: Library of Congress, 1987 for a look at the works copyrighted in the first ten years of the federal law, and Joyce, Craig P., and Lyman Ray Patterson. "Copyright in 1791: An Essay Concerning the Founder's View on Copyright Granted to Congress in Article I, Section 8, Clause 8 of the U.S. Constitution." *Emory Law Journal* 52 (Spring 2003): 909-952 for a discussion of the intent of the Founding Fathers.

of the age & country which produced them; but have been secured in the profits arising from their labor, and in that way received encouragement in some proportion to their merit in advancing the happiness of mankind."[3] The extension of copyright law during the nineteenth century and beyond ensured that the amount of intellectual property in the public domain increased at a slower rate, allowing authors longer control of their properties and financial reward, while preventing others from enjoying the free use of printed materials. Expansion also protected properties once seen as uninstructive or frivolous. This extension of coverage to include works initially not protected by the law, such as almanacs, newspapers, and works of fiction, turned copyright from its original intent of encouraging the creation works for the betterment of society into a tool to protect individual interests over those of the public. The Founders believed that a limited term of protection would encourage authors to compose and publish, but also prevent monopolies harmful to the public interest.[4]

Copyright law in the nineteenth century ensured protection for at least twenty-eight years; but by the early years of the twentieth century the term lengthened to fifty-six years. This appeared to be a reasonable amount of time for a person to enjoy protection of

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[3] Joel Barlow to the Continental Congress (1783), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org.

[4] James Gilreath, "American Literature, Public Policy and the Copyright Law before 1800," in *Federal Copyright Records, 1790-1800* (Washington, DC: Library of Congress, 1987), xxii. Gilreath discusses the purpose of copyright and looks at the first decade of copyrighted materials at the federal level and what kinds of materials were copyrighted; Meredith L. McGill, "Copyright," in *A History of the Book in America Volume 2: An Extensive Republic: Print, Culture, and Society in the New Nation, 1790-1840,* eds. Robert A. Gross and Mary Kelley (Chapel Hill: The University of North Carolina Press, 2010), 198.Also see, Cathy Davidson's *Revolution and the Word*, and account of the rise of the novel during the nineteenth century.

his or her work. Extending protection much longer seemed detrimental to the public interest. The original intent of the Founders was to create a limited term protection as an incentive to authors. The expansion to include other materials and the increased term limits extended the power of the copyright beyond its original intent. The copyright clause in the Constitution stated that Congress was ensuring protections "for limited Times," meaning they intended for the duration of a copyright to be a reasonable amount of time. In 1790, that was fourteen years, with a fourteen-year renewal if the author was still alive. The definition of what was a reasonable amount of time clearly changed during the nineteenth century.[5]

The study of copyright often focuses on the development of the law as it pertains to authors and changes in copyright from a right of printers to copy a work to an authorial right to protect a work. In recent years, the study has begun to look more at the rights of the public. It is important to remember that the initial purpose of copyright was to provide limited protection for creators of materials deemed useful. The purpose of copyright was to promote learning, provide public access, and to expand the public domain. In the future, the study of the rights of the public in regards to intellectual property will be important, especially in our era where copyright has come to protect trivial materials, like short clips of videos posted on the Internet. The public benefits greatly from the

[5] Malla Pollack, "The Intersection of the Intellectual Property and Commerce Clauses of the Constitution: Beyond a Critique of Shakespeare Co. v. Silsat Corp." *Seattle University Law Review* 18 (Winter 1995): 260-327; Edward C. Walterscheid, "Conforming the General Welfare Clause and the Intellectual Property Clause," *Harvard Journal of Law & Technology* 13 (Fall 1999): 88-126.

willingness of authors to create work from which they hope to make a living, and authors should benefit from their labors. The American copyright system as created by the Founding Fathers created a system by which authors and the public would both benefit. During the nineteenth century, the ideals of the Founding Fathers were revised by men with a focus on the rights of individuals rather than the public. When Congress debated revisions of the copyright law, it was at the request of authors who did not want to lose control over lucrative literary properties. Noah Webster, for example, advocated for more beneficial changes for authors, but, ultimately, the changes were favorable to him and his family. While not all copyrights were lucrative rights for their owners, those, like Webster, who had a valuable property became more interested in maintaining their control, leading to the revisions of the nineteenth century. Expanding the study of the public's right will advance the understanding of how copyright law in the United States has strayed from its original intent.[6]

The history of copyright is complicated. It began as a right granted to printers, not authors, and, as the English example shows, became a monopolistic tool for royal printers

[6] L. Ray Patterson and Craig Joyce, "Copyright in 1791: An Essay Concerning the Founders' Views of the Copyright Power Granted to Congress in Article I, Section 8, Clause 8 of the U.S. Constitution," *Emory Law Journal* 52 (Spring 2003): 929-951. The issue was discussed in the Chapter III. See also, Walterscheid, Edward C. *The Nature of the Intellectual Property Clause: A Study in Historical Perspective*. Buffalo: William S. Hein and Co., Inc., 2002; Walterscheid, Edward C. "Understanding the Copyright Act of 1790: The Issue of Common Law Copyright in America and the Modern Interpretation of the Copyright Power." *Journal of the Copyright Society of the U.S.A.* 53 (Winter 2006): 313-353.

and the Stationers' Company. The introduction of statutory copyright made copyright an authorial right, not a printer's right. Statutory law, as it first appeared, also limited the monopolistic power of a copyright. Under the Statute of Anne, the Stationers were informed that their right was limited to a set number of years (they were granted twenty-one-year copyright) and then their protected works would enter the public domain. In the United States, the passage of copyright law copied the anti-monopolistic elements of the Statute of Anne, and created a limited right for authors. This element generated the original intent of the Founding Fathers to grant limited protection for the publication of works that would be beneficial to the public.

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