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Diane L. Zimmerman
NYU School of Law, zimmermd@exchange.law.nyu.edu

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Recommended Citation

Zimmerman, Diane L., "The Statute of Anne and Its Progeny: Variations without a Theme" (2010). *New York University Law and Economics Working Papers*. Paper 238.
http://lsr.nellco.org/nyu_lewp/238

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The Statute of Anne and Its Progeny: Variations without a Theme

Diane Leenheer Zimmerman¹

The tri-centennial of the Statute of Anne, if not the first then certainly the most significant of the early salvos in the formalization of copyright, provides not merely the occasion for historical inquiry and the celebration of a venerable legal tradition. For American copyright scholars with a skeptical bent, it is also the opportune time to reflect on the “problem” that the Statute of Anne and its first generation progeny generated for subsequent development of copyright law in the United States. The Statute of Anne and the fight over common law copyright that followed close on its heels played an important role in informing and shaping both the intellectual property clause of the American constitution and the statutes passed subsequently under the authority of that clause. The difficulty is that the influences were several and they cut in opposing directions. Looking back at the history of copyright in the eighteenth century, first in Britain and then in the United States, it turns out to be inordinately difficult to understand what Parliament, the British courts, and, following them, the drafters of the Constitution and of the first copyright law here thought they were accomplishing by creating this legal structure. What did they understand to be the purpose of copyright protection, and what were the values intended to animate it?

One might be excused for expecting that, after all these years, the answer to these questions would be clear. But not so. In fact, the uncertainties about and conflicting

¹ Samuel Tilden Professor of Law Emerita, New York University School of Law. The author wants to thank Craig Joyce for inviting me to participate in the IPIL Houston 2010 Conference entitled Celebrating Copyright’s Tri-Centennial. I also thank the other participants in the conference for their helpful questions, comments and suggestions on the earlier draft of this Article, and to give special thanks to my research assistant, Brian Leary, N.Y.U. Class of 2012, for his patient and skilled help in preparing it.

interpretations of the Statute of Anne have continued to reverberate in intellectual property law even after the passage of three centuries. The only certain thing is that the Statute of Anne, as the first formal copyright law, played a notable role in forming the conviction throughout Western Europe, the newly formed United States, and ultimately across much of the world that it was important for government to offer some form of exclusive rights in expressive works. But why such protection was important, and how it broadly and deeply it should sweep, was not something that can be discerned from the form in which statutory copyright was born in 1710. And, at least on this side of the Atlantic (and, I suspect, elsewhere as well), the proper resolution of those issues has become, if anything, more contested over time. Thus, the Statute of Anne can be considered not merely the progenitor of the copyright movement, but also the spring from which American copyright confusion began to bubble. For this reason, the centennial of copyright is not entirely an occasion for celebration.

The difficulties come from the fact that copyright did not start out as a well-thought-out and well-articulated legislative solution to a clearly defined problem. In fact, no one today is entirely sure why Parliament enacted it. What is evident is that Anglo-American copyright evolved in fits and starts, tacking on additional theoretical bits and pieces without any apparent concern over coherence as new claims, theories, and interest groups captured the imaginations of judges and legislators.² Most of what we think we know about the purpose of copyright was thought up after the Statute of Anne was enacted, and was pushed by parties with their own special interests (largely financial) to

² The picture is complicated by the fact that changes in the law to respond to one argument or theory often lead to consequences that were unanticipated. One example is the orphan works problem, a direct result of a decision to extend the term of copyright and to eliminate formal requirements, both putatively to respect the rights of authors.

advance. These parties often advocated for themselves under cover of the rights of authors, whose claimed genius or natural rights to property protection for their intellectual productions became important threads in the push for more generous interpretations of the original copyright law. The advent of new technologies and new methods of exploiting works as the nineteenth century progressed created new economic opportunities and new arguments about the purpose of copyright and offered new arguments for making the law more generous to owners. As a result, the structure of copyright ended up less like a well-formed building on a solid foundation than like a ramshackle old mansion that has had rooms and entire wings randomly tacked on.

This Article is an attempt to sort through the confusing legacy that eighteenth century British copyright bequeathed to its former colony across the Atlantic. Much of what was “understood” about copyright in the United States in the last decades of the eighteenth century was derived from the British experience. That history influenced the drafting of the copyright clause, and indeed the first copyright act passed pursuant to it was essentially a copy of the Statute of Anne. But the “understandings” never quite fit together into a coherent whole, with the result -- as can readily be detected in the attempts of nineteenth century American courts to graft some stable meaning onto the copyright clause – that confusion and cross-purposes continued to mark the legal regime, even to the present day.

While it is certainly possible to argue that what is termed copyright incoherence in this Article could simply be viewed merely as the perfectly proper and sensible pursuit of multiple goals, that answer is far too easy. For one thing, the pursuit of multiple ends presumes that those ends are capable of coexisting; but in American copyright, especially

today, at least some objectives of the law, both as written and interpreted, seem to point in completely divergent and contradictory directions.

For another, Congress's exclusive authority to enact copyright law is limited by the terms of a written Constitution. The Copyright Clause says that the purpose for which Congress may grant rights to authors for limited times is the promotion of science (that is to say, learning).³ Depending upon how these terms are interpreted, some policy objectives might actually be constitutionally inappropriate, as might certain manipulations of the scope of the rights Congress can provide.

To further complicate the picture (and to make an understanding of the purpose of and scope intended for copyright even more important) the copyright clause coexists in tension with the First Amendment prohibition on governmental restriction of speech. Without an agreement about specific and well-defined goals for copyright, parsing the line between restricting speech in the interest of authors and restricting speech in violation of the first amendment becomes a troublesome puzzle.

Putting these special considerations together, it is reasonable to argue that copyright law in America should be constrained in the ends it may pursue by some prior concept of why and how authors may be protected. But what are those constraints? The problem is that, 300 years into the life of copyright, our sense of what Americans took from the confusing history of British copyright and what they thought they were doing when they adopted the British model to protect authors remains remarkably mysterious.

A. Copyright and Incoherence: the History

a. The Statute of Anne

³ U.S. CONST. art. I, § 8, cl. 8.

The history of publishing in Britain prior to the passage of the Statute of Anne has been widely discussed,⁴ and there is no need to rehearse it more than briefly here. What is relevant for this discussion is that for 150 years prior to the Statute's passage, with a few exceptions expressly authorized by the Crown,⁵ the Stationer's Company in London, as a practical and legal matter, enjoyed a national monopoly over the publication of books, old and new. Over time, discontent with the practice of crown grants of monopoly power grew,⁶ but the Stationers held on to their control over the book trade. There is evidence that the Stationers were aware that theirs was a somewhat delicate position; in the seventeenth century, they mounted what we would now call a public relations campaign to convince Parliament and the public that whatever monopoly power they enjoyed was in fact "harmless," extending as it did only to the production of luxury goods (books) rather than such necessities as bread or clothing.⁷ The Stationers, at the same time, and rather inconsistently, also tried to position themselves in public opinion as deserving their advantaged position because they acted as the protectors and promoters of cultural progress and learning.⁸

⁴ See LYMAN RAY PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* (1968); L. RAY PATTERSON & STANLEY F. BIRCH, JR., *A UNIFIED THEORY OF COPYRIGHT* (Craig Joyce ed.) in 46 *HOUSTON L. REV.* 215 (2009).

⁵ Both Cambridge and Oxford were permitted to operate printing presses. Cyprian Blagden, *the Stationers' Company: A History, 1403-1959* at 101-06 (1960). The Crown also gave specific printers exclusive control over specific works, such as Bibles and prayer books. George Unwin, *The Gilds and Companies of London* 258-59 (1908).

⁶ The Statute of Monopolies, which intended to cut back sharply on monopolies in industry, business, trades and so forth, was passed in 1624, during the reign of James I. Statute of Monopolies, 1624, 21 Jac., c. 3 (Eng.), *reprinted in SOURCES OF ENGLISH CONSTITUTIONAL HISTORY* 434 (Carl Stephenson & Frederick Marcham eds. & trans., 1937). See also Chris Dent, 'Generally Inconvenient': *The 1624 Statute of Monopolies as Political Compromise*, 33 *MELB. U. L. REV.* 415 (2009).

⁷ PATTERSON, *COPYRIGHT*, SUPRA NOTE __ AT 129-30 (1968). To add credibility to their argument, the Stationers did concede that the patent creating exclusive rights to produce Bibles was an exception to their "no harm, no foul" stance.

⁸ Ian Gadd has done an interesting study of efforts by the Stationers' Company in the seventeenth century to elevate its status and distinguish itself from less socially desirable trade-protectionist organizations of the time. Ian Gadd, *The Mechanics of Difference: A Study in Stationers' Company Discourse in the*

These sorts of arguments allowed the Company to escape the coils of the Statute of Monopolies,⁹ but it ultimately lost the ability to monopolize the production of books anyway when the Crown did away with the last vestiges of prior censorship (through pre-publication licensing) in 1694.¹⁰ It was this confluence of the government's desire to control the publication of "dangerous" books and the Stationers' own broad charter that enabled them to exert a de facto "copy rights" over books before the Statute of Anne. Until 1694, manuscripts had to be pre-cleared by official censors and registered at Stationers' Hall in order to be published.¹¹ Since the Company only permitted its members to register books, and guaranteed each one that it would enjoy exclusive publication rights for the works the member registered, copyright existed as a practice, rather than by law. But once books no longer needed to be licensed to be printed, the mechanism that supported this "copy right" was gone and the Stationers could no longer stop outsiders from competing with them by producing rival editions or bringing out new works.

Anxious to regain their exclusive control over book publishing, the Stationers went to Parliament for help, arguing that they were not merely championing their own cause, but that of authors as well.¹² Parliament ultimately responded to the guild, but, famously, not in the way the Stationers may have expected. Copyright was explicitly

Seventeenth Century, in THE STATIONERS' COMPANY AND THE BOOK TRADE 1550-1900 at 93-105 (Robin Myers & Michael Harris eds., 1997).

⁹ Dent, *supra* note __ at 451.

¹⁰ See PATTERSON, COPYRIGHT, *supra* note __, at 138-43 (discussing the final lapse of the Licensing Act of 1662); L. Ray Patterson & Craig Joyce, *Copyright in 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*, 52 EMORY L.J. 909, 914-16 (2003).

¹¹ PATTERSON, *supra* note __, at 6.

¹² A petition for legislation, presented to Parliament by the Stationers in 1707, is known to have raised the issue of authors and their rights. HARRY RANSOM, THE FIRST COPYRIGHT STATUTE: AN ESSAY ON AN ACT FOR THE ENCOURAGEMENT OF LEARNING 90-91 (1956).

made available to all “authors or purchasers of such copies” rather than to publishers alone. Since purchasers of copies could be located anywhere in the United Kingdom; the Stationers’ Company did not regain its monopoly. Now any printer/bookseller, wherever located within the country, could register a copyright with the Company.¹³ What was more, the protection given by Parliament was limited solely to a prohibition against making unauthorized copies of protected works,¹⁴ and that only for a comparatively brief term of years, renewable once but only if the author was still alive.¹⁵

Precisely what Parliament intended to achieve by the creation of a statutory copyright is difficult to discern from the historical record, despite the best efforts of historians to deconstruct the events surrounding the Act’s passage. One real possibility is that the Act was no more than a codification (with the addition of a few specific limits) of publishing practices that in Parliament’s view had become respectable simply by virtue of their antiquity rather than the product of rational and well-thought-out policy choices.

The Statute began with a rather lofty statement of purpose, describing the act as intended “for the encouragement of learning.” This language was nothing new; it paralleled some that had been used earlier by the Stationers to describe the social benefits derived from their activities. It has been thought by scholars to be more rhetorical than substantive.¹⁶ But even if the language had real meaning for Parliament, the “learning” in question was likely to have had a quite narrow meaning to legislators at the turn of the eighteenth century.

¹³ Statute of Anne, 1710, 8 Ann., c. 19, § II (Eng.).

¹⁴ *Id.*

¹⁵ *Id.* § XI.

¹⁶ PATTERSON, *supra* note ___, at 143-50 (arguing that the Statute of Anne was primarily a “trade-regulation statute directed to the problem of monopoly”).

In contrast to the commonly accepted understanding of what the Framers meant when they adopted similar language in the American copyright and patent clause,¹⁷ the promotion of learning by making an increasing number of books available to the public at large was unlikely to have been high on the list of Parliamentary objectives in 1710. At the time, only a small percentage of Britain's population was literate;¹⁸ the identification of mass literacy as an important social policy objective did not begin to attract attention until considerably later in the century and was not seriously addressed in Britain until the nineteenth century.¹⁹ The putative recipients of any benefit to intellectual development from copyright were, rather, the small coterie of "learned men" who, according to the Statute, needed exclusivity to "compose and write useful books,"²⁰ presumably for one another's consumption. In other words, the promotion of learning would only have been of interest to a small elite of scholars and educated persons.²¹

The addition of authors to the traditional company of copyright holders (printers and booksellers) seems unquestionably also to be pure rhetorical flourish. Statutory copyright was not available for any but published works, and, as a practical matter, authors simply could not hope both to publish and hold on to a copyright in that era; publishers simply would not agree to it. As a result, for all intents and purposes,

¹⁷ See *supra* text accompanying notes ___-__.

¹⁸ . One expert estimates that in the late eighteenth century, literacy in Britain was still at about the same level it had been in Elizabethan times, which is to say quite low. Richard D. Altick, *The English Common Reader: A Social History of the Mass Reading Public 1800-1900*, at 30 (1957).

¹⁹ Evangelical religious groups and political radicals led the earliest efforts to spread literacy at the end of the eighteenth century. Public funding for elementary education did not begin until the 1830s but remained scant for decades thereafter. See Diane Leenheer Zimmerman, *Authorship Without Ownership: Reconsidering Incentives in a Digital Age*, 52 DEPAUL L. REV. 1121, 1130-32 (2003).

²⁰ 8 Ann., c. 19, § I.

²¹ Mark Rose points out that authors, before the middle of the century, commonly were more dependent on patrons than on book purchasers for their economic survival. Mark Rose, *The Author as Proprietor in OF AUTHORS AND ORIGINS: ESSAYS ON COPYRIGHT LAW* at 28 (Brad Sherman & Alain Strowell eds., 1994).

copyrights effectively protected printers and booksellers, who bought authors' manuscripts outright, produced and distributed their books, and held whatever rights attached.²²

Viewed objectively, the most likely reason the statute was passed was because Parliament wanted a compromise between a pesky constituency (the publishers) and its own deep commitment to limiting monopolies.²³ This is suggested by the similarity between the approach taken by Parliament toward copyrights and that taken toward patents on new inventions in the Statute of Monopolies. The only exclusive right available was control over the making of copies,²⁴ and the right was further constrained by a strictly limited time frame.²⁵ The ability to enjoy the benefits of copyright was further limited by a set of formal requirements, including registration and deposit.²⁶

²² See Zimmerman, *Authorship Without Ownership*, *supra* note __, at 1137-41; PATTERSON, *supra* note __; PATTERSON & BIRCH, *supra* note __, at 253. That part of the statute that seemed to return copyrights to living authors at the end of the first fourteen years was a source of concern to publishers, who tried unsuccessfully, in 1734, to get a single term substituted for the fourteen years plus fourteen. That failed, but courts came to the rescue. For example, in 1786, the Court of Chancery ruled that when an author conveyed his copyright to a printer/publisher without express limitations, both terms were conveyed. PATTERSON, *supra* note __, at 156. A brief history of reversion, and its comparative uselessness to authors, can be found in *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643, 647-48 (1943).

²³ One particularly interesting indication that the control over publishing exercised by the Stationers until late in the seventeenth century was considered to constitute a harmful monopoly is provided by John Locke, the philosopher whose writings are frequently cited as laying the basis for recognizing literary property rights. Locke objected to the notion of perpetual control over works, and was one of the earliest critics to propose a limited term. Simon Stern, *Copyright, Originality, and the Public Domain in Eighteenth-Century England*, in *ORIGINALITY AND INTELLECTUAL PROPERTY IN THE FRENCH AND ENGLISH ENLIGHTENMENT* at 69, 74-76 (Reginald McGinnis, ed., 2008).

²⁴ Ronan Deazley has pointed out that broader rights than those provided by the Statute of Anne were fairly common in grants of printing privilege by the Crown, extending not merely to control over reprinting, but also over abridgements. Ronan Deazley, *The Statute of Anne and the Great Abridgement Swindle*, __ HOUSTON L. REV. __, __-__ (2010).

²⁵ The Statute of Anne created a fourteen-year renewable term for copyrights of new books, and gave a twenty-one year grace period to anyone claiming rights in a book published before the statute. . 8 Ann., c. 19, §§ II, XI.

²⁶ Recovery for infringement could be had only for books, the copyright to which was registered with the Stationer's Company. If proof existed, however, that the Company refused or neglected to register the work, the statute had provisions protecting the copyright owner against loss of protection. . *Id.* § III. Copyright claimants were also required to deliver nine copies of each work for distribution to a variety of institutional libraries, including those of Cambridge and Oxford. Failure to do so would result in a significant fine. *Id.*, §§ II, V. It has been pointed out that the deposit requirement was, at the time, quite an

Furthermore, although the fact is rarely discussed in much detail, a very significant portion of the Statute of Anne consisted of a provision permitting citizens to seek remedies in a wide variety of fora against those who “set a price upon, or sell, or expose to sale, any book or books at such a price or rate as shall be conceived by any person or persons to be too high and unreasonable.”²⁷ The statute set up a complex scheme to deal with the risk of price gouging by publishers, reinforcing the belief that a primary concern of Parliament was to keep the rent-seeking activities of the print industry in check during the period in which it had of full control over the publication of a book.²⁸

Whether Parliament believed that, in addition to the ratification of tradition, the desire for respite from the lobbying of the Stationers, and the hope of limiting the potential for harmful price gouging, an actual positive case existed for the scheme of exclusive rights created by the Statute of Anne is more opaque. The preamble to the Act, in addition to the language about the promotion of learning, does contain language to the effect that recent incidents of piracy of proprietors’ books were to “their very great detriment, and too often to the ruin of them and their families.”²⁹ This could be taken as evidence of an affirmative goal: an attempt to avoid, by providing a comparatively brief period of exclusivity, what we would now term the public goods problem associated with published works. Without such exclusivity, Parliament may have believed, a market failure in the publication of books could occur if those who invested in producing and disseminating them were unable to recover those investments (including what they paid

onerous one, considering that the typical print run for a book was 250 copies. Catherine Seville, *The Statute of Anne: Rhetoric and Reception in the Nineteenth Century*, __ Houston L. Rev. __, __ (2010).

²⁷ 8 Ann., c. 19, § IV. Among those given authority to hear such complaints were the Archbishop of Canterbury, various judges, the Rector of the University of Edinburgh, and the Vice-Chancellors of Oxford and Cambridge. *Id.*

²⁸ According to Ransom, section IV was added to the statute at the insistence of the House of Commons. HARRY RANSOM, *supra* note __, at 101-02.

²⁹ 8 Ann., c. 19, § IV.

to the authors of new manuscripts) or earn any profit for their efforts.³⁰ By providing coverage that was narrow (owners were protected only against unconsented wholesale reproduction of books) and of brief duration, proprietors would get enough protection to make the publishing business attractive, but not so much that they could damage the public welfare through sustained high prices or lengthy periods of control. Whether Parliament actually made such a policy choice is, of course, entirely speculative because no record exists of any debates and discussions that preceded the passage of the act.³¹

b. The Consequences of the Common Law Copyright Wars

Perhaps because the Statute was so spare, and certainly because it was peppered with broad language that invited argument and interpretation – why authors are mentioned, how learning is to be promoted, and how seriously to take the need for protection against piracy – it was subjected in succeeding decades to much creative disputation about its purpose and its reach. Out of that long period of dispute, while the nascent publishing industry jockeyed to improve its position vis-à-vis the apparent restrictiveness of the Statute of Anne, much of what we think of today as the fundamentals of copyright were developed and were gradually onto the positive law as understandings of what copyright was “about,” even though in some cases these “fundamentals” were deeply contradictory. This evolutionary process -- what I mean when I refer to the Statute of Anne and its progeny -- has direct relevance to copyright in

³⁰ There is evidence from court cases predating the Statute of Anne that “protection was sought as a means to ensure a fair return on expenditure of money, skill and time; it was not a matter of recognizing the public utility of the act of publication or the originality and personality embodied in the work.” DAVID SAUNDERS, *AUTHORSHIP AND COPYRIGHT* 29 (1992). That this understanding of why copyright was needed would also inform Parliament’s thinking seems credible.

³¹ FREDERICK SEATON SIEBERT, *FREEDOM OF THE PRESS IN ENGLAND, 1476-1776*, at 279-89 (1952); *see also* Peter D. G. Thomas, *The Beginning of Parliamentary Reporting in Newspapers, 1768-1774*, 74 *ENG. HIST. REV.* 623, 623 (1959) (describing the “veil of secrecy over parliamentary news, long enforced by Standing Orders” prior to the development of widespread parliamentary reporting in the second half of the eighteenth century).

the United States, not only because the Americans so freely adopted language from the Statute for its copyright clause and its first federal copyright statute, but also because the men who drafted and ratified the copyright and patent clause of the Constitution and those who later interpreted it were aware of, and influenced by, the post-statutory battles in eighteenth century Britain.³²

Among the several important “understandings” that developed and carried weight on both sides of the Atlantic in the eighteenth century were ones having to do with the nature of authorship, the elevation of the public interest as a general justification for intellectual property rights in writings, and a conception of the public domain as integral to the normative framework of copyright.³³

The propulsion of the author to a central role in copyright has been much commented upon in the literature.³⁴ Publishers, eager to find a way around the time limitations in the Statute of Anne, found authors a convenient stalking horse for their own economic interests. Surely, they argued, copyright was already a property interest protected by common law well before the Statute of Anne, and the Statute meant to augment, not erase, it. To claim otherwise would be to deny the natural rights of authors. Is not literature the product of the author’s labor, they asked, and does not John Locke tell

³² PATTERSON, *supra* note __, at __; Patterson & Joyce, *supra* note __, at 929-30

³³ L. Ray Patterson and Stanley Birch credit the Statute of Anne with introducing the idea of the public domain. PATTERSON & BIRCH, *supra* note __, at 252-53. But no assurance that this was so came until the conclusion of the battle over the survival of common law copyright much later in the century and the ruling of the House of Lords in *Donaldson v. Beckett*, (1774) 17 Parl. Hist. Eng. 953 (H.L.).

³⁴ See, e.g., Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of “Authorship,”* 1991 DUKE L.J. 455; Mark Rose, *The Author as Proprietor: Donaldson v. Becket and the Genealogy of Modern Authorship*, 23 REPRESENTATIONS 51 (1988); Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the ‘Author,’* 17 EIGHTEENTH-CENTURY STUD. 425 (1984).

us that labor is the just basis on which property rights rests at common law?³⁵ In a somewhat different version of the argument, the processes of the mind were said to represent an intimate and integral expression of the self; respect for human autonomy therefore demands protection for that which is the product of the autonomous mind.³⁶ Finally, publishers also characterized authors as people who deserved permanent rights because they were “special.” What they gave the public was of access to the end product of their genius and creativity.³⁷ Had the cause of the author on any of these grounds won the day, of course, publishers expected the actual monetary benefits of perpetual copyright to flow exclusively their way.³⁸

³⁵ Blackstone was one notable figure to make this argument in the case of *Tonson v. Collins* (1761) 96 Eng. Rep. 180, 181 (K.B.).

³⁶ This claim took various forms. See, e.g., See I. KANT, *Of the Injustice of Counterfeiting Books*, in I ESSAYS AND TREATISES ON MORAL, POLITICAL, AND VARIOUS PHILOSOPHICAL SUBJECTS 225, 229-30 (W. Richardson trans. 1798) (arguing that an authors works were an extension of his personality and that they had special interests in protecting them against unconsented copying to control how authors communicated themselves to others); GEORG WILHELM FRIEDRICH HEGEL, *PHILOSOPHY OF RIGHT* ¶¶ 40-43 (T.M. Knox trans., Oxford University Press 1967) (1952) (arguing that property is an embodiment of personality and that protecting intellectual property rights is necessary to recognizing the individual); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 365 (1988) (arguing that personality justifications of property are especially apt to intellectual property “because intellectual products, even the most technical, seem to result from the individual’s mental processes”). Further evidence of the commitment to the idea of copyright as a protection of personal liberty can be found in the recognition of copyright as an element of human rights in major international instruments. See The Universal Declaration of Human Rights, Art. 27 (2) (adopted by the United Nations on Dec. 10, 1948), available at <http://www.un.org/en/documents/udhr/index.shtml#atop>; The International Covenant on Economic, Social and Cultural Rights, Art. 15(c) (adopted by the United Nations General Assembly on Dec. 16, 1966 and in force as of Jan. 3, 1976), available at <http://www2.ohchr.org/english/law/cescr.htm>.

³⁷ A typical characterization of the author, whose interests the publishers were endeavoring to protect, is given by David Rae, who argues that an author, “who by efforts of the most bright understanding and sublime genius” should enjoy at least the same property rights in his writings as cabinetmaker or shoemaker in his products. Information for Mess. John Hinton and Attorney against Mess. Alexander Donaldson, and Others 11 (1773), reprinted in *THE LITERARY PROPERTY DEBATE: SIX TRACTS 1764-1774*, (S. Parks ed., 1975). Even Joseph Yates, who was no supporter of the natural rights view of copyright, nevertheless concurred in the valorization of authors by referring to literary works as products of their authors’ “genius.” *Tonson*, 96 Eng. Rep. at 188. For discussions of the invention of the “romantic author” and its implications, see generally, Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of “Authorship,”* 1991 DUKE L.J. 455; Mark Rose, *The Author as Proprietor: Donaldson v. Becket and the Genealogy of Modern Authorship*, 23 REPRESENTATIONS 51 (1988); Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the ‘Author,’* 17 EIGHTEENTH-CENTURY STUD. 425 (1984).

³⁸ Patterson & Joyce, *supra* note __, at 924.

The publishers eventually lost the struggle to win perpetual control over the works they owned, both in Britain³⁹ and later in the United States,⁴⁰ but the aftermath of that struggle left behind a newly minted vision of the author as a social benefactor, a mental laborer laying claim to his intellectual property as a matter of natural right, and an autonomous human being whose liberty interests demanded recognition. The image of the author as a claimant to protection based on claims of personal liberty and of the value of his contributions to mankind significantly influenced the future course of copyright's development in Britain, continental Europe, and ultimately among the worldwide signatories to the Berne Convention.⁴¹ In the early part of the twentieth century, the Berne Convention was modified in such a way to make the point absolutely indisputable. The new language required that all signatories protect their authors' "moral rights." Berne demanded that members offer authors a minimum array of personal controls over their works that would remain in effect even after they had divested themselves of all economic interest in them.⁴² Although natural rights never developed the hold on American law that it did in Europe, the post-Anne copyright wars, with their elevation of the concept of authorial entitlement, based on natural law and the claims of genius, exerted a strong influence on the views about copyright that found expression in the law of the new nation.

³⁹ In 1774, the House of Lords decided that all copyright protection ceases once the statutory term reaches its end. The case is reported in *Donaldson v. Beckett* (1774) 17 Parl. Hist. Eng. 953 (H.L.).

⁴⁰ *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834).

⁴¹ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, revised, July 24, 1971, 828 U.N.T.S. 221. See also *supra* note ____.

⁴² Although some countries chose to offer even greater protection, Berne required that authors be granted at least a right to claim attribution and to protect the integrity of their creations. Berne Convention, art. 6bis. This provision was added to the Convention in 1928. See Kimberly Y. W. Holst, *A Case of Bad Credit?: The United States and the Protection of Moral Rights in Intellectual Property Law*, 3 Buff. Intell. Prop. L.J. 105, 109-10 (2006).

The second fall-out of the perpetual rights dispute was an explicit recognition that the public's interest in limiting copyright (specifically the interest of potential readers) went well beyond their desire for books at reasonable prices.⁴³ The audience for new works also had a claim to benefit from them by using them to further their own intellectual and political development and to build new works on the foundation of previous ones. These interests were, of course, in serious tension with the claims of the valorized author. Nevertheless, advocacy in favor of an expanded view of the public interest by some of the leading legal thinkers of the day undoubtedly influenced the outcome before the House of Lords in *Donaldson v. Beckett*⁴⁴ (the case that ended all hope in Britain of perpetual copyright) and the thinking of American lawmakers as well.

Joseph Yates, who earlier in his career had defended so-called pirates for violating authors' (in actual fact, publishers') ostensible perpetual rights, went on to become a judge and the sole dissenter in *Millar v. Taylor*, the case decided by the King's Bench that initially ruled in favor of the existence of perpetual copyright.⁴⁵ Yates worried that, if perpetual rights in books were recognized, the public would be injured because its ability to learn from existing works would be limited.⁴⁶ He was not alone. Lord Kames, in a Scottish decision handed down in 1773, took the position that not only

⁴³ Trevor Ross has persuasively argued that the most significant outcome of the common law copyright debate was that readers' rights and the public interest were vindicated as core values that needed to be protected. Trevor Ross, *Copyright and the Invention of Tradition*, 26 EIGHTEENTH-CENTURY STUD. 1, 9-13 (1992).

⁴⁴ (1774) 17 Parl. Hist. Eng. 953. *Donaldson* held that statutory copyright supplanted any common law rights once the work was published, and terminated them.

⁴⁵ (1769) 98 Eng. Rep. 201. The argument adopted by the court was that statutory copyright added remedies for infringement for a limited time, but that when the term was up, authors and their assigns could fall back on their pre-existing common law rights, which were perpetual.

⁴⁶ Similar concerns surfaced in France late in the eighteenth century. According to Ginsburg, "a strong current of Enlightenment thought objected on instrumentalist grounds to any assertion of property rights in idea-bearing works: individual proprietary claims would retard the progress of knowledge." Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, in OF AUTHORS AND ORIGINS: ESSAYS ON COPYRIGHT LAW at 150 (Brad Sherman & Alain Strowell eds., 1994).

did “ordinary readers” benefit when prices of books fell at the end of the copyright term, but that the end of copyright also encouraged others to “improve” on what had been created earlier.⁴⁷

When *Donaldson v. Beckett* came before the House of Lords, Lord Camden, who also opposed perpetual copyright, eloquently attacked the notion that authors had a moral claim to permanent ownership. He countered that those whose intellect and genius gave rise to works for the enlightenment of the public should be held, in the absence of a statutory right to the contrary, to be obligated to donate them to society for the greater good of all. In his now famous words, “If there be any thing in the world common to all mankind, science and learning are in their nature *publici juris*, and they ought to be as free and general as air or water.”⁴⁸ And Lord Effingham, in his opinion in, expressed another modern-sounding concern, worrying that an unlimited term of protection would interfere with freedom of the press.⁴⁹

In an effort to diminish the impact of these various claims about the negative effects of perpetual copyright on public learning and on future creators made by such eminent judges, advocates for the publishers during the Battle of the Booksellers made a concession that has been of major importance in the subsequent development of copyright. They contended that detrimental effects on learning would not occur because copyright did not extend to the protection of ideas – just to the actual expression of the

⁴⁷ James Boswell, *The Decision of the Court of Session, upon the Question of Literary Property*, in THE LITERARY PROPERTY DEBATE: SIX TRACTS 1764-1774 at 19-20 (Stephen Parks ed., 1975). The issue was of particular importance in Scotland where local publishers were attempting to compete with the established London Stationers.

⁴⁸ Hansard, Parliamentary Debates (1st series), xvii 999 (4 February 1774).

⁴⁹ *Donaldson*, 17 Parl. Hist. Eng. at 1003.

author.⁵⁰ Anyone could take the matter from a work as long as he did not take the expression itself.

Thus, by the time the House of Lords in *Donaldson* came down in favor of a strictly limited term with no survival of common law rights, certain pro-user attributes of copyright were becoming generally accepted, even though they were not originally expressed in the Statute of Anne, and the statute remained essentially unchanged. First, as just noted, was the distinction between ideas, which are free to all, and expression which belongs to the copyright owner.⁵¹ Second, the general public, and not merely the author and publisher, became a recognized stakeholder in the copyright equation, based on the concern that, if published works were given too extensive protection, the cost

⁵⁰ Francis Hargrave, who argued on behalf of the publishers before the House of Lords in the *Donaldson* case, made this point quite clearly. He wrote:

An attempt to appropriate, to the author and his assigns, the perpetual use of the ideas contained in a written composition, might well be deemed so absurd and impracticable, as to deserve to be treated in a Court of Justice with equal contempt and indignation; and it would be a disgrace to argue in favour of such a claim.

Francis Hargrave, AN ARGUMENT IN DEFENCE OF LITERARY PROPERTY 16 (1774), reprinted in PRIMARY SOURCES ON COPYRIGHT (1450-1900), (L. Bently & M. Kretschmer eds.), available at <http://www.copyrighthistory.org/>.

⁵¹ That the idea/expression dichotomy was firmly ensconced from an early date in British legal thought is evidenced in opinions of several of the Justices, delivered to the House of Lords in *Millar v. Taylor*, (1769) 98 Eng. Rep. 201 (K.B.). See, e.g., *id.* at 206 (Willes, J.) (permissible to abridge, translate and imitate, but not to copy identical expression); *id.* at 227 (Aston, J.) (members of the public who acquire copies of an author's book "may improve upon it, imitate it, translate it; oppose its sentiments: but [not] publish the identical work"). According to Stern, the belief that authors were entitled to borrow extensively from earlier works was widely accepted in practice even before, being common among seventeenth century writers, and the assumption that anything short of direct or virtually direct copying of expression was permissible carried over into the eighteenth century. Stern, *supra* note __, at 73, 80-81. By the early to mid-nineteenth century, cases in the United States were discussing the distinction as if, there too, it was beyond question. See *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (No. 4436) (noting that borrowing ideas is permissible and indeed inevitable); see also *Stowe v. Thomas*, 23 F. Cas. 201, 206-07 (C.C.E.D. Pa. 1853) (No. 13,514) (copyright protects expression but not ideas). Some commentators have described *Baker v. Selden*, 101 U.S. 99 (1879), as the first Supreme Court case to ratify this notion. Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's 'Total Concept and Feel'*, 38 EMORY L.J. 393, 400-01 (1989). For other interesting discussions of the idea/expression dichotomy, see Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets and Liberal Values in Early American Copyright*, 118 YALE L. J. 186, 235-38 (2008); Pamela Samuelson, *The Story of Baker v. Selden: Sharpening the Distinction between Authorship and Invention*, in INTELLECTUAL PROPERTY STORIES 159, 177, 188-89 (Jane C. Ginsburg & Rochelle Cooper Dreyfuss eds., 2005).

would be measured not only in the high price of books, but also in detriments to learning, innovation, and freedom of speech and thought. Third, a reason to limit the right in time and scope was emerging that may or may not have loomed large in the thinking of those who wrote the positive law (who seemed most motivated to limit the term of copyright by the prospect of monopolistic booksellers using their exclusive rights to jack up the prices of their products): that the public's interest in access and reuse required a reasonably brief period of protection. In a real sense, the perpetual copyright debate gave rise to the development of a positive theory of the public domain.

The problem, of course, was that different parties weighed each of these values in different ways, so that, by the end of the first three-quarters of the eighteenth century copyright theory was torn among inconsistent and conflicting suppositions about its purpose, about the relative importance to it of the natural rights claims of authors and about the strength of society's claim to greater freedom to share in and utilize new expression and ideas.

C. Copyright Comes to the United States

The unresolved tensions in copyright that followed the Statute of Anne and led to the copyright wars of the mid-eighteenth century -- the push and pull between claims made in the name of authors' natural rights, liberty interests, and genius and those privileging the public's claim to protection against rent-seeking, to generous access and to build on what earlier authors produced -- uncovered profound disagreements in Great Britain that about whether protection should be limited or broad, brief or prolonged. The Statute and the several decades that followed in turn provided the atmospheric for the introduction of copyright into the legal fabric of the newly forming United States.

The same arguments about the public interest, authors' interests, the threats posed by monopolies, whether intellectual property should be crafted merely to avoid market failure or to mimic the traditions of real property all found adherents on this side of the Atlantic and must have influenced how various of the Framers thought about the protection of literary works. Needless to say, they, like their British predecessors, probably did not respond to these arguments in the same way, if indeed most thought the matter through much at all. Thus, instability remained a mark of copyright as it moved across the Atlantic, but with the added wrinkle that, in the United States, the ability of Congress to legislate on the matter down the line would be constrained by the language empowering it to act on the subject contained in a written constitution. Because exactly what the Framers thought was the objective of copyright is subject to debate, the meaning of the constitutional language they ultimately adopted is also something of a puzzle. All that can be said for certain is that it, and the statute that followed, were hugely indebted to the English model and to the original Statute of Anne.

a. The formative years

Prior to the American Revolution, copyright protection for colonial authors was essentially nonexistent.⁵² But lobbying by such notable figures as Noah Webster and Thomas Paine⁵³ convinced the Continental Congress in 1783 to recommend that the recently formed states all enact their own copyright laws. Connecticut was the first to do

⁵² There is evidence of at least three private copyright laws having been passed, two in Massachusetts and one in Connecticut. Tyler T. Ochoa & Mark Rose, *The Anti-Monopoly Origins of the Patent and Copyright Clause*, 84 J. PAT. & TRADEMARK OFF. SOC'Y 909, 920 n.60 (2002). But generally applicable copyright laws appear not to have been enacted until their passage was recommended to the states by the Continental Congress. PATTERSON, *supra* note __, at 183.

⁵³ EDWARD C. WALTERSCHEID, *THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE* 74 (2002); Bruce Willis Bugbee, *The Early American Law of Intellectual Property: The Historical Foundations of the United States Patent and Copyright Systems* 254 (1960) (dissertation, University of Michigan).

so, but within the next three years all but Delaware had passed them.⁵⁴ These state copyright laws were notable for picking up and emphasizing a range of different threads from the scramble of possible rationales for copyright. Some clearly reflected the concern that the Statute of Anne showed about how best to control the risks of monopolization;⁵⁵ others claimed that copyright was designed to champion the natural rights of authors;⁵⁶ and still others stressed a form of public benefit theory by claiming that copyright was intended encourage men of “Learning and Genius to publish their Writings; which may do Honor to their Country, and Service to Mankind.”⁵⁷

When the drafters of the Constitution were at work in 1787, a comparatively last-minute decision was made to move authority over patents and copyrights from the states to the federal government⁵⁸ in the apparent interest of providing legal uniformity.⁵⁹ James Madison, who had earlier been involved in the passage of the Virginia state copyright law, was one of two delegates to offer proposed intellectual property language for inclusion in the Constitution.⁶⁰ Charles Pinckney of South Carolina was the other.⁶¹ What is now the copyright and patent clause came out of committee in a somewhat different form from either proposal (and, unfortunately, left behind no external record of

⁵⁴ PATTERSON, *supra* note __, at 183-92; Bugbee, *supra* note __, at 276-77.

⁵⁵ North Carolina’s law, for example, contained a provision similar to that in the Statute of Anne creating remedies in cases of price gouging. Bugbee, *supra* note __, at 288. Connecticut’s copyright statute also included such a provision. *Id.* at 259.

⁵⁶ Massachusetts’ statute stated that “no Property [is] more peculiarly a Man’s own than that which is produced by the Labour of his Mind.” *Id.* at 271.

⁵⁷ This language is quoted from the Connecticut statute. *Id.* at 258.

⁵⁸ WALTERSCHIED, *supra* note __, at 80-81 (referring to the introduction of the clause as last minute). The Constitutional Convention first convened on May 25, 1787; the suggestion that power over copyrights and patents should be granted to Congress was first made on August 18 of that year. The final document was submitted for ratification on September 17. James Madison, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 (Gaillard Hunt & James Brown Scott eds., 1920), *available at* http://avalon.law.yale.edu/subject_menus/debcont.asp.

⁵⁹ This is the explanation given by James Madison in the Federalist Papers. THE FEDERALIST NO. 43 (James Madison), *available at* <http://www.foundingfathers.info/federalistpapers/fed43.htm>.

⁶⁰ WALTERSCHIED, *supra* note __, at 101-02.

⁶¹ *Id.*

the committee’s discussions, if any, on how to frame the language). Article I, Clause VIII, Paragraph 8 went on to be passed by the Constitutional Convention without debate, an outcome that contributed greatly to the ability of later judges and commentators to ascribe to it their preferred rationale.

Clearly some disagreement existed from the start about the wisdom of offering intellectual property protection for any reason. Walterscheid points out that although both Maryland and North Carolina ended up passing copyright laws in the period preceding the federal Constitution, they also put language into their state constitutions describing all monopolies respectively as “odious, contrary to the spirit of free government, and the principles of commerce,” and as “contrary to the genius of a free state.”⁶² Madison, clearly aware of the tension over intellectual property rights as state-sanctioned monopolies, wrote a letter on the subject to Jefferson in 1788 in an attempt to convince his fellow Virginian that the copyright and patent clause in the new Constitution was a wise addition to Congress’s powers:

With regard to Monopolies, they are justly classed among the greatest nuisances in Government. But is it clear that as encouragements to literary works and ingenious discoveries, they are not too valuable to be wholly renounced? Would it not suffice to reserve in all cases a right to the public to abolish the privilege at a price to be specified in the grant of it? Is there not also infinitely less danger of this abuse in our Governments than in most others? Monopolies are sacrifices of the many to the few. Where the power is in the few it is natural for them to sacrifice the many to their own partialities and corruptions. Where the power as with us is in the many not in the few the danger cannot be very great that the few will be thus favored. It is much more to be dreaded that the few will be unnecessarily sacrificed to the many.⁶³

⁶² WALTERSCHEID, *supra* note __, at 87 n. 31.

⁶³ Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *reprinted in* 14 THE PAPERS OF THOMAS JEFFERSON, 1788-1789, at 17 (Julian P. Boyd ed., 1956).

The limited times language, which reflects ideas expressed in the Statute of Monopolies and the Statute of Anne, is the device that seems most likely to have been intended as a way to defang the specter of monopolies in knowledge wrecking harm on social progress and well-being.

But it is one thing to try to limit monopolies. The real question, harkening back to the fight over the meaning of the Statute of Anne, is whether there was some positive case that convinced the Framers to offer such protection in the first place, given the perception of its attendant risks. One scholar has speculated that the affirmative rationale was a trade protectionist one.⁶⁴ His theory is that copyrights and patents were intended to give American authors and inventors shelter from foreign competition and to promote national economic development.

An equally credible hypothesis is that the Framers were motivated by the fear that, unless the public goods problems associated with the production of expressive works and inventions could be overcome by statutory means, the public welfare would suffer from an underproduction of the products necessary for the expansion of knowledge. This fear had more significance for the United States in the 1780s than it may have for Britain in 1710. While the promotion of learning language in the Statute of Anne may well have been pure boilerplate or aimed at the interests of a very small elite, the Framers are likely to have invested quite different, and more weighty meaning in the phrase. They were determined to promote general civic improvement.

⁶⁴ See Diane Leenheer Zimmerman, *It's an Original! (?): In Pursuit of Copyright's Elusive Essence*, 28 COLUM. J. L. & ARTS 187, 198 & n. 72. L. Ray Patterson has commented that in his studies of American copyright, he was unable to find at any stage a fully developed conceptual framework. PATTERSON, *supra* note __, at 180.

The language adopted for the clause’s preamble specifies a sole purpose for the granting of both copyrights and patents -- to promote science and the useful arts.⁶⁵ The slant toward public education and enlightenment this language portends is suggested by language in the proposed provisions originally submitted to the drafting committee by Madison and by Pinckney. Each, in addition to the patent and copyright language, proposed that the federal government be authorized to promote progress through such other means as monetary grants and the establishment of institutions of learning.⁶⁶ One scholar has argued that the reason the Framers adopted the copyright and patent route while dropping the language about grants, establishment of institutions of learning, and other forms of direct support of authors and inventors was simply because it was the cheaper alternative.⁶⁷

Michael Birnhack has pointed out, in further support of the claim that the language about learning was to be taken seriously and in a broader sense than that of the Statute of Anne, that the newly minted United States was a frontier nation with a strong belief in the perfectibility of political structures and of its citizens.⁶⁸ There is much to suggest a belief that only an educated population could avoid the errors of past forms of governance and create a “more perfect union.”⁶⁹ It would stand to reason, then, that

⁶⁵ The language in the preamble did not appear in the draft versions supplied either by Madison or by Pinckney, but there is no record of why it was added or by whom. WALTERSCHEID, *supra* note __, at 125.

⁶⁶ Pinckney, for example, proposed empowering Congress to “establish public institutions, rewards and immunities” to promote agriculture, commerce, trades and manufactures. Bugbee, *supra* note __, at 302. Madison suggested adding “To encourage by premiums and provisions, the advancement of useful knowledge and discoveries.” *Id.*

⁶⁷ WALTERSCHEID, *supra* note __, at 91-92.

⁶⁸ Michael D. Birnhack, *The Idea of Progress in Copyright Law*, 1 BUFF. INTELL. PROP. L.J. 3, 17-21, 33-41 (2001).

⁶⁹ As Birnhack points out, President Washington admonished Congress in 1790, to get busy and pass a copyright law, which up until then, it had failed to do, on the grounds that knowledge was the most certain basis for human happiness and fundamental to democratic participation. *Id.* at 37. In passing the first Act shortly thereafter, the House wrote that “[T]he promotion of science and literature will contribute to the

when the Framers talked about copyrights as a means to promote “science,” it was envisioning them as a means of increasing the level of public education and enhancing the intellectual development of self-governing citizens.

But whether this was the only function of copyright, and how it was supposed to mesh with the various natural rights and deserts-based arguments that were also clearly in favor at the time, is unclear, despite the fact that it has become something of a mantra in American law to assert that the intellectual property clause puts copyright in the service first of the public, and, only secondarily, of the author. This strain of interpretation sees the main goal of intellectual property as serving the public’s interest in accessing and reusing information goods by giving authors and disseminators of works enough, but only enough, protection to ensure that the public’s use will not diminish or cut off the incentive to continue producing new works.⁷⁰ If added benefits requested by authors and their assigns do not increase public welfare, those additions should not be granted.

However, the case can also be made that copyright was intended to be far more author-centric (and by extension pro-publisher) than the prior formulation suggests. To begin with, Blackstone’s Commentaries, which were highly influential with American lawmakers in the early years of the Republic, expressed a strong belief in natural law as a basis for property rights generally, and particularly in the product of man’s “rational

security of a free Government.” *Id.* (citing Thorvald Solberg, COPYRIGHT IN CONGRESS 1789-1904, at 117-18 (1905)).

⁷⁰ For statements of this principle, see, e.g., *To Amend and Consolidate the Acts Respecting Copyright: HR 2222 with 28,192 Attached*, 60th Cong. (Feb. 22, 1909), reprinted in 1 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT 7 (E. Fulton Brylawski & Abe Goldman eds., 1976) (“Not primarily for the benefit of the author, but primarily for the benefit of the public, such rights are given.”); *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984). For the same argument by legal scholars, see Glynn S. Lunney, *Reexamining Copyright’s Incentives-Access Paradigm*, 49 VAND. L. REV. 483, 492-98 (1996); William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1703-04 (1988).

powers.”⁷¹ As already noted, many of the state laws that were supplanted when federal copyright was enacted expressed a deep belief in the moral claim of authors to protection.⁷² And it makes perfect sense that this same conviction was held by at least some number of the Framers who voted to support the idea of a national copyright system.⁷³ The lack of clarity on this point is demonstrated by Madison’s explanation of the copyright and patent clause in Federalist Papers – the closest thing we have to legislative history for the provision.⁷⁴ He first stated that giving Congress power over copyrights satisfied the need for national uniformity in the law, but then went on to add that “promotion of “the public good fully coincides . . . with the claims of individuals,”⁷⁵ (that is, of authors and inventors) to protection. This ambiguous phrasing could be understood to say that the more rights authors are given, the better off, ipso facto, the public will be. This would put the public welfare on the tag end of copyright rather than as its top priority, and would accord with a complete respect for authors’ claims to be protected based on their just deserts and their liberty interests. As long as they continued

⁷¹ In his Commentaries, Blackstone wrote:

There is still another species of property, which (if it subsists by the common law) being grounded on labour and invention is more properly reducible to the head of occupancy than any other; since the right of occupancy itself is supposed by Mr. Locke, and many others, to be founded on the personal labour of the occupant. And this is the right, which an author may be supposed to have in his own original literary compositions; so that no other person without his leave may publish or make profit of the copies. When a man by the exertion of his rational powers has produced an original work, he seems to have clearly a right to dispose of that identical work as he pleases, and any attempt to vary the disposition he has made of it, appears to be an invasion of that right.

WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 404-07 (Thomas M. Cooley ed., 3d ed. 1884).

⁷² Oren Bracha, *The Statute of Anne: An American Mythology*, __ HOUSTON L. REV. __, __ (2010).

⁷³ Bracha points out that the three person committee charged with considering whether to add power over intellectual property to the federal constitution expressly invoked both natural rights and the desirability of rewarding genius as reasons to protect copyright. *Id.* at __.

⁷⁴ Some of the same people, including Madison, were involved in passage of their own state’s provision and voted to add the power to grant copyrights to the federal constitution. *See supra* text accompanying note __.

⁷⁵ THE FEDERALIST NO. 43 (James Madison), available at <http://www.foundingfathers.info/federalistpapers/fed43.htm>.

to publish new works, the public was getting exactly the benefit the Framers intended for it.⁷⁶

The first copyright statute added nothing to help clarify how the objectives embodied in the constitution should be understood because Congress modeled it almost wholly on the Statute of Anne.⁷⁷ Given the gloss that had attached to that statute after decades of quarrels over what it meant, the choice of it as a template for an American law could certainly not help clarify anyone's intentions. In fact, once the Constitution was ratified and the new copyright act passed, courts and scholars continued to espouse a variety of views about why Congress provided for copyrights. Many thought that authors had a special claim to protection based on the value of their contributions to society,⁷⁸

⁷⁶ That Madison's text remains susceptible to ambiguous interpretation is supported by language in Justice Ginsburg's opinion for the majority in *Eldred*. In upholding Congress's decision to extend existing copyrights to a term of life plus 70 years, despite the fact that such retroactive extension has only the loosest claim to being an "incentive," she quoted the following language from *Mazer v. Stein*, 374 U.S. 201, 219 (1954):

Error! Main Document Only.The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.

537 U.S. at 214.

⁷⁷ The American version lacked a provision to deal with price fixing or price gouging by publishers, and it added maps and charts to the subject matter of copyright. But otherwise the language tracks the Statute of Anne quite closely. Bugbee, *supra* note ___, at 358.

⁷⁸ Some scholars point to *Burrow-Giles Lithography Co. v. Sarony*, 111 U.S. 53 (1886) with its definition of the author as one who embodies his or her mental conception in the work as a prime example of "reward for genius" reasoning. Peter Jaszi, *Toward a Theory of Copyright: The Metamorphosis of "Authorship"*, 1991 DUKE L. J. 455, 480-81. But references to the idea that copyright is a reward for the benefit of receiving works marked by the author's genius were abundant in the caselaw. See, e.g., *Pierpont v. Fowle*, 19 F. Cas. 652, 659-60 (C.C.D. Mass. 1846) (copyright intended to "encourage and aid genius"); *Jollie v. Jacque*, 13 F. Cas. 910, 914 (C.C.N.Y. 1850) (referring to protection of a piece of music which is "the production of the mind and genius of the author"). Gordon terms this the "just rewards" theory, and locates in a theory of restitution. Wendy J. Gordon, *Toward a Jurisprudence of Benefits: The Norms of Copyright and the Problems of Private Censorship*, 57 U. CHI. L. REV. 1009, 1038-39 (1990). Another way to understand the notion of the author as entitled to a reward is offered by Jane Ginsburg:

[A]n author is (or should be) a human creator who, notwithstanding the constraints of her task succeeds in exercising minimal personal autonomy in her fashioning of the work. Because, and to the extent that, she moulds the work to her vision (be it even a myopic one), she is entitled not only to recognition and payment, but to exert some artistic control over it.

others argued that the source of their right was in natural law.⁷⁹ Illustrative of the hold that belief in the natural rights and just deserts of authors held in copyright, it took over forty years from the passage of the first copyright act for the courts to reject the very same argument that had lost in the House of Lords in 1774: that common law copyright in the United States did not survive the expiration of the term of the statutory copyright.⁸⁰

b. Copyright confusion in nineteenth-century America

Where American copyright would go in its first century -- rooted as it was in the contradictory impulses of the Statute of Anne and its immediate aftermath, and touched by a uniquely American sensibility -- can hardly have been clear. On the one hand, the public's interests in learning and improving on the past could dominate, leading to a copyright that would remain both brief in term and narrow in scope. The same impulse could also incline the courts and Congress to be selective about the kinds of works that could be copyrighted, since the case could be made that not all writings were likely to promote learning.

On the other hand, natural rights and liberty-based conceptions of intellectual property -- which were plausible in light of the language in the prior state laws and that of Madison in his ambiguous contribution on the subject to the Federalist Papers -- might counsel an ever-broadening duration and scope for copyright, and extend to anything that evinced the application of someone's effort in its creation. For example, control might move beyond simple reproduction to the making of derivative works (including

Jane C. Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, 52 DePaul L. Rev. 1063, 1092 (2003).

⁷⁹ Eaton Drone, the major American commentator on copyright in the nineteenth century, was a vigorous proponent of the natural right theory of intellectual property. EATON S. DRONE, *A TREATISE ON THE LAW OF INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES* 3-8 (1879).

⁸⁰ *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834). For a discussion of the case and its history, see Craig Joyce, *The Story of Wheaton v. Peters*, in *INTELLECTUAL PROPERTY STORIES*, *supra* note __, at 36.

abridgments and translations) and even to the performance of works. Natural rights reasoning would counsel the expansion of copyright well beyond books, maps and charts to encompass all sorts of works, including, including, for example, photography and works of fine art.⁸¹

As it turned out, in the nineteenth century, all these contradictory routes were followed, some successfully and some abortively. Efforts to limit copyright, to keep it narrow and focused on the public interest took several forms. First, as noted above, the persistent struggle to make copyright protection permanent failed when a majority of the Supreme Court in *Wheaton v. Peters* rejected the claim that common law copyright survived the end of the statutory term.⁸² *Wheaton* was notable for a second reason as well: it established that statutory copyright could not be enjoyed if the claimant did not comply strictly with the statute's requirements, such as deposit and notice.⁸³ The failure to obtain a valid statutory copyright upon publication, of course, resulted in the work's immediate injection into the public domain. The insistence on strict compliance supported the view that copyright was a privilege rather than a natural right.

The nineteenth century, too, saw the elaboration of what has come to be known as the fair use doctrine. Although today the doctrine provides defendants with a possible excuse for what might otherwise be deemed infringing copying, fair use started out as a device to deal with a tricky problem. When copyright protected owners only against direct piracy, it was clear that copying a work in its entirety was infringement. But what about copying some significant portion of it or just varying the expression of the original a little bit? Attempts to answer this question were what gave rise to modern fair use. In

⁸¹ As it will be seen, all of these in fact came about. See *infra* text accompanying notes ___ to ___.

⁸² See *supra* note ___ and accompanying text.

⁸³ *Wheaton*, 33 U.S. at 662-67.

this early period, when neither abridging someone else's work nor translating it qualified as a violation of copyright,⁸⁴ one could think of judges as applying fair use reasoning to expand the copyright owner's rights a little, ensuring that at least some forms of incomplete copying would be actionable. But, whatever the reason, Justice Story in *Folsom v. Marsh*⁸⁵ did begin a process of elaborating criteria that would serve to excuse certain types of partial copying on the grounds that it was not harmful to the author's legitimate interests.

But a quite different attack, imposing limitations on copyright, drew from the same language in the preamble to the copyright and patent clause that traces back to the Statute of Anne. Because the Constitution stated that the purpose of authorizing Congress to provide for copyrights was to promote the advancement of science (that is, learning), judges reasoned that copyright could not be used to protect writings that did not serve that purpose. Thus, nineteenth century courts took on the task of determining what did and what did not meet the criterion of promoting science, turning the language of the preamble into a qualitative limit on copyrightability. Material might be excluded from protection because it was too ephemeral or too trivial to be worthy of protection. Thus courts refused on various occasions to permit copyright in labels,⁸⁶

⁸⁴ *Stowe v. Thomas*, 1 Pitts 82, 23 F. Cas. 201 ((C.C.E.D. Pa. 1853)) (No. 13,514) (a translation of Stowe's book into German does not violate her copyright). For a case on abridgements, see, e.g., *Gyles v. Wilcox*, (1740) 26 Eng. Rep. 489 (Ch.1740). See also Deazley, *supra* note __, at __. **Error! Main Document Only.** Two excellent articles discuss the latitude permitted by early courts for borrowing from copyrighted works owned by others. See Laura G. Lape, *Transforming Fair Use: The Productive Use Factor in Fair Use Doctrine*, 58 ALB. L. REV. 677, 680-88 (1995); Lloyd L. Weinreb, *Fair Use and How It Got That Way*, 45 J. COPYRIGHT SOC'Y 636, 636-40 (1998).

⁸⁵ 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901).

⁸⁶ See, e.g., *Higgins v. Keuffel*, 140 U.S. 428, 432 (1891) (labels for ink bottles not copyrightable because they did not "instruct and amuse"); *Clayton v. Stone*, 5 F. Cas. 999 (C.C.N.Y. 1829) (No. 2872) (in case involving copying of financial data, court says newspapers too ephemeral to be considered copyrightable). Eaton Drone, the influential copyright treatise writer of the nineteenth century, was quite clear that a work could not be copyrighted unless it constituted "a material contribution to useful knowledge." EATON S.

advertisements,⁸⁷ and even daily and weekly newspapers.⁸⁸ But, by determining copyrightability based on the value of the work to the public, courts did not have to look particularly hard at the qualitative nature of the author's contribution to it. Nineteenth century courts commonly granted copyrights to useful compilations of pre-existing or non-copyrightable materials, based solely on a sweat-of-the-brow, property-through-labor rationale.⁸⁹ The protection given to works of this kind consisted of requiring anyone who wanted to compile the same materials to make another work start the research and data collection from scratch, rather than simply copying what he needed from the preceding work. And, as noted earlier, abridgments and translations were treated as independently copyrightable and noninfringing because they were socially valuable and represented a significant expenditure of labor by the party who prepared them.⁹⁰

A somewhat different attempt to impose a qualitative limitation on copyrightability was the requirement that the work be "original." Guesswork must inevitably play a role in trying to understand the impulse led to the announcement of this criterion. But it emerged as an attempt to interpret what was meant by the Framers' use in the copyright clause of the word "author." This was a subject of some dispute in Britain in the eighteenth century, and it would not be surprising that the confusion carried over into American copyright law. As Simon Stern points out, some advocates of

DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES 208 (1879).

⁸⁷ See, e.g., *J.L. Mott Iron Works v. Clow*, 82 F. 316, 318-19 (7th Cir. 1897) (denying copyright to an illustrated catalogue of bathroom fixtures).

⁸⁸ *Clayton v. Stone*, 5 F. Cas. 99 (C.C.N.Y. 1829) (No. 2872).

⁸⁹ See, e.g., *List Pub. Co. v. Keller*, 30 F. 772 (C.C.N.Y. 1887) (infringement to copy names and addresses from another's copyrighted compilation); *Blunt v. Patten*, 3 F. Cas. 763 (C.C.N.Y. 1828) (No. 1580) (defendant wishing to make modifications to a pre-existing chart must do all the research over again and cannot copy from the original).

⁹⁰ See, e.g., *Lawrence v. Dana*, 15 F. Cas. 26, 59 (C.C.D. Mass. 1869) (No. 8136) (doctrine that abridgments permissible under copyright too venerable to be open to dispute); see also *Stowe v. Thomas*, 23 F. Cas. 201 (C.C.E.D. Pa. 1853) (No. 13,514) (holding a translation not to be infringing, but an independently copyrightable work).

authorship as a source of natural rights based their claim on the fact that the contributions of an author were marked by “literary genius and originality,” whereas others (including Blackstone) took a more labor-based approach, requiring only that the “author” had done the work himself and had not copied.⁹¹

One reason to opt for the romantic view of authorship was that it would not have the uncomfortable consequence of rendering even the most mundane productions protectable simply because they had not been copied. In any event, the United States Supreme Court first mentioned originality as a substantive criterion for copyrightability in *The Trade-Mark Cases*, decided in 1879.⁹² And shortly after, in *Burroughs-Giles Lithographing Co. v. Sarony*, the Court expanded on the matter, in a case involving a noted photographer’s portraits of the author Oscar Wilde. While recognizing that the images in question were created not by hand but entirely by means of a mechanical process, the Court held that copyright could nonetheless attach so long as the resulting photographs gave evidence of “intellectual production, of thought, and conception on the part of the author.”⁹³ The implication was that sophisticated studio portraits demonstrated the requisite originality, although simple, candid snapshots might well not do so.

Had these two qualitative limitations on copyrightability survived, they might have managed to impose a kind of coherence on at least some of the varied strains of thinking that marched under the banner of copyright theory, bringing together the hitherto oppositional author-centric and public benefit understandings of copyright

⁹¹ Stern, *supra* note __, at 70.

⁹² 100 U.S. 82, 94 (1879) (to be copyrightable, a work must be “original, and ...founded in the creative powers of the mind”).

⁹³ 111 U.S. 53, 60 (1884).

into some semblance of coexistence. The public would endure the limits imposed by copyright on access and use, as well as the risk of higher prices, only where the work in question furthered learning, informed debate, fueled the imagination, and was produced by an author who evinced sufficient qualities of genius to deserve encouragement. Admittedly, this consensus would still have required compromises, for example, in deciding what to do about useful works that represented more the exertion of labor rather than of genius. But, the effort, particularly since it found its basis in an interpretation of the language of a written constitution, offered a possible (if not simple) way to wrest some solid meaning from the uncertainty bequeathed us by the Statute of Anne and the battle of the booksellers.

But the potential of qualitative limits to define what copyright was about for all intents and purposes went through the shredder when Justice Holmes issued his opinion for the majority in *Bleistein v. Donaldson Lithographing Co.*⁹⁴ The dispute in *Bleistein* involved advertising posters -- subject matter that, as already mentioned, had previously found little favor in the courts on the ground that it was not a kind of expressive work that promoted learning.⁹⁵ The case could have been resolved, had Holmes wished it, in the plaintiff's favor on narrow grounds -- the posters at issue quite plausibly could be described as highly original and creative pictorial works, the purpose of which -- to advertise the circus -- was incidental to their inherent qualities.

But that approach did not appeal to Justice Holmes. He seemed altogether uninterested in the argument that the preamble to the copyright and patent clause imposed

⁹⁴ 188 U.S. 239 (1903). For a history of the case, and a discussion of its consequences, see Diane Leenheer Zimmerman, *The Story of Bleistein v. Donaldson Lithographing Company: Originality as a Vehicle for Copyright Inclusivity*, in *INTELLECTUAL PROPERTY STORIES*, *supra* note __, at 77.

⁹⁵ The Sixth Circuit Court of Appeals had ruled below that the posters were ineligible for copyright on this ground. *Courier Lithographing Co. v. Donaldson Lithographing Co.*, 104 F. 993 (6th Cir. 1900).

qualitative limits on protectability.⁹⁶ Making distinctions that rely on the nature, quality or purpose of the work at issue, he argued, was actually improper: “It would be a dangerous undertaking,” Holmes famously opined, “for persons trained only in the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.”⁹⁷ And, as for originality – well, he wrote, that is not much of a meaningful stricture, either. As long as the work contains something that the author did not copy from another, it meets the standard for originality. The “something” in question clearly amounted, in Holmes’ view, to very little: even a person’s handwriting, he suggested, could be sufficient to express an author’s “singularity.”⁹⁸

The *Bleistein* opinion came to be seen as setting out a fundamental principle of copyright, so much so that its holding was reflected in the language of the next major rewrite of the copyright law. The 1909 Act expressly protected all the writings of an author,⁹⁹ and registration was specifically permitted for “prints or labels used for articles of merchandise, as well as all pictorial illustrations.”¹⁰⁰ Over the ensuing decades, only a tiny number of works were refused registration by the Copyright Office based on insufficient originality, and courts pretty much assumed that any form of fixed expression

⁹⁶ The view that the preamble imposes no substantive limitations on Congress’s power to enact copyright laws continues to the present. *See, e.g., Eldred v. Reno*, 239 F.3d 372, 387 (D.C. Cir. 2001) (rejecting the argument “that the introductory language of the Copyright Clause constitutes a limit on congressional power.”) (quoting *Schnapper v. Foley*, 667 F.2d 102, 112 (1981)), *aff’d sub nom. Eldred v. Ashcroft*, 537 U.S. 186 (2003). For further discussion, see *infra* note ___.

⁹⁷ *Bleistein*, 188 U.S. at 251.

⁹⁸ *Id.* at 250. Subsequently, Judge Jerome Frank went so far as to assume that any variation that was above de minimus was a sufficient contribution to support a copyright for a derivative copy of a public domain art work – even if the “contribution” was the result of inadvertency. *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 104-05 (2d Cir. 1951).

⁹⁹ ⁹⁹ Copyright Act of 1909, ch. 320, § 4, 35 Stat. 1075, *available at* <http://law.copyrightdata.com/index.php>. Since authorship, in Holmes’s terms, simply meant not copying and showing some evidence of “singularity,” the provision in the 1909 Act clearly did not envision a high threshold for coverage.

¹⁰⁰ *Id.* at § 5(k). Interestingly, the category of photographs, without limiting language, was also added. *Id.*, §5 (j).

that was not affirmatively shown to have been copied from elsewhere could sustain a copyright.¹⁰¹ One might say that *Bleistein* was the apotheosis of the labor-based understanding of copyright, although it did not express a view, one way or the other, on any additional aspect of the proper balance between the author's rights and those of the public.

All the while, however, that courts were attempting to impose structural limits on the coverage of copyright, the idea that authors had an entitlement to broad and deep protection, based either on genius or on natural law, continued to exert force. First, the term of copyright began to be expanded. In 1831, a revision of the Copyright Act extended the term of the copyright to 28 years plus a possible renewal for 14 more years.¹⁰² If the author died during the first term, his widow or children could renew.¹⁰³ And the subject matter eligible for copyright was expanded so that instead of covering merely books, maps and charts, musical compositions as well as prints and engravings could be protected.¹⁰⁴ A glance at the debate preceding the passage of the 1831 Act makes clear that those favoring the extension were acting out of sympathy with a natural rights view of an author's property in his work.¹⁰⁵ Opponents tried to argue that

¹⁰¹ The fact that the work was "ephemeral" ceased to count against it. Courts were willing to grant protection to computer game displays, despite the fact that the displays changed constantly and could be altered by users. See *Williams Electronics, Inc. v. Arctic Intern., Inc.*, 685 F.2d 870 (3d Cir. 1982); *Atari Games Corp. v. Oman*, 979 F.2d 242 (D.C. Cir. 1992).

¹⁰² Copyright Act of 1831, Ch. 16, § 2, 4 Stat. 436.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at § 1. Prints and engravings were added to the statute for the first in 1802. 1802 Amendment (1802), in PRIMARY SOURCES ON COPYRIGHT, *supra* note __.

¹⁰⁵ A report of the debate describes Rep. Gulian Crommelin Verplanck saying:
[T]he work of an author was the result of his own labor. It was a right of property existing before the law of copyrights had been made. That Statute did not give the right, it only secured it... .
House Debate (1831), in PRIMARY SOURCES ON COPYRIGHT, *supra* note __.

extending the term violated the contract between authors and the public that was the foundation of copyright.¹⁰⁶ Natural rights carried the day.¹⁰⁷

Over the rest of the century, the argument that authors and their families were entitled by innate right to more and greater protection continued to gain traction. By 1870, copyright law covered a variety of additional kinds of works such as photographs, sculpture, dramatic works, paintings and models for works of fine arts.¹⁰⁸ Public performance of dramatic works, rather than merely copying them, became actionable.¹⁰⁹ As noted earlier, by 1909, coverage extended to “all the writings of an author,” suggesting that the form of the expressive work was now irrelevant to whether or not it was covered by the statute.¹¹⁰ Public performance rights were further expanded, and authors were given extensive control over the making of derivative works by third parties, including dramatizations, translations and musical arrangements.¹¹¹ The statute specifically extended coverage to such information products as directories and gazetteers.¹¹² And the term of the copyright was increased to 28 years with a possible 28 year renewal.¹¹³

¹⁰⁶ *Id.* (Statement of Rep. Michael Hoffman).

¹⁰⁷ To a great extent, this reasoning was flawed, since authors frequently failed to benefit from the increased duration, largely because they conveyed their rights up front and could not thereafter benefit from any unexpectedly lengthy flow of profits from their works. The Romantic poet William Wordsworth, for example, fought hard to convince Parliament to extend the term of copyright without ever seeming to acknowledge that doing so would have little if any positive effect on authors’ well-being. CATHERINE SEVILLE, *LITERARY COPYRIGHT REFORM IN EARLY VICTORIAN ENGLAND 159-75* (1999). That did not stop commentators from lamenting about the “inadequate” term of U.S. copyright. One decried the fact that American copyright displayed a lower level of “ethical development” than either France or Spain, and that the law risks taking “from an author the control of his book at the very moment when he is at the height of his fame and when the infirmities of age make the revenue from his copyrights most necessary.” Brander Matthews, *The Evolution of Copyright*, 5 *POL. SCI. Q.* 583, 595 (1880).

¹⁰⁸ Copyright Act of 1870, Ch. 230, § 86, 16 Stat. 198, available at <http://www.copyrighthistory.org>.

¹⁰⁹ *Id.*, § 101.

¹¹⁰ Copyright Act of 1909, Ch. 320, § 4, 35 Stat. 1075, available at <http://law.copyrightdata.com>.

¹¹¹ *Id.*, § 1(e).

¹¹² *Id.*, § 5(a).

¹¹³ At the same time, the positive law continued to impose stiff requirements to obtain this protection. Publication of a work without proper notice was generally fatal to a claim of copyright, *id.* at §§ 9, 18-20,

In the courts, too, natural rights continued to play a role in the thinking of the judiciary. The ruling of the majority in *Wheaton v. Peters* generated a heated dissent by Justice Thompson, who wrote: “In my judgment, every principle of justice, equity, morality, fitness and sound policy concurs, in protecting the literary labours of men to the same extent that property acquired through manual labour is protected.”¹¹⁴ Half a century after the Supreme Court rejected the argument that authors’ property rights were perpetual, an Illinois Circuit Court judge described the decisions in *Wheaton*, and in *Donaldson* before it, as “rather trenching upon the inherent rights of authors.”¹¹⁵ In his view, copyright was intended to “secure” rights the author already enjoyed at common law, not to make it difficult for them obtain them. Therefore, he concluded, the formal requirements for obtaining copyright should be “liberally” applied to avoid defeating the purpose of the statute – “to give effect to what may be considered the inherent right of the author to his own work.”¹¹⁶

By the time statutory copyright reached the ripe old age of 120 in the United States, and the 1909 Act was firmly in place, it was evident that the core confusions that existed at the time the copyright and patent clause was added to the Constitution had never been resolved, and that copyright continued to lack a core, logical organizing principle. In its absence, rationalizing the protections offered in the statute or giving firm guidance to courts charged with the responsibility of interpreting the law was challenging. By then, U.S. copyright law offered up to 56 years of protection for any writing, however trivial, that originated with an author in the sense of not being “copied,”

and failure to make a timely deposit of copies of the work with the Library of Congress could result in a forfeiture of rights. *Id.* at § 13.

¹¹⁴ *Wheaton v. Peters*, 33 U.S. 591, 672 (Thompson J., dissenting).

¹¹⁵ *Myers v. Callaghan*, 5 F. 726, 732 (C.C.N.D. Ill. 1881).

¹¹⁶ *Id.*

at least as long as the proprietor, at publication, properly complied with the formal requirements of the statute.

What no one seemed to be asking is why this should be so. Over the course of the previous two hundred years, starting with the Statute of Anne, many thoughtful people were sure they could explain copyright, or assumed that it could be explained, but its sense and purpose continued to remain always just a little out of reach. Now, with the failure of such nineteenth century limitations as originality and the promotion of learning to serve as templates to shape and confine the law, and the continued inability of claims of natural law to prevail, copyright reached the twentieth century still as mysterious in purpose as it was at its start.

C. The Consequences of Confusion: Modern Copyright

As can be seen, the failed experiments of the nineteenth century left contemporary copyright in the curious position of offering powerful protections for writings, very broadly defined, but without much in the way of filters to avoid having the law invoked even by those who had done nothing that would seem obviously to merit such solicitousness on the part of the government. By the 1950s, an influential opinion by a well-regarded judge went so far as to suggest that even a mark on a piece of paper that was the result of a start caused by a thunderclap constituted sufficient authorial input to justify a copyright for a derivative work based on a public domain original.¹¹⁷

What was missing was an inquiry into the rationale for offering the expansive (and expensive) protections of copyright to virtually any expression that has been fixed in tangible form. Was this the ultimate victory of the most simplistic version of Lockean

¹¹⁷ Alfred Bell & Co., Ltd. v. Catalda Fine Arts, Inc., 191 F.2d 99, 104-05 (2d Cir. 1951)(Frank, J.).

natural rights? A Hegelian statement about the value society should place on all emanations of the individuality of the person who produced it? In what sense was the public interest served by such a system?¹¹⁸

These were fair questions in 1909. In the time since then, however, the strains between the public interest perspective and the authors' rights one (need it be added, the copyright industries' interests as well?) have if anything grown more acute. The passage of the 1976 Copyright Act extended the term of copyright dramatically from a possible 56 years to a term set by the lifespan of the author plus an additional 50 years.¹¹⁹ Two decades later, the term was again extended, this time to 70 years after the author's death.¹²⁰ As a result, works now do not enter the public domain for about a century, during which time their owners become increasingly difficult to identify should anyone want permission to use them.¹²¹ Furthermore, copyright now kicks in as soon as the work was fixed in tangible form, thereby diluting the traditional assumption that access by the public is an essential element of the legal bargain between authors and users. Formal

¹¹⁸ The examples of theoretical understandings of copyright do not exhaust the field. Neil Netanel, for example, in a widely cited paper suggests that copyright is a mechanism designed to support democratic civil society by maintaining "autonomous, self-reliant authorship." Neil Weinstock Netanel, *Copyright and A Democratic Civil Society*, 106 Yale L. J. 283, 288 (1996). But I have confined the discussion in this Article to those theories that are clearly reflected in either legislation, treaties or judicial decisions.

¹¹⁹ Pub. L. No. 94-553, sec. 101, § 302(a), 90 Stat. 2541, 2572 (1976) (codified as 17 U.S.C. § 302(a)).

¹²⁰ Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, § 102(b), 112 Stat. 2827, 2827 (1998) (amending 17 U.S.C. § 302).

¹²¹ This is the so-called "orphan works" problem. Orphaned works are ones that cannot be licensed because the owner can no longer be ascertained. See UNITED STATES COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS (2006). The Report describes common impediments to identifying copyright owners, *id.* at 23-24, examples of uses of orphan works that cannot be made, *id.* at 36-40, the legal history giving rise to the problem, *id.* at 41-68, and finally, proposed solutions to it. *Id.* at 69-89. For further discussion, see also Pamela Brannon, *Reforming Copyright to Foster Innovation: Providing Access to Orphaned Works*, 14 J. INTELL. PROP. L. 145 (2006); Olive Huang, *U.S. Copyright Office Orphan Works Inquiry: Finding Homes for the Orphans*, 21 BERKELEY TECH. L.J. 265 (2006); Joshua O. Mausner, *Copyright Orphan Works: A Multi-Pronged Solution to Solve a Harmful Market Inefficiency*, 55 J. COPYRIGHT SOC'Y 517 (2008).

requirements to obtain and retain copyright have withered away,¹²² making copyright seem more and more like a right than the privilege it had previously been considered; authors and owners are no longer required to elect copyright protection or take any affirmative steps to secure it.

Many of these changes in the law were made in the 1976 Copyright Act so that the United States could eventually choose to adhere to the Berne Convention for the Protection of Artistic and Literary Works.¹²³ Joining Berne, and subsequently the TRIPS agreement¹²⁴ have pushed American law closer to the European author-centric, natural rights model by limiting its discretion to carve out copyright exceptions,¹²⁵ and by requiring such unusual measures as restoration of copyrights for those foreign works that had previously fallen into the public domain in the United States through failure to

¹²² Notice is no longer required at publication to gain or preserve a copyright. 17 U.S.C. § 401(a) now says that notice “may” be attached. Deposit is mandatory, but failure to comply will not void a copyright. *Id.*, § 407. Registration is optional, *id.*, § 408, although it is required before an infringement action can be filed, and the availability of certain remedies depends upon registration. *Id.*, § 412.

¹²³ The United States joined Berne in 1988. Most of the requirements for accession (including the life plus 50 term of protection) had been put into place by the 1976 Copyright Act; but a few more adjustments, particularly elimination of any mandatory notice provision and broadening the protection for architectural works to include the structure itself, had to be made. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853-2861 (amending scattered sections of 17 U.S.C.).

¹²⁴ TRIPs stands for Trade-Related Aspects of Intellectual Property Rights. Apr. 15, 1994, 108 Stat. 4809, 1869 U.N.T.S. 299. Among other things, TRIPs makes most of the provisions of the Berne Convention enforceable by the World Trade Organization. *Id.* art. 9(1). The U.S. is also a signatory to other intellectual property treaties with their own sets of requirements. See 1996 WIPO Copyright Treaty (WCT), Dec. 20, 1996, S. Treaty Doc. No. 105-17, 36 I.L.M. 65, *available at* http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html (requiring, among other things, that signatories protect against circumvention of technological measures used to protect copyrighted works and alteration or removal of copyright information from works); WIPO Performances and Phonograms Treaty (WPPT), Dec. 20, 1996, S. Treaty Doc. No. 105-17, 36 I.L.M. 76, *available at* http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html (requiring remuneration to performers and producers of sound recordings from proceeds generated by public communication of the works).

¹²⁵ For example, the United States decision to exempt certain restaurants and small businesses from the requirement of obtaining licenses to perform copyrighted music, 17 U.S.C. § 110(5) was successfully challenged before a World Trade Organization panel; the government now pays a fee annually to the complainants. WTO Dispute Settlement Proceeding Regarding Section 110(5) of the Copyright Act, 66 Fed. Reg. 8838-39 (Feb. 2, 2001).

comply with statutory formalities.¹²⁶ The expansionary trend has gone so far even to encompass the addition to American copyright of limited moral rights,¹²⁷ although the government has continued to resist adopting a full-fledged moral rights regime.¹²⁸ These changes, profound as they have been, do not appear to reflect some affirmative conclusion by Congress that copyright in the United States was instituted ab initio to protect authors' natural rights. Rather, they have occurred because simply because they furthered the country's position in the arena of international trade.¹²⁹ But the latitude under the Copyright Clause to adopt such changes can clearly be traced to the confusion about rationales identified in this Article.

Although these developments which have, at the very least, diluted the primacy of the public's interest in the benefits of new expressive works, it is interesting to note that courts with some frequency continue to recite the familiar mantra that copyright is only secondarily for the benefit of authors.¹³⁰ And there remain aspects of the Copyright Act

¹²⁶ 17 U.S.C. § 104A.

¹²⁷ Authors of certain works of visual art are given special rights of attribution and integrity. 17 U.S.C. § 106A. TRIPs, however, does not require compliance with the moral rights provisions of Berne. Agreement on Trade Related Aspects of Intellectual Property Rights, art. 9(1), Apr. 15, 1994, 33 I.L.M. 1 (“[m]embers shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom.”).

¹²⁸ For discussions of the reasons for this resistance, see, e.g., Holst, *supra* note __, at 115-17; Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT'L L.J. 353 (2006).

¹²⁹ ¹²⁹ Mihály Ficsor, *The WIPO “Internet Treaties:” The United States As The Driver; The United States As The Main Source Of Obstruction--As Seen By An Antirevolutionary Central European*, 6 J. MARSHALL REV. INTELL. PROP. L. 17, 17 (2006); Neil W. Netanel, *The Next Round: The Impact Of The WIPO Copyright Treaty On TRIPs Dispute Settlement*, 37 VA. J. INT'L L. 441, 449-61 (1997).

¹³⁰ In *Mazer v. Stein*, for example, the Court wrote that “[t]he copyright law, like the patent statutes, makes reward to the owner a secondary consideration.” 347 U.S. 201, 219 (1954). This sentiment was repeated in fuller form thirty years later in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 431-322 (1984):

The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good. 'The

that are clearly meant to favor users over owners. The first sale doctrine¹³¹ applies an exhaustion of rights principle, so that, in most instances, once the copyright owner has sold particular copies of an information good, their purchasers are free to lend or vend them as they wish. The 1976 act also expressly made fair use a defense, available in all infringement actions, including ones involving the unconsented use of unpublished works.¹³² Chapter One of the Act is replete with numerous provisions that impose limitations on copyright owner's powers, largely to serve public-regarding objectives.¹³³

The Supreme Court even tried to bring back qualitative limits on copyright twenty years ago in *Feist Publications, Inc. v. Rural Telephone Service Co.*¹³⁴ In this decision, the Court first lay to rest the hoary practice of giving copyright protection to reward labor. It ruled that the mere collection and publication of data -- however labor-intensive and expensive -- did not justify a grant of intellectual property rights because the information compiled was factual, and therefore did not "originate" with the author. But the truly striking part of the opinion was the second thing the Court said about originality. The case involved ostensible infringement of telephone directory white pages. Although the gathered facts could not be protected, arguably the way they were selected and arranged into a directory could have been the basis for protection. No allegation was

sole interest of the United States and the primary object in conferring the monopoly,' this Court has said, 'lie in the general benefits derived by the public from the labors of authors.'

¹³¹ 17 U.S.C. § 109(a).

¹³² 17 U.S.C. § 107 (setting a list of limits on the exclusive rights of copyright owners to favor uses by educators, religious institutions, and even small shops and restaurants). A second fair use provision applies specifically to libraries. *Id.*, § 108.

¹³³ *See, e.g., id.*, § 110,

¹³⁴ 499 U.S. 340 (1991). Efforts to bring back the preamble to the copyright and patent clause as a source of limitation on intellectual property law have been less successful. Some courts have denied outright that the preamble imposes any substantive limits on Congress's power to enact copyright law. *See, e.g., Eldred v. Ashcroft*, 255 F.3d 849, 850-51 (D.C. Cir. 2001); *Luck's Music Library v. Ashcroft*, 321 F.Supp.2d 107, 116 (D.D.C. 2004). In the Supreme Court decision in *Eldred*, the majority sidestepped or defined away the preamble question by concluding that it is up to Congress to decide what promotes the "Progress of Science." *Eldred v. Ashcroft*, 537 U.S. 186, 212-13 (2003)

made that Rural had copied its selection and arrangement of the directory from anyone else, which, post-*Bleistein* and post-*Alfred Bell*, seemed all that would be necessary to gain protection for a compilation. The Court, nonetheless, found for the defendant on the ground that the compilation from which it had copied failed to demonstrate any noticeable level of creativity, cryptically defined as that which demonstrates “intellectual production, ...thought, and conception.”

The case might have represented a turning point, a chance to impose at least some limited set of coherent understandings on copyright. But, cognizant no doubt of the definitional problems a creativity test might impose on judges, the justices were at pains to make clear that “originality is not a stringent standard; it does not require that facts be presented in an innovative or surprising way.”¹³⁵ What prompted the Court to reintroduce a creativity component where – if anywhere at all – the new standard may lead is currently a subject of controversy and debate.¹³⁶ For now, however, that part of *Feist* remains more a theoretical than an actual limit on authors’ rights.

That the battle between copyright for authors and owners and copyright for the public good continues unabated could easily be missed today, however, because it now gets fought out under the cover of a third, neutral-sounding theory that, purposefully or not, has had the effect of papering over the differences in the two dueling perspectives: that is, the neoclassical economic analysis of copyright. Instead of grappling with the philosophies of Hegel or Locke, or engaging with romantic concepts of authorship,

¹³⁵ *Feist*, 499 U.S. at 358.

¹³⁶ See generally Zimmerman, *Original*, *supra* note ___. For important discussions of the originality requirement and the *Feist* case, see Howard B. Abrams, *Originality and Creativity in Copyright Law*, 55 LAW & CONTEMP. PROBS. 3 (1992); Alan L. Durham, *The Random Muse: Authorship and Indeterminacy*, 44 WM. & MARY L. REV. 569 (2002); Russ VerSteeg, *Rethinking Originality*, 34 WM. & MARY L. REV. 801 (1993).

economists think in terms of maximizing social utility. This would seem at first glance likely to move copyright back toward a minimalist stance of the sort that, it is argued, animated the Statute of Anne and was imbedded in the American copyright clause: to wit, that society should grant authors and publishers enough, but no more than enough, protection to facilitate their earning a reasonable return for their investment in producing and disseminating works. As it turns out, however, the neoclassic economic model as applied to copyright has turned out to provide a justification for a duration and scope of copyright protection that is far from minimalist. In fact, it comes out somewhere close to advocating for the kind of copyright law a natural rights enthusiast might have designed.

The operative construct in neoclassical theory is that of an author as a rational profit maximizer who responds positively to economic rewards and increases her output as the reward for it increases. In other words, this is a social-science ratification of and expansion upon Dr. Samuel Johnson's famed comment that "No man but a blockhead ever wrote, except for money." The adoption of this form of reasoning was on prominent display in the Supreme Court's majority opinion in *Eldred v. Ashcroft*, ratifying the power of Congress to extend the copyrights of pre-existing as well as new works from life plus 50 to life plus 70 years.¹³⁷ The Court noted that Congress had adopted the term extension because it believed, based on the evidence presented at hearings, that the change would give authors necessary additional incentives to create new works by ensuring that they would receive "fair compensation" for them. The added incentives would not merely provide benefits for authors during their lifetimes,¹³⁸ but

¹³⁷ 537 U.S. 186 (2003).

¹³⁸ This proposition would hold true, of course, only if the returns flowed to the author or his heirs rather than to the disseminators of the work.

also for those of several generations of their successors.¹³⁹ The justices in the majority concluded that, “We would not take Congress to task for crediting this evidence which . . . reflects general ‘propositions about the value of incentives’ that are ‘undeniably true.’”¹⁴⁰ Thus, belief in the power of economic incentives seems poised to achieve what natural rights enthusiasts in the nineteenth century only dreamed of: powering an end run around the limited times provision in the Constitution by establishing a term that, while nominally “limited,” is the function equivalent of perpetual.¹⁴¹

Economic theory, by promoting the idea that money is an important incentive for the production of expressive works, encourages courts to veer away from a strictly applied public benefit approach in favor interpretations of copyright that are more generous toward plaintiffs. This means understanding substantial similarity in a broad sense and fair use in a narrow one. By taking these approaches, courts can steer more licensing fees to authors and their assigns, a result that proponents of the natural law rationale would also see as eminently fair. One can find many examples of cases that exemplify this approach.

I will use two from the Second Circuit to illustrate what I mean. One is *Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc.*,¹⁴² involving a trivia book about a popular television series. In deciding the case, the Court first concluded that a

¹³⁹ 537 U.S. at 207 n.15.

¹⁴⁰ *Id.* at 207. In fact, neoclassical economists do not generally believe that every extension of the copyright term yields more productivity. At a certain point, the present value of the income stream from a given work that will not be enjoyed until far into the future and that must be discounted by the uncertainty of its ever materializing becomes so perishingly small that it can no longer plausibly be argued to provide a motive to create. William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 474 (2003). The authors, however, do not necessarily favor eliminating copyright at this point, arguing that continued protection avoids “premature exhaustion” of a work’s value, *id.* at 223, and encourages the owner to preserve the work and continue to make it available. *Id.* at 228-29.

¹⁴¹ See Bracha, *supra* note __, at __.

¹⁴² 150 F.3d 132 (2nd Cir. 1998).

book that asks trivia questions about a situation comedy is “substantially similar” to a series of half-hour television shows. This meant that the trivia book, which would scarcely threaten to substitute for the shows themselves, was deemed an infringing derivative work rather than an independent effort that merely used information (data) about the original.¹⁴³ It then denied the defendant’s claim of fair use, in substantial part because it believed that the “purpose” of copyright (presumably to provide incentives) would be best served by allowing the owner of the original to control all secondary or niche markets for it, even if the owner in fact had no present intent of exploiting one or more of them.¹⁴⁴ In the second example, *Horgan v. Macmillan, Inc.*,¹⁴⁵ the court concluded that a book in which sixty still photographs of dancers performing George Balanchine’s *The Nutcracker* appeared was substantially similar to the protected choreographical work and therefore infringing – despite the complete improbability that anyone could discern the content of the dance from the scattered photographs. Both seem quite consistent with the idea that, for copyright to act as an incentive, the pot of rewards available must be as rich as possible.

The adoption of incentive theory, by seeming to meld public interest theory and authors’ rights into a unitary whole might seem at last to have resolved the tensions that originated with the Statute of Anne. But not so. For one thing, it does nothing to explain or justify giving a century of copyright protection to virtually every “original” expression, however trivial, simply because it has been fixed in tangible form. For

¹⁴³ *Id.* at 138-39. The Court admits that discussions of fictional characters and events can be characterized as factual and can involve ideas, but concludes that in this case, the questions are a taking of creative expression. *Id.* at 139 & n. 5. For example, a fictional character or event can be used in a factual way by another author who describes, in the course of a review or a scholarly paper, what the character did or the plot devices used in a work. Failure to draw a clear line between “factual” uses and the taking of creative expression could lead to a finding that things like literary study aids constitute infringement.

¹⁴⁴ *Id.* at 145.

¹⁴⁵ 789 F.2d 157 (2^d Cir. 1986).

another, it may be based on bad, or at least highly incomplete, social science. When the behavior of authors is viewed through other lenses – those of behavioral economics and cognitive psychology, their motivations turn out to be more complex and less reward-driven than standard economic theory assumes.

Contrary to Dr. Johnson’s assertion, authors create for a wide variety of reasons other than money, a truth that has been acknowledged, at least in passing, in the copyright literature for a long time. How else could one explain why poets and artists and playwrights devote so much time to their artistic pursuits without experiencing much if any financial success as a result of their output?¹⁴⁶ Many of the reasons people create new works are as or more powerful than wealth enhancement. But the significance of this common observation has not been fully appreciated within the copyright community, despite decades of research on the subject by psychologists and the surprising phenomena of open source software and peer production of such other information goods as Wikipedia.

Starting in the middle of the twentieth century, psychologists interested in human motivation and in creative behavior began to posit that the forces that drive individuals to devote themselves to solving problems, unearthing new information and making creative works are largely intrinsic— that is, a response to internal needs rather than external

¹⁴⁶ To illustrate the point, the National Endowment for the Arts recently reported that, in the first half of the last decade, the average writer without a full-time job to support him or her made an average of \$22,500 a year; visual artists without outside jobs earned about \$17,000. NAT’L ENDOWMENT FOR THE ARTS, ARTISTS IN THE WORKFORCE 1990-2005 at 122 (2008). These figures are for the years 2003-05 and are reported in 2005 dollars. One possible economic explanation for this behavior was offered by F. M. Scherer. He suggested that creative people may be incentivized by the prospect of winning the lottery in the form of producing a best-seller or a hit record, even when the chances of doing so are slim. On the other hand, Scherer himself does not put too much weight on lotteries as incentives for creativity, characterizing them as a side benefit rather than a necessity. F.M. Scherer, *The Innovation Lottery*, in EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY: INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY 3, 19 (Rochelle Dreyfuss, Diane L. Zimmerman & Harry First eds., 2001).

carrots. What they argued was that people who are driven to create new works and solve challenging problems are most centrally motivated by their own internal needs for mastery, control, self-expression and satisfaction of intellectual curiosity.

Efforts were made to test this hypothesis both through in-depth interviews with creative people and through controlled experiments. What researchers found was that creative and innovative people are more inclined to spend time doing things they love doing rather than those which would earn them the most money.¹⁴⁷ What is most intriguing is that many experiments suggest that when the performance of creative tasks is tied to the promise of financial or other “extrinsic” rewards, such “incentives” may actually have a negative impact on performance.¹⁴⁸

The point is not that authors and creative entities such as film companies are indifferent to money. Like all of us, individuals have material needs to satisfy for themselves and their families. Some works that will be valued by the public are probably created almost entirely to make money. But the business calculation that is made in deciding whether to go ahead and produce these works is likely to involve a considerably more limited time line: will the work bring in a reasonable amount over the next few

¹⁴⁷ MIHALY CSIKSZENTMIHALYI, *CREATIVITY: FLOW AND THE PSYCHOLOGY OF DISCOVERY AND INNOVATION* 107 (1996). *See also* RICHARD FLORIDA, *THE RISE OF THE CREATIVE CLASS* 89 (2002) (finding the innate challenge of work mattered more to software developers than base pay or other financial motivators, like stock options); Albert LeBlanc & Jan McCrary, *Motivation and Perceived Rewards for Research by Music Faculty*, 38 J. RES. MUSIC EDUC. 61, 64-66 (1990) (finding the most important motivators for college music professors were the satisfaction of their intellectual curiosity and their enjoyment of the research process).

¹⁴⁸ . *See, e.g.*, Dan Ariely, Uri Gneezy, George Loewenstein & Nina Mazar, *Large Stakes and Big Mistakes*, 76 REV. ECON. STUD. 451 (2008) (finding higher monetary incentives led to worse performance in tasks involving cognitive rather than physical effort); Ignacio Fagueras Sorauren, *Non-Monetary Incentives: Do People Work Only for Money?*, 10 BUS. ETHICS Q. 925 (2000) (examining employee motivation in business). This research is reviewed in Diane Leenheer Zimmerman, *Copyrights as Incentives: Did We Just Imagine That?*, forthcoming in *__THEORETICAL INQUIRIES IN LAW* (2011).

years to compensate for my time and expenditures?¹⁴⁹ Hence, it seems unlikely that a purely commercial creator would opt out of making new works unless she is offered nothing less than very broad protection for a century or so, and even less so that creative individuals would. And increasing the size of the potential reward may actually be counterproductive if quality rather than sheer quantity is part of the public policy objective.

The bottom line is that incentive theory, as applied to copyright over the past thirty years or so, is probably based in large part on incorrect assumptions and is unlikely in the long run to allow twenty-first century copyright scholars, judges and legislators out of the dilemma that the Statute of Anne and its progeny left on our proverbial doorstep when we were a new nation. We will still be asking, what is copyright about? What are its overarching goals and principles? As problems like the orphan works dilemma or the ongoing debates over whether to adopt moral rights in the United States demonstrate, fundamental conflicts exist between an author-centric and a public interest model for copyright,¹⁵⁰ and they are not readily resolved based on history and precedent.

Little wonder then that courts so often flounder when trying to establish the proper boundaries of copyright claims. Fair use provides a plethora of examples of the effect of uncertainty as to copyright's objective on how actual disputes are to be settled.

¹⁴⁹ Evidence suggests that the period during which a given work enjoys the potential to generate significant returns is quite limited. *See, e.g.*, 2 Studies on Copyright 1251 (Copyright Soc'y of the U.S. ed., 1963) (finding by Copyright Office that, at a time when copyrights had to be renewed after 28 years, notice to renew was filed in only 15 per cent of cases, suggesting that the vast majority of works had lost their economic value by that time); Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 Harv. L. Rev. 281, 325 (1970) (noting that publishers "normally base their publication decision upon an expectation that a book will earn a return within two years (tradebooks), five years (some texts), or at most ten or twenty years (certain reference books)"). **FN on economic calculus of publishing, etc.**

¹⁵⁰ PATTERSON, *supra* note __, at 213-16. *See also*, Gordon, *supra* note __, at 1038 ("emphasizing authors inevitably leads to more copyright and less emphasis on the public's interests").

Jeff Koons, who in one case was found to be an infringer and not entitled to a fair use defense for translating the plaintiff's photograph of German shepherd puppies and their owners into an absurdist sculpture,¹⁵¹ was later excused by the same court on fair use grounds for lifting an image directly out of another person's photograph and inserting it into his own work.¹⁵²

Author Alice Randall was able to borrow heavily from the plot and characters of the novel *Gone with the Wind* to tell the story of life at Tara from the perspective of its slaves,¹⁵³ despite the fact that plots and, increasingly, characters are dealt with as elements of copyrightable expression.¹⁵⁴ By contrast, in *Salinger v. Colting*,¹⁵⁵ the defendant who wrote a book about what he imagined Holden Caulfield, the protagonist of *Catcher in the Rye*, to be like 60 years after the J.D. Salinger original ended, was found not to enjoy a fair use defense, despite claiming that the book was intended as an outsider's critical take on the character and his adult life. In each case, the court in question was undoubtedly doing its best to discern and apply the policy levers behind copyright.

¹⁵¹ *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992), cert. denied, 506 U.S. 934 (1992).

¹⁵² *Blanch v. Koons*, 476 F.3d 244 (2d Cir. 2006).

¹⁵³ *Suntrust Bank v. Houghton Mifflin Co.*, 268 F. 3d 1257 (11th Cir. 2001). The book in question was ALICE RANDALL, *THE WIND DONE GONE* (2001).

¹⁵⁴ The earliest examples of characters receiving copyright protection involved cartoons. See, e.g., *Detective Comics, Inc. v. Bruns Publ'ns, Inc.*, 111 F.2d 432, 433 (1940) (character of Wonderman infringes that of Superman). More recently, audiovisual characters have been added to the category of protected characters. See, e.g., *Anderson v. Stallone*, 1989 WL 206431 (C.D. Cal. Apr. 25 1989) (characters in Rocky movies protected). Protection of literary characters is less common, but seems to be increasing. A notable recent example is *Salinger v. Colting*, 641 F. Supp. 2d 250, 254 (S.D.N.Y. 2009), rev'd on other grounds, 607 F. 3d 68 (2d Cir. 2010). A full description of the proceedings in the district court regarding protection of the character Holden Caulfield can be found at 607 F.3d at 73. For another example of protection for literary characters, see *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 519 F. Supp. 388, 391 (1981) (Tarzan). Similarity in plots, too, may be a basis for an infringement action. See, e.g., *Fleener v. Trinity Broad. Network*, 203 F. Supp.2d 1142 (C.D. Cal. 2001) (denying defendant's motion for summary judgment where plot of allegedly infringing work tracked plaintiff's work on six elements of the plot).

¹⁵⁵ 607 F.3d 68 (2d Cir. 2010).

Congress, of course, could help clarify matters – within the confines of its constitutional powers – but it has shown no inclination to do so. Its actions in revising copyright in the last thirty years have been made more with an eye toward capitalizing on the value of expressive works as subjects of trade than resolving questions about the basic purposes of the law. When faced with a discrete problem that would seem to invite it to choose among competing theories -- for instance, to solve the orphan works impasse -- the legislature, faced with pressure groups on all sides, has often simply failed to act or has deferred to the copyright industries.¹⁵⁶

In the orphan works case, for example, it is widely acknowledged that a strong public interest exists in having Congress adopt even limited steps to immunize users from liability for using works where the owners of them are genuinely unidentifiable, but no legislation has succeeded in passing. As a result, the closest thing to a solution has come from a private actor who simply ignored the constraints of formal copyright: Google, and its project to digitize the world's books.¹⁵⁷ And the potential for conflicts between increasingly expansive copyright laws and the First Amendment looms larger and larger

¹⁵⁶ See generally Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857 (1987).

¹⁵⁷ Google is in the process of digitizing millions of books, some in the public domain and some under copyright. The company did not seek permission to do this, arguing that the cost and difficulty of finding owners would make doing so impracticable. Authors and publishers sued for infringement. The Authors Guild, Inc., et al. v. Google Inc., Case No. 05 CV 8136 (S.D.N.Y.). A settlement between Google and the Authors Guild and the American Publishers Association has been reached but is awaiting final approval by the court. Google Books Settlement Agreement at <http://books.google.com/googlebooks/agreement/>. For information about the settlement, see Authors Guild v. Google Settlement Resources Page at <http://www.authorsguild.org/advocacy/articles/settlement-resources.html>. The controversy of the Google project has generated a great deal of scholarship. See, e.g., Pamela **Error! Main Document Only**. Samuelson, *Google Book Search and the Future of Books in Cyberspace*, 94 MINN. L. REV. 1308 (2010); James Grimmelman, *How to Fix the Google Book Settlement*, 12 No. 10 J. Internet L. 1 (2009); Diane Leenheer Zimmerman, *Cultural Preservation: Fear of Drowning in the Licensing Swamp*, in Dreyfuss, First, & Zimmerman, *supra* note ____.

in the consciousness of courts and academic commentators.¹⁵⁸ I think this is where we came in.

Conclusion

Copyright, to put the case bluntly, is an analytical mess. It did not develop at its inception from a set of consistent premises; rather its early evolution was largely guided by the needs and self-interest of a trade guild. By the time Parliament, followed some seven decades later by the United States, got into the business of legislating about copyright, its existence was already sufficiently long-standing for the legitimacy of what was to be assumed. As a result, both the British Parliament and the Framers after them may well have passed laws and drafted constitutional phrases without bothering to go back to first principles. This allowed copyright to become a vessel into which many conflicting ideas could be poured without giving anyone down the road sufficient tools to sort out and definitively discard the ones that conflicted with the desired pattern. In the absence of clarity about what copyright was to do, content owners had openings to fight, often successfully, for ever broader and more enduring rights. Today, a growing community of copyright skeptics is saying, wait – too much, too far. But is it actually too late, Berne'd and TRIPs'ed as we are, to demand that this costly and cumbersome form of legal protection be required to account for itself? Maybe.

For those who remain convinced that the copyright clause actually demands a carefully calibrated balancing of authors' need for a cure to the public goods problem and

¹⁵⁸ The Supreme Court in *Eldred* has now acknowledged the possibility that new and expanded copyright protections could conflict with freedom of speech. *Eldred*, 537 U.S. at 218-21. A recent decision by the Court of Appeals for the Tenth Circuit demonstrates the increasing tension between copyright, constrained by international treaties, and normal principles of free speech. *Golan v. Holder*, ___ F.3d ___, WL 2473217 (10th Cir., June 21, 2010) (dealing with the restoration of works in the public domain back into copyright, pursuant to treaty obligations, and the tensions with the First Amendment).

the public interest in access and innovative reuse of prior works, the position may indeed be too late to salvage. The 1976 Act, Berne and TRIPs have seen to that. But it would not be too late, however, to avoid following the high protectionist impulse off a policy cliff by continuing to expand the scope of copyright. There are still many places where smart redefinition of the idea/expression divide, the meaning of substantial similarity, application of the merger doctrine, and expansion of fair use are possible and could offer considerably more leeway to users without posing any credible risk that content creators would abandon ship.

For those committed to a vision of copyright that honors the natural rights of authors and rewards them for their uniquely valuable intellectual contributions, realization of that vision is more possible (indeed, it has been the decided direction of the developments of the last third of a century). But a cautionary note needs to be sounded. Going much farther in that direction could have the effect of pitting the author more directly against users' claims to access and utilize publicly available content under the shelter of the First Amendment rights.¹⁵⁹ No easy answers here.

My personal vote would be to swing as much as possible to the minimalist social contract model, given the constraints of political possibility and international obligation. I end up there because my reading of the history involved convinces me (in the face of admittedly unclear evidence) that both the Statute of Anne and the copyright clause intended to give authors and publishers only enough protection to keep them in the content provision business so that the detriment of exclusive rights to the intellectual development, innovativeness and the pocketbooks of book buyers could be kept to a

¹⁵⁹ PATTERSON & BIRCH, *supra* note __, at 299-309 (2009); L. Ray Patterson & Craig Joyce, *supra* note __, at 942-52 (2003).

minimum.¹⁶⁰ I also lean in that direction because it seems to me to allow copyright and freedom of speech the easiest degree of coexistence.

These are questions on which reasonable people disagree often and vigorously. In the end, it would be a relief to have closure. There is something unseemly about a major legal regime, the pieces of which so often seem to be at war with one another. Even more uncomfortable is the fact that no logical and compelling reason appears to exist for protecting anything like the range of what the American law of copyright now covers. These problems obviously are not entirely or even largely the fault of the Statute of Anne and its progeny, but given the fact that history has played an obfuscating and unhelpful role in creating all this uncertainty, may I merely wish the Statute of Anne a happy birthday – with reservations.

¹⁶⁰ I base this reading on the narrowness of both the Statute of Anne and the first copyright law in the United States, passed by people who were there, for the most part, when the copyright clause was drafted and adopted. I also base it on the nearly two hundred years during which Congress and the courts treated copyright as a privilege rather than as a right. For example, up until the 1976 Act became effective, failure to place proper notice on a work at publication, 1909 Act, §§ 9, 18-20, or to file a notice of renewal in a timely fashion, *id.* § 24, could inject a work into the public domain. Failure to make the requisite deposit could result in the voiding of the copyright. *Id.*, § 13. *See also supra* note ___ and accompanying text.