

# THE ADVENTURES OF THE STATUTE OF ANNE IN THE LAND OF UNLIMITED POSSIBILITIES: THE LIFE OF A LEGAL TRANSPLANT

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## I. INTRODUCTION

We are so used to thinking of the Statute of Anne<sup>1</sup> as the source of Anglo-American copyright law that we often miss the fact that in the United States it functioned as a legal transplant.<sup>2</sup> The arrival of the Statute of Anne in the United States at the end of the eighteenth century was a clear case of a legal regime that was lifted from one legal culture and transferred to another where the legal, social, and cultural context was quite different. When the early American copyright regime is examined from this perspective and

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1. Act for the Encouragement of Learning (Statute of Anne), 8 Ann., c. 19 (1710) (Gr. Brit.).

2. *See generally* ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (2d ed. 1993) (describing the process of legal transplantation).

against the backdrop of the rich theoretical legal transplants literature, several insights and questions emerge.

First, the sheer degree of identity, at least on the formal level, between the British Statute of 1710 and the American copyright regime, ushered in by the state statutes of the 1780s and consolidated in the federal 1790 Copyright Act,<sup>3</sup> is striking. While the influence of the Statute of Anne on early American copyright legislation is widely known, scholars often overlook the scale of duplication on the level of ideological purposes, concepts, technical legal arrangements, and specific text. When these identical features are examined closely, the genesis of the American copyright system appears to be a major operation of international plagiarism.

Second, the contrast between the close duplication of legal forms and the obvious disparities in relevant social and cultural conditions between the originating and receiving jurisdiction gives rise to several questions. Why did Americans who were, to a large extent, drawing the plans for their new copyright system on a clean slate, choose to adopt an eighty-year-old statute deeply rooted in the economic conditions and political-ideological debates of the Imperial power whose dominion they had just overthrown? Why did they copy, with only minor changes and omissions, a regulatory scheme that was ambiguous and occasionally sloppy at the time it was created, and whose silence on some of the more vexing and important copyright questions of the time was growing increasingly apparent by the end of the eighteenth century?

Americans turned to the Statute of Anne for two main reasons. First, the Statute was a relatively familiar and accessible template for governing a field whose regulation seemed desirable or necessary. The availability of such a ready-made regulatory scheme was in itself a considerable source of attraction to the new post-revolutionary nation. In this regard, the adoption of the Statute of Anne fits within the larger context of American resort to British common law and statutory law. Second, in the eyes of Americans, Britain was a leading nation in the cultural and scholarly fields. This prestige enhanced the attractiveness of the British legal regime associated with these fields and facilitated its transfer to the United States.

Moreover, there is the question of the success or survivability of the legal transplant. In light of the circumstances described above, the Statute of Anne may appear to have been an unlikely candidate for a successful and enduring transplantation in the United States. And yet, at least as a matter of the statute book, the basic framework borrowed from Britain in 1790

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3. Act of May 31, 1790, ch. 15, 1 Stat. 124.

survived in the United States at least until the second half of the nineteenth century, a series of statutory amendments and revisions notwithstanding. Even after the major revision of 1870<sup>4</sup> and several significant modifications in the preceding decades, the old foundations could still be seen under the new layers. What accounts for this success, or at least this survivability? Was there something in the basic features of the Statute of Anne or the subject matter to which it applied that made it particularly portable? Was it the nature of the relationship between the British and the American legal cultures or cultures in general? Or was it perhaps something in the process of transplantation and reception that explains the longevity of the old Statute in the new nation, even in the face of changed economic and social conditions?

Much of the success of the Statute of Anne in the United States can be explained by recent approaches to legal transplantation as a dynamic process that involves adaptation and transformation rather than simple duplication. The migration of the Statute of Anne to the United States makes a fascinating test case for the process of reception of a legal transplant. Comparative law scholars have been debating for decades the nature of legal transplantation and the variables affecting it.<sup>5</sup> While many questions pertaining to these debates are far from settled, many of these scholars have adopted various models of the legal transplant as a process of translation.<sup>6</sup> Like translation, the legal transplant is seen not as a mechanical process of exact duplication, but rather as a dynamic and creative process in which a preexisting legal form acquires new meaning by placement in a new environment. Because the exact content and function of a legal form is shaped, in part, by the other elements of the legal and cultural system in which it operates, a legal transplant is likely to be transformed by the transplantation process. Because the legal transplant is a new element in the receiving system, it is likely to affect preexisting elements and the system itself.

The naturalization of the Statute of Anne regime in America was just such a process. The early American statutory framework closely followed the

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4. Act of July 8, 1870, ch. 230, 16 Stat. 198.

5. See Michele Graziadei, *Comparative Law as the Study of Transplants and Receptions*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW (M. Reimann & R. Zimmerman eds., 2006).

6. The translation metaphor is used by Máximo Langer. See Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L L.J. 1, 29–35 (2004). Others take a similar approach to legal transplants while not necessarily using the translation metaphor. See, e.g., Graziadei, *supra* note 5, at 469–70.

Statute of Anne, and for a long period of time, it appeared to change relatively little. This static appearance, however, is misleading. From a very early stage, various elements of the American copyright regime were reinterpreted and new elements were developed and added. For a long period, this adaptation process happened mainly through case law, thus leaving the basic statutory infrastructure almost untouched. This process of adaptation through judicial development involved yet another layer of ongoing transplantation because American courts often resorted to the English case law, which was itself in the process of development. This layer was also dynamic and creative rather than merely duplicative since American judges often reshaped the precedents they were importing from England, even as they professed to be implementing the precedents' principles. In the first century of American copyright, judicial development and creation dealing with the scope of protection, entitlements, concept of authorship, and remedies was at least as important in shaping the copyright regime as the basic statutory framework imported from Britain and the later statutory amendments. Thus, by the late nineteenth century, American copyright law was different from the original Statute of Anne regime far beyond the degree betrayed by the simple comparison of statutory texts.

If American courts responding to developing demands and ideological constraints radically changed the regime imported from Britain, in what way, if at all, did the Statute of Anne leave an imprint on the American copyright system? Was there any enduring effect to the early massive "plagiarism" or were the specific arrangements copied from Britain merely fleeting forms whose actual effect eroded relatively quickly? The enduring effect consisted of a series of path dependencies and features that became entrenched in the American copyright system. Some of these are substantive, while others are mainly illustrative anecdotes. A non-exhaustive list of these features includes: the early shift to a general statutory regime, duration, formalities, renewal, and statutory damages. In all of these contexts, the Statute of Anne left its mark on American copyright, at times even after the relevant features faded or were abandoned in Britain.

This article proceeds in five parts. Part II provides background about the Statute of Anne, which is necessary for understanding its later influence in the United States. It describes briefly the regulatory framework that preceded the Statute, the circumstances surrounding its legislation, the competing purposes and interests underlying it, and the new regime it created. Part III shifts the focus to the United States. It describes the deep influence of the Statute of Anne in four post-independence American contexts: early lobbying for protection by authors and their allies, the 1780s state copyright

statutes, the intellectual property clause of the U.S. Constitution, and the 1790 Copyright Act. Part IV discusses the possible reasons that led Americans to rely heavily on the old and imperfect British Statute. Part V analyzes the transfer of the Statute of Anne to America as a creative and adaptive process. This Part describes how, while statutory law seemed to closely duplicate the original legal forms, the legal regime was changed and developed mainly through the case law. Part VI concludes the article by looking at the flipside of this dynamic process. It sketches some of the ways in which, despite the changes, the legal forms and concepts imported from the Statute of Anne have had an enduring effect in the United States.

## II. THE BIRTH OF THE STATUTE OF ANNE

Modern scholars disagree about the exact purposes and motivating forces behind the Statute of Anne. The Statute is commonly known for embodying the moment at which authors were recognized as the proper focal point of copyright protection and for establishing authors' legal rights and their ability to bargain for better terms in the marketplace.<sup>7</sup> Many scholars espouse other views. For instance, Lyman Patterson described the Statute as primarily an attack on the monopoly of the Stationers' Company, the London publishers' guild, in which the figure of the author was used rhetorically as a pretext for breaking this monopoly power and regulating the book trade.<sup>8</sup> Ronan Deazley, while not necessarily disagreeing with Patterson, emphasized that the Statute's motivation was to strike a deal between the author, the bookseller, and the reading public that was designed to maximize the production and dissemination of useful books.<sup>9</sup> John Feather, on the other hand, described the Statute's purpose and effect as an attempt by the Stationers' Company to retain as much of its power and privileges in a changed world.<sup>10</sup> In this account, the author figure's growing ideological

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7. See VICTOR BONHAM-CARTER, 1 AUTHORS BY PROFESSION 16 (1978) (arguing that the Statute of Anne "established the author's right to his own property, and thereby gave him the power to bargain for better terms").

8. LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 143-44 (1968).

9. RONAN DEAZLEY, ON THE ORIGIN OF THE RIGHT TO COPY: CHARTING THE MOVEMENT OF COPYRIGHT LAW IN EIGHTEENTH CENTURY BRITAIN (1695-1775) 45-46 (2004) [hereinafter DEAZLEY, ORIGIN OF THE RIGHT TO COPY]; Ronan Deazley, *The Myth of Copyright at Common Law*, 62 CAMBRIDGE L.J. 106, 108 (2003).

10. JOHN FEATHER, A HISTORY OF BRITISH PUBLISHING 74-75 (1988) [hereinafter FEATHER, BRITISH PUBLISHING]; JOHN FEATHER, PUBLISHING, PIRACY AND POLITICS: AN HISTORICAL STUDY OF COPYRIGHT IN BRITAIN 61-63 (1994) [hereinafter FEATHER, PIRACY

value serviced the London booksellers, rather than the interests of the public or the authors.<sup>11</sup> Which of these seemingly inconsistent accounts is right? As recently suggested by Isabella Alexander, the most probable answer is: all of them.<sup>12</sup> To see why and in order to understand some of the Statute of Anne's fundamental features that are relevant to its later history in America, a brief description of its background is necessary.

The Statute of Anne's enactment was the result of the decline of the framework for regulating book-publishing rights that had been employed in England for over a century and a half. This framework consisted of two main mechanisms, both of which created publishers' rather than authors' rights. The first was the printing patent.<sup>13</sup> Printing patents, awarded since the early sixteenth century, were royal discretionary privilege grants.<sup>14</sup> Issued under the Crown's prerogative power, they bestowed upon a specified printer or publisher the exclusive right of printing and selling a particular book or category of books, usually for a limited time.<sup>15</sup> Printing patents were issued for some of the more commercially valuable and popular printed works,<sup>16</sup> and thus, they were highly coveted and often caused unrest within the book trade.<sup>17</sup> They were, however, never the norm; most books published in England were not covered by printing patents.<sup>18</sup> Printing patents continued to exist after the Statute of Anne,<sup>19</sup> but during the eighteenth century, for

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AND POLITICS]; *see also* BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 8–9 (1967).

11. FEATHER, BRITISH PUBLISHING, *supra* note 10, at 17; FEATHER, PIRACY AND POLITICS, *supra* note 10, at 61–63; *see also* BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 8–9 (1967).

12. ISABELLA ALEXANDER, COPYRIGHT LAW AND THE PUBLIC INTEREST IN THE NINETEENTH CENTURY 18 (2009).

13. On the printing patent, *see* FEATHER, PIRACY AND POLITICS, *supra* note 10, at 10–14; PATTERSON, *supra* note 8, at 78–113; Leo Kirschbaum, *Author's Copyright in England Before 1640*, in 40 THE PAPERS OF THE BIBLIOGRAPHICAL SOCIETY OF AMERICA 43 (1946); Oren Bracha, *Owning Ideas: A History of Anglo-American Intellectual Property* 12–129 (2005) (unpublished S.J.D. dissertation, Harvard Law School), *available at* <http://www.obracha.net/oi/oi.htm>.

14. PATTERSON, *supra* note 8, at 78.

15. *Id.* at 79.

16. FEATHER, PIRACY AND POLITICS, *supra* note 10, at 12; PATTERSON, *supra* note 8, at 78, 80.

17. *See* PATTERSON, *supra* note 8, at 90–106 (describing the conflict caused by printing patents).

18. FEATHER, PIRACY AND POLITICS, *supra* note 10, at 14.

19. The Statute of Anne explicitly disclaimed any effect on the validity of printing patents. Act for the Encouragement of Learning (Statute of Anne), 8 Ann., c. 19, § 9 (1710) (Gr. Brit.).

various reasons, they were subjected to growing restrictions, and their significance steadily declined.<sup>20</sup>

The other more immediate ancestor of the Statute of Anne was an internal regulation of the London publishers' guild—the Stationers' Company<sup>21</sup>—that came to be known as the “stationer's copyright.”<sup>22</sup> The stationer's copyright was rooted in an overlap between the guild's commercial interests and government's political ones. The basic deal involved a facilitation of censorship in return for tight control of the trade and broad enforcement powers. The 1557 Charter, given to the Company by Philip and Mary I, established the Company's national monopoly and bestowed various search and enforcement powers upon it.<sup>23</sup> Later decrees increased the Company's powers and responsibilities.<sup>24</sup> The complete licensing framework that expressed the government-guild symbiosis and dominated this field for more than a century was solidified, however, in the Star Chamber Decree of 1586.<sup>25</sup> The heart of this framework was a prior licensing regime under which any book printed in England had to be submitted to the Company, licensed by specified office holders, and then

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20. See Bracha, *supra* note 13, at 146–57. The reasons for the decline of the printing patents included growing unrest in the trade over the concentration of wealth and power they created, the general disdain of monopoly patents in English political discourse, and the taking over by the Stationers' Company of the printing rights of many of the valuable works covered by patents. *Id.*

21. For more information about the Stationers' Company, see CYPRIAN BLAGDEN, *THE STATIONERS' COMPANY: A HISTORY, 1403–1959* (1977); Graham Pollard, *The Company of Stationers Before 1557*, 18 *LIBR.* 1 (4th ser. 1937).

22. On the stationer's copyright, see John Feather, *From Rights in Copies to Copyright: The Recognition of Authors' Rights in English Law and Practice in the Sixteenth and Seventeenth Centuries*, in *THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATIONS IN LAW AND LITERATURE* 191, 201–02 (Martha Woodmansee & Peter Jaszi eds., 1994); PATTERSON, *supra* note 8, at 42–77; see also MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 12–16 (1993); Bracha, *supra* note 13, at 129–45.

23. See PATTERSON, *supra* note 8, at 28–30; ROSE, *supra* note 22, at 12–13; Bracha, *supra* note 13, at 136. The Charter is reproduced in 1 *A TRANSCRIPTION OF THE REGISTERS OF THE COMPANY OF STATIONERS OF LONDON, 1554–1640 A.D.*, at xxx–xxxii (London, Edward Arber ed., 1876) [hereinafter *TRANSCRIPT OF THE REGISTERS*].

24. For a list and explanation of later decrees, see PATTERSON, *supra* note 8, at 36–41, 114–38; Bracha, *supra* note 13, at 136–39.

25. *THE NEWE DECREES OF THE STARRE CHAMBER FOR ORDERS IN PRINTINGE* (1586), reprinted in 2 *TRANSCRIPT OF THE REGISTERS*, *supra* note 23, at 807 [hereinafter *1586 DECREE*]; see also PATTERSON, *supra* note 8, at 115–19; Ronan Deazley, *Commentary on Star Chamber Decree 1586*, in *PRIMARY SOURCES ON COPYRIGHT (1450–1900)* (Lionel Bently & Martin Kretschmer eds., 2008), available at [www.copyrighthistory.org](http://www.copyrighthistory.org) (detailing the background of the Star Chamber Decree).

registered in the Company's register.<sup>26</sup> It was prohibited to print a book contrary to any law, decree, patent, or company regulation, and extensive enforcement powers were given to the Company. This system remained in force under various Star Chamber decrees and acts until 1695.<sup>27</sup>

Even though it probably predated the Charter by a few years, the stationer's copyright was deeply rooted in this licensing system. The Crown's main interest was in the licensing and censorship system and in the concentration of the printing trade that facilitated it, rather than any exclusive commercial printing rights.<sup>28</sup> It was the licensing system, however, that enabled and nourished the exclusive rights created and enforced by the Stationers' Company as an internal trade regulation. The stationers understood this connection well, and in their lobbying efforts to maintain their powers, perfected arguments based on it to a degree of an art. One of their petitions phrased the connection as follows:

The first and greatest end of order in the Presse, is the advancement of wholesome knowledge, and this end is merely publike: But that second end which provides for the prosperity of Printing and Printers, is not meerly private, partly because the benefit of so considerable a Body is of concernment to the whole; and partly because the compassing of the second end does much conduce to the accomplishing of the first.<sup>29</sup>

The essence of the stationer's copyright was that any member of the Company who was the first to register a book in its register obtained an exclusive, perpetual right to print that book.<sup>30</sup> The Company itself enforced violations of this right, and its internal tribunal usually handled disputes.<sup>31</sup> Like the printing patent, the publishers rather than the authors received the stationer's copyright.<sup>32</sup> But unlike the patent, the stationer's copyright was perpetual.<sup>33</sup> Finally, the stationer's copyright regulation was more universal

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26. 1586 DECREE, *supra* note 25, § 4.

27. For subsequent acts and decrees, see PATTERSON, *supra* note 8, at 119–39.

28. See ROSE, *supra* note 22, at 12.

29. *The Humble Remonstrance of the Company of Stationers to the High Court of Parliament*, April 1643, in 1 TRANSCRIPT OF THE REGISTERS, *supra* note 23, at 584–85.

30. There are some doubts whether registration was constitutive of the right. Both Patterson and Feather conclude that registration was both mandatory and a strong evidence of copyright, but that it was possible to acquire copyright by way of first publication without registration, at least during the early years of the system. Feather, *supra* note 22, at 201–02; PATTERSON, *supra* note 8, at 55–64.

31. PATTERSON, *supra* note 8, at 47.

32. *Id.* at 43.

33. ROSE, *supra* note 22, at 12.



and standardized than the patent. The stationer's copyright was limited only to guild members, but within these confines, it was issued upon registration as a matter of routine and not on the basis of ad hoc discretionary decisions.<sup>34</sup>

The Statute of Anne originated in the stationers' attempts to renew their familiar form of protection after the last extension of the 1662 Licensing Act lapsed in 1695. At first, the stationers lobbied for a new legislative scheme in the traditional pattern. The justifications offered in support of such legislation were many, but censorship was the most important and conspicuous one.<sup>35</sup> The stationers, however, were to learn that they lived in a changed ideological and political climate. The proposed bills for renewing the licensing regime were defeated one after another.<sup>36</sup> There were three recurring reasons, offered by opponents of these bills, for resisting the renewal of the licensing regime: opposition to censorship, at least in the format of a comprehensive licensing regime and prior restraint; concerns over the monopolistic powers of the Stationers' Company; and claims that the traditional system served the interests of publishers at the expense of those who should be its legitimate beneficiaries, namely authors.<sup>37</sup> One opponent of extending the Licensing Act in the House of Lords succinctly summed up all three objections when he claimed that the Act "subjects all Learning and true Information to the arbitrary Will and Pleasure of a mercenary, and perhaps ignorant, Licensor; destroys the Properties of Authors in their Copies; and sets up many Monopolies."<sup>38</sup>

After numerous failed attempts to renew the Licensing Act, the stationers changed their strategy. The watershed moment came in 1707 with a petition to Parliament premised on the following argument:

many learned Men have spent much Time, and been at great Charges, in composing Books, who used to dispose of their Copies upon valuable Considerations, to be printed by the Purchasers . . . but of late Years such Properties have been much invaded, by other Persons printing the same Books . . . to the great Discouragement of Persons from writing Matters, that might be of great Use to the Publick, and to the great Damage of Proprietors.<sup>39</sup>

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34. Bracha, *supra* note 13, at 139–43.

35. FEATHER, PIRACY AND POLITICS, *supra* note 10, at 51–54; ROSE, *supra* note 22, at 34.

36. See PATTERSON, *supra* note 8, at 139–41.

37. Bracha, *supra* note 13, at 178–82.

38. 15 H.L. JOUR. (1693) 280.

39. 15 H.C. JOUR. (1707) 313.

Much of the substance of this argument was not new. In fact, an almost identical version of it appeared in the 1643 petition entitled *Remonstrance of the Company of Stationers*.<sup>40</sup> The strategic change consisted in eliminating all references to censorship and shifting the gravity center of the argument to the protection of authors and the encouragement of learning. This strategy responded to all three strands of opposition. Since licensing was no longer the basis for the proposed legislation, anti-censorship sentiments became moot.<sup>41</sup> The claim that the protection would serve the public good by encouraging useful writings countered monopoly concerns. Finally, stationers now presented authors as the prime beneficiaries of the regime rather than its victims, although what the stationers really had in mind was the indirect protection of authors' interests through publishers' rights.<sup>42</sup>

This new strategy eventually led to the 1710 Statute of Anne.<sup>43</sup> This does not mean that the stationers got everything they wanted. The Statute was a compromise that contained various elements reflecting the contending interests and concerns behind it: the interests of stationers in securing their economic rights, fears of the Company's monopoly and of the power of its prominent members including by smaller booksellers, attempts to secure the public interest referred to as "the encouragement of learning," and an emerging concern for authors. The basic features of the Statute reflected this amalgam of competing forces.

The heart of the Statute was two matching entitlements. In regard to "Book or Books already Printed," there was a twenty-one-year exclusive right to print given to the author, or in the more likely case that the author "[t]ransferred to any other the Copy or Copies of such Book or Books," to the bookseller, printer or "Person or Persons, who hath or have Purchased or Acquired the Copy or Copies . . . in order to Print or Reprint the same."<sup>44</sup> In regard to new books, there was a fourteen year exclusive right to print

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40. *Remonstrance of the Company of Stationers* (1643), in 1 TRANSCRIPT OF THE REGISTERS, *supra* note 23, at 587.

41. Indeed, in a complete reversal of their former position, later petitions by stationers listed the absence of licensing as one of the merits of the legislation they promoted. See *The Booksellers Humble Address to the Honourable House of Commons in Behalf of the Bill of Encouraging Learning* (1710), cited in ROSE, *supra* note 22, at 43.

42. FEATHER, PIRACY AND POLITICS, *supra* note 10, at 56–57.

43. For a review of the legislative history, see DEAZLEY, ORIGIN OF THE RIGHT TO COPY, *supra* note 9, at 31–50; FEATHER, PIRACY AND POLITICS, *supra* note 10, at 59–63; ROSE, *supra* note 22, at 42–48.

44. Act for the Encouragement of Learning (Statute of Anne), 8 Ann., c. 19, § 1 (1710) (Gr. Brit.).

given to “the Author . . . and his assignee or assigns.”<sup>45</sup> Thus, the stationers received their familiar exclusive printing rights initiated by the familiar procedure of registration in the stationers’ register, though these rights were limited in time.<sup>46</sup> The stationers also received recognition of authors’ past and future assignment of their rights to publishers. Other interests seen as crucial by stationers, such as a ban on the importation of English books and the inclusion of Scotland, the growing center of provincial competition, were also included.<sup>47</sup>

At the same time, a host of the Statute’s features were responsive to the anti-monopoly and the encouragement of learning concerns. Making the rights available to any author and assignee meant the stationers lost their exclusivity. The time limitations were seen as the standard means for blunting the pernicious effects of monopolies since the early seventeenth century.<sup>48</sup> It was also a mechanism crucial to the Statute’s “encouragement of learning” purpose by effectively creating what is known today as the public domain.<sup>49</sup> The Stationers’ Company lost its enforcement and adjudication powers, and general courts received jurisdiction over all actions under the Statute.<sup>50</sup> Rights owners were also subjected to a price control mechanism supposedly triggered in cases of exorbitant prices,<sup>51</sup> extensive requirements for the deposit of copies with English and Scottish libraries,<sup>52</sup> and an exemption for the importation of books in foreign languages,<sup>53</sup> which were usually seen as inadequately supplied by English booksellers.

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45. *Id.*

46. *Id.* §§ 1–2.

47. *Id.* §§ 1, 6.

48. See *infra* text accompanying notes 202–11.

49. See Tyler T. Ochoa, *Origins and Meanings of the Public Domain*, 28 U. DAYTON L. REV. 215, 223 (2003) (“[I]mplicit in the Statute of Anne was the principle that when the limited term expired, the work could be published by anyone without restraint.”). There are two important qualifications. See Jane Ginsburg, “*Une Chose Publique*”? *The Author’s Domain and the Public Domain in Early British, French and U.S. Copyright Law*, 65 CAMBRIDGE L.J. 636, 642 (2006) (stating that the legal regime created by the Statute did not clearly define which works were in the public domain because “[t]he Statute of Anne may have separated the waters from the lands, but it did not clearly tell us which was which”); Mark Rose, *Nine-Tenths of the Law: The English Copyright Debates and the Rhetoric of the Public Domain*, 66 LAW & CONTEMP. PROBS. 75, 77 (2003) (“[E]ven after the passage of the Statute, the major London booksellers continued to treat literary property . . . as perpetual properties.”).

50. 8 Ann., c. 19, § 1.

51. *Id.* § 4.

52. *Id.* § 5.

53. *Id.* § 7.

Finally, two features of the Statute expressed the new central status of authors in an unprecedented way. First, for the first time, authors, rather than publishers, were the original owners of the rights.<sup>54</sup> Second, the Statute recognized a reversionary interest of authors, possibly intended to mitigate cases of inequitable treatment by publishers, by providing that after the first term of protection, the exclusive rights would return to a surviving author for a second term of fourteen years.<sup>55</sup>

The new regime created by the Statute of Anne fundamentally transformed the regulation of the book trade and introduced important innovations. The three most important of these innovations were universalizing the former guild protection system and opening it up to all, making the author rather than the publisher the initial bearer of the rights, and limiting the duration of the right.<sup>56</sup> At the same time, the Statute incorporated much of the preexisting framework. The exclusive right it created was the same as the one protected by the printing patents and the stationer's copyright, namely, the narrow right of making and selling reprints of specified texts.<sup>57</sup> The registration system implemented was that of the Stationers' Company, although it was now commandeered for general use, including by those who were not Company members. The limited term of protection was routinely used in printing patents and was one of the fundamental legal requirements for valid royal patents in general for over a century under the Statute of Monopolies<sup>58</sup> and the common law.<sup>59</sup> The deposit provision and the exemption for imported foreign language copies had antecedents in the 1662 Licensing Act.<sup>60</sup>

Beyond continuity with the past, what was absent from the new regime is also important. Although the Statute vested new rights in authors, it contained no criterion for identifying authors or works of authorship. Protectable subject matter was limited to the traditional regulation of the book trade, namely, the product of the printing press, or in the words of the Statute: "books."<sup>61</sup> Despite several references to "Property" and

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54. *See id.* § 1.

55. *Id.* § 11.

56. *See id.* § 1.

57. *See id.*

58. Statute of Monopolies, 1624, 21 Jac. 1, c. 3 (Eng.).

59. *See* Oren Bracha, *The Commodification of Patents 1600–1836: How Patents Became Rights and Why We Should Care*, 38 LOY. L.A. L. REV. 177, 197–98 (2004); Tyler T. Ochoa & Mark Rose, *The Anti-Monopoly Origins of the Patent and Copyright Clause*, 49 J. COPYRIGHT SOC'Y U.S. 675, 677–79 (2002).

60. Licensing Act, 1662, 13 & 14 Car. 2, c. 33, § 17 (Eng.).

61. 8 Ann., c. 19, § 1.

“Proprietor,” the Statute contained no new concept of ownership of intellectual works. Its scope of protection was limited to the traditional publisher entitlement, namely, the making and selling of exact reprints.<sup>62</sup> To a large extent, the new regime was the old stationer’s privilege, except it was universalized, capped in time, and formally conferred upon authors rather than publishers.

In practice, the Statute of Anne’s immediate innovations were even more limited. For a long time, the effect on the author’s economic status and the publisher-author relationship was minimal and limited to exceptional cases. Ordinarily, publishers kept acquiring the full copyright in books for a lump sum paid to the author at the outset, just as they did under the old system.<sup>63</sup> There are some reasons to suspect that the reversion right was not always observed after the first fourteen year term of protection,<sup>64</sup> and, at any rate, it soon received a restrictive judicial interpretation.<sup>65</sup> The concentrated economic power of the wealthiest members of the Stationers’ Company was not quickly undermined. They continued to rely on various economic arrangements in order to ensure concentrated control of the book market, at least in London.<sup>66</sup> Moreover, for a long period, this economic power allowed the stationers to continue treating many of their most valuable works, including those that had formally fallen into the public domain, as if they were under perpetual protection. This was evidenced by the prices of the printing rights for those works in trade auctions.<sup>67</sup> Thus, much of the actual economic-social change instigated by the Statute, such as establishing the author’s status or breaking up the old book trade monopolies, was painfully slow, and it continued to unfold throughout the eighteenth century and beyond.

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62. *Id.*

63. Bracha, *supra* note 13, at 190–91.

64. Lionel Bently & Jane C. Ginsburg, “*The Sole Right . . . Shall Return to the Authors*”: *Anglo-American Authors’ Reversion Rights from the Statute of Anne to Contemporary U.S. Copyright*, 25 BERKELEY TECH. L.J. 1475 (2010) (discussing some evidence that reversion right was ignored by publishers).

65. *Carnan v. Bowles*, (1786) 29 Eng. Rep. 45 (Ch.) (allowing the author to assign the second term in advance and interpreting certain language as constituting such conveyance).

66. ALEXANDER, *supra* note 12, at 27–28; Terry Belanger, *Booksellers’ Trade Sales, 1718–1768*, 30 LIBR. 281 (5th Ser. 1975) (describing the practices of the London book trade sales).

67. Terry Belanger, *Publishers and Writers in Eighteenth Century England*, in *BOOKS AND THEIR READERS IN EIGHTEENTH CENTURY ENGLAND* 5, 16 (Isabel Rivers ed., 1982); Terry Belanger, *Tonson, Wellington and the Shakespeare Copyrights*, in *STUDIES IN THE BOOK TRADE IN HONOUR OF GRAHAM POLLARD* 195, 195 (R.W. Hunt et al eds., 1975).

The Statute of Anne was thus the product of a great transformation that incorporated much of the preexisting institutional framework. It was a significant step toward universalizing the copyright system by detaching the system from the guild and censorship apparatus that remained deeply rooted in the specific concerns, interests, politics, and ideological concepts of early eighteenth century England. Finally, the Statute was an early model of general authors' rights still pervaded by the old machinery of the booksellers' privilege. When seen in this light, it is somewhat surprising that eighty years later, Americans would copy it, almost to the letter, as the template for their first copyright regime.

### III. THE STATUTE OF ANNE GOES WEST

#### A. EARLY AMERICAN LOBBYING

Americans discovered the Statute of Anne soon after the Revolution, at about the same time they began to take interest in copyright as a general regime of authors' rights. During colonial times, there was no general copyright regime in the colonies. The Statute of Anne did not apply to the colonies. Given the embryonic state of printing and publishing during most of the relevant period, it is unsurprising that there were no equivalent local statutory frameworks. The only protection for the product of the press was in the form of very sporadic printing privilege grants issued by colonial legislatures to publishers or printers.<sup>68</sup> These were rudimentary local versions of the English printing patent.

An interest in authors' rights began to appear at the very end of the colonial period<sup>69</sup> and intensified after the Revolution. During this period, a gradually growing number of authors, sometimes aided by others, lobbied state legislatures for legal protection of their works. The most famous case is that of Noah Webster, who in the early 1780s traveled to various states in an attempt to convince the local legislatures to provide him exclusive rights to

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68. The conventional wisdom is that only one such printing privilege was issued during the colonial period—a 1672 grant by Massachusetts to John Ushers. There were, however, other legislative grants occasionally issued by other colonies. See Oren Bracha, *Early American Printing Privileges. The Ambivalent Origins of Authors' Copyright in America*, in PRIVILEGE AND PROPERTY: ESSAYS ON THE HISTORY OF COPYRIGHT 89, 97–100 (Ronan Deazley et al. eds., 2010) (describing other colonial printing privileges).

69. An important landmark is the legislative privilege granted to William Billings by the Massachusetts legislature in 1772 for his psalms book. The grant was vetoed by the Governor. See Rollo Silver, *Prologue to Copyright in America: 1772*, 11 STUDIES IN BIBLIOGRAPHY 259 (1958).

his *Grammatical Institute of the English Language*,<sup>70</sup> but there were many other cases as well.<sup>71</sup> What those authors were petitioning for and what some states, starting with Connecticut,<sup>72</sup> began to legislate were not general copyright statutes, but rather discretionary, ad hoc legislative privileges. These legislative privileges were the equivalents of the colonial printing privileges that were now sometimes granted to authors instead of publishers. In some cases, however, some lobbying authors began to advocate for general legislative regimes of authors' rights.<sup>73</sup> It was in this context and in connection to the clamor for general legislation in particular that Americans first turned to the Statute of Anne.

Knowledge of the exact details of lobbying for copyright protection during the first decades of the republic and the kinds of arguments used is fragmentary. The incomplete information, however, is still sufficient to show that Americans derived their arguments justifying the protection of author rights from two sources: the Statute of Anne and the literary property debate. The literary property debate was a series of litigated cases accompanied by a vibrant public debate that took place in Britain from the early 1740s to 1774.<sup>74</sup> The debate revolved around the claim that copyright was a (perpetual) common law property right. It originated in the battle of the stationers for continued perpetual protection irrespective of the limited statutory duration, but it generated voluminous theoretical literature. For decades, jurists, pamphleteers, thinkers, and speakers wrestled with the notion of "literary property" and with the fundamental principles underlying and justifying copyright. The debate left behind a mass of arguments, concepts, and assumptions that became incorporated into copyright thought. Although the House of Lords finally rejected common law copyright in 1774 in *Donaldson v. Beckett*,<sup>75</sup> much of the intellectual residue left by the episode

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70. See BRUCE W. BUGBEE, *THE GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW* 106–08 (1967); Noah Webster, *Origin of the Copy-right Laws of the United States*, in *A COLLECTION OF PAPERS ON POLITICAL, LITERARY AND MORAL SUBJECTS* (1843).

71. See Bracha, *supra* note 68, at 101–13; BUGBEE, *supra* note 70, at 110.

72. An Act for the Encouragement of Literature and Genius, 1783, in *ACTS AND LAWS OF THE STATE OF CONNECTICUT IN AMERICA* 133 (New London, Conn., Timothy Green, 1784).

73. See cases cited *infra* notes 76–83.

74. The literature on the literary property debate is voluminous. E.g., DEAZLEY, *ORIGIN OF THE RIGHT TO COPY*, *supra* note 9, at 115–210; FEATHER, *PIRACY AND POLITICS*, *supra* note 10, at 69–96; PATTERSON, *supra* note 8, at 151–79; ROSE, *supra* note 22, at 67–112; BRAD SHERMAN & LIONEL BENTLY, *THE MAKING OF MODERN INTELLECTUAL PROPERTY LAW, THE BRITISH EXPERIENCE, 1760–1911*, at 19–42 (1999).

75. (1774) 1 Eng. Rep. 837 (H.L.).

concerned copyright as a property right in the product of the intellect. Arguments that had their genesis in the justification of the Statute of Anne's statutory scheme and those that originated in claims about copyright as a perpetual natural property right were not necessarily incongruent or contradictory. If there was any tension, it did not stop late eighteenth century Americans from freely mixing these arguments together.

Thus, in 1782, when Samuel Stanhope Smith, then a professor of theology in the College of New Jersey, provided Webster with a recommendation letter for purposes of lobbying for protection of his work, he observed that: "Men of industry or of talents . . . have a right to the property of their production; and it encourages invention and improvement to secure it to them by certain laws."<sup>76</sup> Smith did not indicate whether the "certain laws" he recommended were ad hoc legislative privileges or general copyright regimes. He did mention that such legislation "has been practiced in European countries with advantage and success."<sup>77</sup> Smith was most likely referring to the Statute of Anne.

The most explicit and elaborate reliance on the Statute of Anne in support of copyright legislation came the following year from Joel Barlow.<sup>78</sup> In January 1783, Barlow wrote Elias Boudinot, the president of the Continental Congress, about what he described as "the embarrassment which bears upon the interests of literature & works of genius in the United States."<sup>79</sup> Probably working under the assumption that the Continental Congress had no power to enact copyright protection on the national level, Barlow tried to obtain from it a recommendation to the states to legislate in this area.

Like Smith, Barlow used a combination of utilitarian and natural property rights arguments. As to the former, Barlow observed that in other countries

[t]he Historian, The Philosopher, the Poet & the Orator have not only been considered among the first ornaments of the age & country which produced them; but have been secured in the profits arising from their labor, and in that way received encouragement in

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76. Webster, *supra* note 70, at 173.

77. *Id.*

78. Barlow was Webster's classmate at Yale. After wartime service as a chaplain for the Massachusetts brigade he settled in Hartford, where he failed to find a patron to support his writing. See JAMES WOODRESS, *YANKEE'S ODYSSEY: THE LIFE OF JOEL BARLOW* 74-77 (1958).

79. IV PAPERS OF THE CONTINENTAL CONGRESS, 1774-1789, No. 78, at 369 (1783).



some proportion to their merit in advancing the happiness of mankind.<sup>80</sup>

Echoing the “encouragement of learning” rationale of the Statute of Anne, Barlow argued that “we are not to expect to see any works of considerable magnitude, (which must always be works of time & labor), offered to the Public till such security be given.”<sup>81</sup> To this he added the following natural property rights argument:

There is certainly no kind of property, in the nature of things, so much his own, as the works which a person originates from his own creative imagination: And when he has spent great part of his life in study, wasted his time, his fortune & perhaps his health in improving his knowledge & correcting his taste, it is a principle of natural justice that he should be entitled to the profits arising from the sale of his works.<sup>82</sup>

Barlow buttressed these arguments with a fairly detailed reference to the Statute of Anne and a recommendation for the adoption of similar statutes by the states:

In England, your Excellency is sensible that the copy-right of any book or pamphlet is holden by the Author & his assigns for the term of fourteen years from the time of its publication; &, if he is then alive, for fourteen years longer. If the passing of statutes similar to this were recommended by Congress to the several States, the measure would be undoubtedly adopted, & the consequences would be extensively happy upon the spirit of the nation . . . .<sup>83</sup>

The efforts by Barlow and others who petitioned Congress on the matter were successful. The petition was referred to a three person committee, who submitted a report that echoed Barlow’s argument by concluding that “nothing is more properly a man's own than the fruit of his study, and that the protection and security of literary property would greatly tend to encourage genius, to promote useful discoveries and to the general extension of the arts and commerce . . . .”<sup>84</sup> Based on this report, Congress issued a resolution in the form of a recommendation that did not mention the Statute

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80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. 24 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 326 (Gaillard Hunt ed., 1922).

of Anne but closely tracked its outline. It recommended that the states “secure to the authors or publishers of any new books not hitherto printed, being citizens of the United States, and to their executors, administrators and assigns, the copyright of such books,” for a minimum term of fourteen years, once renewable by a surviving author.<sup>85</sup>

Thus, the Statute of Anne was first introduced into public discourse in the United States as part of the effort to convince authorities to extend general protection to authors. The Statute was appealed to as a successful precedent from a civilized European country. Alongside the literary property debate, it was the source for substantive arguments in favor of authors’ rights. It also provided a basic model to implement in the new nation. When the states responded to the lobbying and began to legislate copyright enactments, the reliance on the Statute of Anne went even deeper. Rather than just a general model for a regime of authors’ rights, it became a concrete doctrinal template, with many of its details closely replicated by the American statutes.

## B. THE STATE STATUTES

Connecticut, Massachusetts, and Maryland enacted copyright statutes prior to the Continental Congress resolution.<sup>86</sup> By 1786, all the states except Delaware (which would remain the holdout) had passed such enactments.<sup>87</sup> These statutes differed from each other in regard to many of the details, but they were all miniature versions of the Statute of Anne.<sup>88</sup> Whether all state drafters were working directly from the British Statute or some of them simply copied from other states’ statutes, they all tracked the Statute of Anne closely, sometimes to the degree of duplicating substantial parts of its text.

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85. *Id.* at 326–27.

86. ACTS AND LAWS OF THE STATE OF CONNECTICUT IN AMERICA, *supra* note 72; An Act Respecting Literary Property, *in* LAWS OF MARYLAND, MADE AND PASSED AT A SESSION OF ASSEMBLY: BEGUN AND HELD AT THE CITY OF ANNAPOLIS, ON MONDAY THE TWENTY-FIRST OF APRIL, IN THE YEAR OF OUR LORD ONE THOUSAND SEVEN HUNDRED AND EIGHTY-THREE ch. 34 (1783); An Act for the Purpose of Securing to Authors the Exclusive Right and Benefit of Publishing their Literary Productions, for Twenty-one Years, *in* THE PERPETUAL LAWS OF THE COMMONWEALTH OF MASSACHUSETTS 369–70 (Boston, Mass., Adams and Nourse, 1789).

87. PATTERSON, *supra* note 8, at 183–84.

88. For a general survey of the state statutes, see Francine Crawford, *Pre-Constitutional Copyright Statutes*, 23 BULL. COPYRIGHT SOC. 11 (1975); *see also* Oren Bracha, *Commentary on: Connecticut Copyright Statute, USA (1783)*, *in* PRIMARY SOURCES ON COPYRIGHT (1450–1900), (L. Bently & M. Kretschmer eds., 2008), *available at* [www.copyrighthistory.org](http://www.copyrighthistory.org).

The similarity pervaded the statutes, from the titles and the preambles to some of the more technical details.

The Statute of Anne's title coupled its public policy purpose with its proprietary rights means. It was officially named "An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, During the Times therein mentioned."<sup>89</sup> Some state statutes' titles, such as Pennsylvania's "An act for the encouragement and promotion of learning by vesting a right to the copies of printed books in the authors or purchasers of such copies, during the time therein mentioned,"<sup>90</sup> maintained this duality. Other titles emphasized either the public policy or the vesting of rights element, but not both. Connecticut's "An Act for the Encouragement of Literature and Genius"<sup>91</sup> was an early example of the former. Two months later, Massachusetts named its statute "An Act for the Purpose of Securing to Authors the exclusive Right and Benefit of publishing their Literary Productions for Twenty-one Years,"<sup>92</sup> thereby focusing exclusively on the property rights element of the Statute of Anne's title. The Maryland statute's title exhibited an even stronger influence of the literary property debate. It was called simply "An Act respecting literary property."<sup>93</sup> The titles of all the other state statutes followed one of those strategies.

A similar division exhibiting the combined influence of the Statute of Anne and the literary property debate can be seen in the statutes' preambles. The Statute of Anne's preamble read as follows:

Whereas printers Booksellers and other Persons have of late frequently taken the liberty of Printing, Reprinting and Publishing or causing to be Printed, Reprinted, and Published Books, and other Writings, without the Consent of the Authors or Proprietors of such Books and Writings, to their very great Detriment, and too often to the Ruin of them and their Families: For Preventing

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89. Act for the Encouragement of Learning (Statute of Anne), 8 Ann., c. 19, pmbl (1710) (Gr. Brit.).

90. An Act for the Encouragement and Promotion of Learning, 1784, in LAWS ENACTED IN THE SECOND SITTING OF THE EIGHTH GENERAL ASSEMBLY, OF THE COMMONWEALTH OF PENNSYLVANIA, WHICH COMMENCED AT PHILADELPHIA, ON TUESDAY THE THIRTEENTH DAY OF JANUARY, IN THE YEAR OF OUR LORD, ONE THOUSAND SEVEN HUNDRED EIGHTY AND FOUR 306 (Phila., Penn., Thomas Bradford, 1784) [hereinafter COMMONWEALTH OF PENNSYLVANIA].

91. ACTS AND LAWS OF THE STATE OF CONNECTICUT IN AMERICA, *supra* note 72.

92. THE PERPETUAL LAWS OF THE COMMONWEALTH OF MASSACHUSETTS, *supra* note 86.

93. LAWS OF MARYLAND, *supra* note 86.

therefore such Practices for the future, and for the Encouragement of Learned Men to Compose and Write useful Books . . . .<sup>94</sup>

This text reflected the new lobbying strategy the stationers adopted in 1707.<sup>95</sup> It was composed of language taken from several of the newer stationers' petitions and contained all the elements of their new case: no appeal to censorship, a complaint of the economic damage caused to publishers by reprints, a recognition of the author's interest and motivations, and an explicit connection between the protection of printing rights and the public policy of encouraging learning.

Strikingly, two of the American state statutes replicated the stationers' exact argument over seventy years later. The Pennsylvania enactment simply copied the Statute of Anne's preamble almost to the letter, alongside a reference to the Continental Congress resolution.<sup>96</sup> The Maryland preamble was somewhat condensed, but still a very similar version of the Statute of Anne's preamble.<sup>97</sup>

Other states were a little more creative in the preambles of their statutes, but they all still employed various mixes of the encouragement of learning rationale from the Statute of Anne and the natural property right argument traceable to the literary property debate. The two basic models were the early statutes of Connecticut and Massachusetts. Connecticut's preamble read:

Whereas it is perfectly agreeable to the Principles of natural Equity and Justice, that every Author should be secured in receiving the Profits that may arise from the Sale of his Works and such Security may encourage Men of Learning and Genius to publish their Writings; which may do Honour to their Country, and Service to Mankind.<sup>98</sup>

The Massachusetts preamble repeated the same combination of arguments but stated the natural right argument in somewhat stronger terms, similar to terms used by Barlow in his petition to the Continental Congress:

Whereas the improvement of knowledge, the progress of civilization, the publick weal of Commonwealth, and the advancement of human happiness, greatly depend on the efforts of learned and ingenious persons in the various arts and sciences: As the principle encouragement such persons can have to make great

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94. 8 Ann., c. 19, pmbl.

95. *See supra* Part II.

96. COMMONWEALTH OF PENNSYLVANIA, *supra* note 90, at 306.

97. LAWS OF MARYLAND, *supra* note 86, at pmbl.

98. ACTS AND LAWS OF THE STATE OF CONNECTICUT IN AMERICA, *supra* note 72.

and beneficial exertions of this nature, must exist in the legal security of the fruits of their study and industry to themselves, and as such security is one of the natural rights of all men, there being no property more peculiarly man's own than that which is produced by the labour of his mind.<sup>99</sup>

All the other statutes that had preambles (South Carolina and Virginia did not) copied, though sometimes with minor modifications, either the Connecticut or the Massachusetts preambles.<sup>100</sup>

The borrowing did not stop with titles and preambles, but rather encompassed all aspects of the states' copyright regimes. Despite the differences between the statutes on many of the specifics, they were all variants on the main themes of the Statute of Anne. The subject matter covered by the state statutes consisted of variations of the Statute of Anne's "book or books."<sup>101</sup> As in the Statute of Anne,<sup>102</sup> registration of a protected work was required in most states.<sup>103</sup> In contrast to the extensive deposit requirement in Britain (nine copies),<sup>104</sup> only Massachusetts and North Carolina required deposit of copies.<sup>105</sup> The entitlements protected by the acts were different variations on the Statute of Anne that identified an infringer as anyone who would "Print, Reprint, or Import, or cause to be Printed, Reprinted, or Imported" or "knowing the same to be so Printed or Reprinted, without the Consent of the Proprietors shall Sell, Publish, or Expose to Sale, or cause to be Sold, Published, or Exposed to sale" a protected book.<sup>106</sup> All states limited the term of protection. With one exception, the duration consisted of different variations on the Statute of

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99. THE PERPETUAL LAWS OF THE COMMONWEALTH OF MASSACHUSETTS, *supra* note 86, at 369.

100. The Massachusetts model was followed by New Hampshire and Rhode Island. The Connecticut one was adopted by North Carolina, Georgia, and New York. New Jersey's preamble was a curious combination of both.

101. Act for the Encouragement of Learning (Statute of Anne), 8 Ann., c. 19, § 1 (1710) (Gr. Brit.); *see also* Crawford, *supra* note 88, at 18–21.

102. 8 Ann., c. 19, § 2.

103. *See* Crawford, *supra* note 88, at 23–25.

104. 8 Ann., c. 19, § 5.

105. THE PERPETUAL LAWS OF THE COMMONWEALTH OF MASSACHUSETTS, *supra* note 86, § 2; An Act for Securing Literary Property § 1, *in* LAWS OF THE STATE OF NORTH CAROLINA: PUBLISHED, ACCORDING TO ACT OF ASSEMBLY, BY JAMES IREDELL, NOW ONE OF THE ASSOCIATE JUSTICES OF THE SUPREME COURT 563 (Edenton, N.C., Hodge and Wills, 1791).

106. 8 Ann., c. 19, § 1; *see* Bracha, *supra* note 88.

Anne's terms.<sup>107</sup> The Statute of Anne provided only two remedies: the forfeiture and destruction of infringing copies, and a per-sheet punitive sum that was to be divided between the crown and "any person or persons that shall sue for the same."<sup>108</sup> The state statutes showed creativity here, but all of them remained within the framework of a penalty/damages sum defined by a statutory formula.<sup>109</sup>

Two other features of several state statutes are particularly illustrative of the influence of the Statute of Anne. One feature was an attempt by five of the state statutes to give specific expression to the anti-monopoly concerns expressed in the Statute of Anne. Four states required copyrighted books to be sold in sufficient copies and at reasonable prices,<sup>110</sup> and one limited itself to a reasonable price requirement.<sup>111</sup> Underlying these requirements was the view elaborated by the Georgia Statute that "it is equally necessary for the encouragement of learning that the inhabitants of this State be furnished useful books &c. at reasonable prices."<sup>112</sup> Exorbitant prices and insufficient supply were the economic ills traditionally associated with monopolies in English political discourse since the beginning of the seventeenth century.<sup>113</sup> Like the Statute of Anne,<sup>114</sup> the five state statutes created a procedure meant to deal with violations of the supply and price requirements by an author or

107. 8 Ann., c. 19, § 1; see Crawford, *supra* note 88, at 21–23. New Hampshire created the original duration of twenty years. See An Act for the Encouragement of Literature and Genius, and for Securing to Authors the Exclusive Right and Benefit of Publishing their Literary Productions for Twenty-One Years, in THE PERPETUAL LAWS OF THE STATE OF NEW HAMPSHIRE 161, 162 (Portsmouth, N.H., John Melcher, 1789).

108. 8 Ann., c. 19, § 1.

109. See Crawford, *supra* note 88, at 31–33.

110. ACTS AND LAWS OF THE STATE OF CONNECTICUT IN AMERICA, *supra* note 72, at 134; An Act for Encouragement of Literature and Genius, in A DIGEST OF THE LAWS OF THE STATE OF GEORGIA: FROM ITS FIRST ESTABLISHMENT AS A BRITISH PROVINCE DOWN TO THE YEAR 1798, INCLUSIVE, AND THE PRINCIPAL ACTS OF 1799: IN WHICH IS COMPREHENDED THE DECLARATION OF INDEPENDENCE; THE STATE CONSTITUTIONS OF 1777 AND 1789, WITH ALTERATIONS AND AMENDMENTS IN 1794. ALSO THE CONSTITUTION OF 1798, at 323, § 3 (Phila., Ga., R. Aitken, 1800); An Act for the Encouragement of the Arts and Sciences, 1784, in ACTS, ORDINANCES, AND RESOLVES OF THE GENERAL ASSEMBLY OF THE STATE OF SOUTH CAROLINA, PASSED IN THE YEAR 1784, at 49, 50–51 (Charleston, S.C., J. Miller, 1784); An Act to Promote Literature, in LAWS OF THE STATE OF NEW-YORK: PASSED BY THE LEGISLATURE OF SAID STATE, AT THEIR NINTH SESSION 99, § 3 (N.Y., N.Y., Samuel Loudon and John Loudon, 1786).

111. LAWS OF THE STATE OF NORTH CAROLINA, *supra* note 105, § 2.

112. DIGEST OF THE LAWS OF THE STATE OF GEORGIA, *supra* note 110, § 3.

113. See CHRISTINE MACLEOD, INVENTING THE INDUSTRIAL REVOLUTION: THE ENGLISH PATENT SYSTEM 1660–1800, at 15–16 (1988).

114. Act for the Encouragement of Learning (Statute of Anne), 8 Ann., c. 19, § 4 (1710) (Gr. Brit.).

publisher. South Carolina, Georgia, and New York followed the procedure introduced by the Connecticut Statute.<sup>115</sup> The procedure was based on a complaint to local judicial authorities. These authorities were authorized to impose fixed quantities and prices on the copyright owner, and in the case of failure or refusal to meet these requirements, to authorize reprints by the complainant. North Carolina's judicial procedure for enforcing its reasonable prices requirement was similar, but it included no compulsory license element. Like the Statute of Anne, it relied instead on a monetary penalty against copyright owners who violated judicially fixed prices.<sup>116</sup> Thus, five states seriously implemented the Statute of Anne's price-fixing procedure. Four of those expanded it to include cases of insufficient copies and attempted to reform the Statute of Anne's enforcement mechanism.

The other feature that merits particular interest is the saving clauses included in the statutes of Connecticut, Georgia, and New York.<sup>117</sup> The Connecticut provision is representative. It provided that "nothing in this Act shall extend to affect, prejudice or confirm the Rights which any Person may have to the printing or publishing of any Book, Pamphlet, Map or Chart, at Common Law, in Cases not mentioned in this Act."<sup>118</sup> One may be tempted to conclude that these state legislatures were taking a strong position on the questions of the literary property debate that swept England: the existence of common law copyright and the relationship between it and the statutory framework. A closer look shows otherwise. The result of the no "affect, prejudice or confirm" language was neutrality in regard to the existence of any common law rights. Moreover, these provisions were clearly the result of a misreading of section nine of the Statute of Anne.<sup>119</sup> They used language almost identical to that section, except that the original did not mention common law rights and was intended to avoid any effect on the royal printing patents of the universities and of others.<sup>120</sup> It had nothing to do with

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115. ACTS AND LAWS OF THE STATE OF CONNECTICUT IN AMERICA, *supra* note 72, at 134; DIGEST OF THE LAWS OF THE STATE OF GEORGIA, *supra* note 110, § 3; LAWS OF THE STATE OF NEW-YORK, *supra* note 110, § 3; ACTS, ORDINANCES, AND RESOLVES, *supra* note 110, at 50–51.

116. 8 Ann., c. 19, § 4; LAWS OF THE STATE OF NORTH CAROLINA, *supra* note 105, § 2.

117. ACTS AND LAWS OF THE STATE OF CONNECTICUT IN AMERICA, *supra* note 72, at 134; DIGEST OF THE LAWS OF THE STATE OF GEORGIA, *supra* note 110, § 4; LAWS OF THE STATE OF NEW-YORK, *supra* note 110, § 4.

118. ACTS AND LAWS OF THE STATE OF CONNECTICUT IN AMERICA, *supra* note 72, at 134.

119. 8 Ann., c. 19, § 9.

120. PATTERSON, *supra* note 8, at 189. It is possible that the source of the mistake was the fact that some proponents of common law copyright in England offered a similar

common law copyright. It was a classic case of an element of a transplanted law whose meaning was lost in translation.

The practical significance of the state statutes was not large. As far as we know, they were not extensively used, and it is possible that two of them never even went into effect.<sup>121</sup> They were also soon superseded in practice by the federal regime. The importance of the statutes was on two other planes. First, the statutes and the deliberative process surrounding them spurred Americans to think about copyright, ponder its purposes, and articulate its justifications. Second, the specific enactments formed an institutional precedent: a detailed model of a regime for protecting authors' rights that was bound to influence any future attempt to achieve the same goal. The Statute of Anne played a cardinal role in regard to both of these dimensions.

### C. THE CONSTITUTIONAL CLAUSE

The next big step for copyright in America was the shift to the national level. This came with the Constitution, which granted Congress the power "To promote the Progress of Science and useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."<sup>122</sup> Questions about the exact meaning of the constitutional clause and its sources are beyond the scope of this essay. It is worthwhile to sketch briefly, however, some obvious connections between the clause and the Statute of Anne.

One such connection is the "limited times" element. By the end of the eighteenth century, the principle of limited duration of monopolies had been a staple of English political thought for two centuries. According to this principle, monopolies usually seen as reprehensible could be tolerated in exceptional cases where they served the public good, provided the monopolies were kept within certain safeguards. Chief among these safeguards was limited duration.<sup>123</sup> A written exchange between James Madison and Thomas Jefferson shortly after the ratification of the Constitution demonstrates the extent to which Americans internalized this

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misreading of section nine of the Statute of Anne in support of their claim that common law copyright existed and was not taken away by the Statute. *See* *Millar v. Taylor*, (1769) 98 Eng. Rep. 201, 227 (K.B.).

121. The statutes of Pennsylvania and Maryland suspended their operation until all states legislated similar enactments, a condition that never came about due to Delaware's holdout. *See* COMMONWEALTH OF PENNSYLVANIA, *supra* note 90, § 7; LAWS OF MARYLAND, *supra* note 86, § 6.

122. U.S. CONST. art. I, § 8, cl. 8.

123. *See* Bracha, *supra* note 59, at 197–98.



outlook. Jefferson, who was absent from the convention due to his position as the American minister to France, wrote Madison that “it is better . . . to abolish . . . Monopolies, in all cases, than not to do it in any.” He added that “saying there shall be no monopolies lessens the incitement to ingenuity, which is spurred on by the hope of a monopoly for a limited time, as of 14 years; but the benefit even of limited monopolies is too doubtful to be opposed to that of their general suppression.”<sup>124</sup> Madison took exception:

In 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 the right to the public to abolish the privilege at a price to be specified in the grant of it?<sup>125</sup>

In reply, Jefferson, who now reluctantly accepted the congressional power to grant such monopolies, suggested that the future Bill of Rights would provide that “Monopolies may be allowed to persons for their own production in literature, and their own inventions in the arts for a term not exceeding — years, but for no longer term, and for no other purpose.”<sup>126</sup> The concepts of tolerated beneficial monopolies as the exception, and of limited duration as an essential safeguard, were derived mainly from the context of the Statute of Monopolies and related common law.<sup>127</sup> The Statute of Anne, however, had the same principle at its foundation and was probably an important secondary source. Given the strong English tradition and the newer precedents from the states—copyright enactments and ad hoc printing privilege grants—it is hardly a surprise that the constitutional clause included a limited duration restriction.

Another connection between the Statute of Anne’s legacy and the constitutional clause—the latter’s focus on authors—may seem too trivial to mention. It is not. By 1789, it may have been a foregone conclusion that any rights created by Congress in this field would be given to authors, rather than

124. Letter from Thomas Jefferson to James Madison, (July 31, 1788), in 1 THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON, 1776–1826, at 545 (James Morton Smith ed., 1995) [hereinafter REPUBLIC OF LETTERS].

125. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in REPUBLIC OF LETTERS, *supra* note 124, at 566.

126. Letter from Thomas Jefferson to James Madison (Aug. 28, 1789), in REPUBLIC OF LETTERS, *supra* note 124, at 630.

127. See Ochoa & Rose, *supra* note 59, at 691. On the Statute of Monopolies background and the origin of patent law, see Bracha, *supra* note 59, at 191–200.

publishers. An important part of the reason for this consensus on the status of authors by 1789, however, was the preceding decade of authorship that saw vigorous campaigns for authors' rights as well as legislation of authors' rights regimes across the nation, all under the inspiration of the Statute of Anne. Thus, if at the beginning of the decade the Statute of Anne's principle of authors' rights was presented as a model for imitation, close to its end, it was already taken for granted.

Finally, the most important concept connecting the clause to the Statute of Anne is the constitutional grant of power to "Promote the Progress of Science and useful Arts."<sup>128</sup> As explained, the basic notion that monopolies should be tolerated in the exceptional cases where they serve the public good is traceable to early seventeenth century England. The concrete formula, however, appears to be more closely linked to the Statute of Anne, as the promotion of science in the constitutional clause was actually synonymous with the "encouragement of learning" in the Statute of Anne. Several of the state statutes' titles replaced or supplemented "encouragement" (of learning or literature) with "promotion" or "to promote."<sup>129</sup> The term "science" was understood to mean learning or knowledge,<sup>130</sup> and indeed the South Carolina Statute was called "An Act for the encouragement of arts and sciences."<sup>131</sup> The clause and the Statute of Anne shared then the goal of encouraging learning/promoting science. To be sure, the concept's precise meaning was different in early eighteenth century England and in the first years of the American republic almost a century later. The American concept put more emphasis on broad dissemination of knowledge throughout society,<sup>132</sup> and tended to understand the ideal mainly as a political one closely related to the health and virtue of the polity.<sup>133</sup> Still, the general ideal entrenched in the

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128. U.S. CONST. art. I, § 8, cl. 8.

129. See, e.g., An Act for the Promotion and Encouragement of Literature, 1783, in ACTS OF THE GENERAL ASSEMBLY OF THE STATE OF NEW JERSEY 325–26 (Trenton, N.J., Peter Wilson, 1784); LAWS OF THE STATE OF NEW-YORK, *supra* note 110; COMMONWEALTH OF PENNSYLVANIA, *supra* note 90.

130. Edward C. Walterscheid, *To Promote the Progress of Science and Useful Arts: The Background and Origin of the Intellectual Property Clause of the United States Constitution*, 2 J. INTELL. PROP. L. 1, 51 (1994); see also Karl B. Lutz, *Patents and Science: A Clarification of the Patent Clause of the U.S. Constitution*, 32 J. PAT. OFF. SOC'Y 83, 84 (1952).

131. ACTS, ORDINANCES, AND RESOLVES, *supra* note 110.

132. See Dianne Leenheer Zimmerman, *The Statute of Anne and Its Progeny: Variations Without a Theme*, 47 HOUS. L. REV. (forthcoming 2010) (manuscript at 4–5, on file with author).

133. See Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 YALE L.J. 186, 243–44 (2008).

American constitutional clause was the same as the ideal from the British Statute.

Unsurprisingly, given the nature of the document, the lines that connect the constitutional clause to the Statute of Anne operate on an abstract, conceptual level. Soon after the ratification of the Constitution, however, the new Congress exercised its power and enacted a federal copyright act, which reintroduced more direct forms of textual and doctrinal plagiarism.

#### D. THE 1790 COPYRIGHT REGIME

To put it bluntly, America's first federal copyright enactment—the 1790 Copyright Act<sup>134</sup>—is the Statute of Anne phrased in somewhat more modern language and featuring a few omissions, additions, and modifications. As with the state statutes, the similarity is felt on every level, including structure, legal technicalities, and specific text. It is possible that the Statute of Anne influenced the 1790 Act indirectly through the texts of some of the state statutes. Yet, there are some indications that the drafters of the 1790 Act worked directly from a version of the Statute of Anne.

The similarity begins with the title. The Statute of Anne was named “An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned.”<sup>135</sup> The title of the 1790 Act was “An Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned.”<sup>136</sup> The 1790 Act dispensed with the preamble of the Statute of Anne, but everything that followed was almost identical.

Both acts applied to existing, published works and to unpublished and future works, although the Statute of Anne, unlike the American Act, prescribed a longer term of twenty-one years for the former category.<sup>137</sup>

The Statute of Anne defined an offender as the person who

shall Print, Reprint, or Import, or cause to be Printed, Reprinted, or Imported any such Book or Books, without the Consent of the Proprietor or Proprietors thereof first had and obtained in Writing, Signed in the Presence of Two or more Credible Witnesses; or knowing the same to be so Printed or Reprinted, without the

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134. Act of May 31, 1790, ch. 15, 1 Stat. 124.

135. Act for the Encouragement of Learning (Statute of Anne), 8 Ann., c. 19 (1710) (Gr. Brit.).

136. Act of May 31, 1790, ch. 15, 1 Stat. 124.

137. 8 Ann., c. 19, § 1; 1 Stat. 124 § 1.

Consent of the Proprietors, shall Sell, Publish, or Expose to Sale, or cause to be Sold, Published, or Exposed to Sale, any such Book or Books, without such Consent first had and obtained, as aforesaid.<sup>138</sup>

The American Statute defined an offender as a person who

shall print, reprint, publish, or import, or cause to be printed, reprinted, published, or imported from any foreign Kingdom or State, any copy or copies of such map, chart, book or books, without the consent of the author or proprietor thereof, first had and obtained in writing, signed in the presence of two or more credible witnesses; or knowing the same to be so printed, reprinted, or imported, shall publish, sell, or expose to sale, or cause to be published, sold or exposed to sale, any copy of such map, chart, book or books, without such consent first had and obtained in writing as aforesaid.<sup>139</sup>

Unlike the Statute of Anne, the American Statute explicitly provided protection to manuscripts.<sup>140</sup> Like some of the state statutes that supplied similar statutory protection, this may have been the result of awareness of the 1741 decision, *Pope v. Curl*,<sup>141</sup> which provided protection to unpublished works as a logical extension or an auxiliary to the statutory protection of published works.

The only remedies in the 1790 Act were those in the Statute of Anne: forfeiture of infringing copies and a statutory penalty calculated on a per-sheet basis to be divided between the plaintiff and the Crown or the United States. There was an interesting divergence in regard to the identity of such a plaintiff. The Statute of Anne awarded half the sum of the statutory penalty to “to any Person or Persons that shall Sue for the same”<sup>142</sup>—possibly a contemplation of *qui tam* actions.<sup>143</sup> H.R. 10,<sup>144</sup> the first bill that resulted in

138. 8 Ann., c. 19, § 1.

139. 1 Stat. 124 § 2.

140. *Id.* § 6.

141. 26 Eng. Rep. 608 (1741).

142. 8 Ann., c. 19, § 1.

143. *Qui tam* actions in which plaintiffs with no direct interest in the case—a “common informer”—could bring actions and enjoy compensation were common enforcement mechanisms in England and its colonies. On *qui tam* actions, see Note, *The History and Development of Qui Tam Actions*, 1972 WASH. U .L.Q. 81, 83–91 (1972); J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N. C. L. REV. 539, 550–55 (2000).

144. H.R. 10 was a joint copyright-patent Bill. No known copy of it has survived. Available texts of the Bill are based on a later typescript of the original. The Bill is reproduced in 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789–1791,

the 1790 Act, retained the *qui tam* action approach by splitting the penalty sum between “the author . . . or the proprietor” and “any person or persons who shall sue for the same.”<sup>145</sup> The final Act, however, dispensed with this mechanism and split the fine between the United States and “the author or proprietor of such map, chart, book or books who shall sue for the same.”<sup>146</sup>

The American Copyright Act followed the British Statute in requiring registration and deposit of the protected work, although it modified and liberalized some of the technical details of these requirements. In contrast to the nine deposited copies required by the Statute of Anne,<sup>147</sup> the Copyright Act required only one copy to be deposited with the Secretary of State.<sup>148</sup> The legislative history of the registration sections strongly supports the conclusion that the American drafters borrowed directly from the Statute of Anne. The British Statute ordered registration in the “Register-Book of the Company of Stationers.”<sup>149</sup> It also provided for a complex mechanism for resolving cases in which the Clerk of the Stationers’ Company “shall Refuse or Neglect” to register works.<sup>150</sup> The reason for this unusual concern was that the Statute of Anne dissolved the long-held monopoly on publishing the Stationers’ Company members enjoyed and turned the Company’s register book into a public record open to any person entitled to copyright protection under the new regime.<sup>151</sup> Against this background, there was a palpable concern that the Company might not cooperate and refuse to register works of non-members. This concern was absent in the United States seventy years later where registration was committed to the clerks of the federal district courts. Nonetheless, the drafters of H.R. 10 unwittingly retained a similar mechanism for dealing with refusals to register.<sup>152</sup> Only in later drafts was this anachronistic provision eliminated from the Statute.

There were some other interesting modifications. Missing from the 1790 Act was the Statute of Anne’s price control procedure, which was intended to deal with cases of “unreasonable” prices charged by copyright owners.<sup>153</sup> It is unknown whether the American drafters simply saw this provision as

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at 519 (Linda Grant De Pauw et al. eds., 1986). Citations here are to the original typescript available in the Copyright Office [hereinafter H.R. 10].

145. *Id.* at 2.

146. Act of May 31, 1790, ch. 15, 1 Stat. 124 § 2.

147. 8 Ann., c. 19, § 5.

148. 1 Stat. 124 § 4.

149. 8 Ann., c. 19, § 2.

150. *Id.* § 3.

151. *See supra* Part II.

152. H.R. 10, *supra* note 144, at 3.

153. 8 Ann., c. 19, § 4.

unnecessary or unworkable, or if they were aware that in Britain it was repealed in 1739, probably without having been used.<sup>154</sup> The American Statute broadened the Statute of Anne's explicit allowance of the importation and sale of any foreign language books<sup>155</sup> to exclude from protection "the importation or vending, reprinting or publishing within the United States" of any work "written, printed, or published by any person not a citizen of the United States, in foreign parts or places without the jurisdiction of the United States."<sup>156</sup> Finally, the Statute of Anne's right of reversion given to the author was bundled with renewal. H.R. 10 repeated the Statute of Anne's arrangement that after the expiration of the first fourteen year term, the right "shall return" to a surviving author for another term of fourteen years.<sup>157</sup> The 1790 Act, however, conditioned the second term upon a procedure of re-registration that was performed within the six months prior to expiration.<sup>158</sup>

As becomes apparent from this brief survey, the 1790 Copyright Act closely followed the Statute of Anne. In a few cases, it made omissions or inserted interesting modifications, but in essence, the statutory framework and much of its details remained the same.

#### IV. WHY THE STATUTE OF ANNE?

What accounts for this massive duplication on the state and federal level? Why would Americans, at a moment of great national enthusiasm, turn to an almost century old British Statute deeply rooted in the context of the English book trade, despite America's lack of the constraints of previously existing institutions and norms?

One possible answer is based on a denial of the last premise of this question. The Statute of Anne arguably represented a moment of universalization. Its main innovation was exactly in detaching the copyright regime from its entanglement with the guild institutional context and the censorship apparatus, thereby creating a general template for the protection of authors' rights. Such a general template, being free from the specifics of a particular society and culture, was highly transportable. That is to say, it was particularly suited for being borrowed and implemented in other societies, even those with very different social and cultural conditions. The argument could be recast in terms of the legal transplants literature. An important

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154. Printing Act 1739, 8 Geo. 2, c. 36 (Gr. Brit.).

155. 8 Ann., c. 19, § 7.

156. Act of May 31, 1790, ch. 15, 1 Stat. 124 § 5.

157. Compare 8 Ann., c. 19, § 11, with H.R. 10, *supra* note 144, at 4.

158. 1 Stat. 124 § 1.

argument from this literature is that the likelihood of a transplantation of a legal institution and the likelihood of the success of such transplantation is correlated with the extent to which that legal institution is embedded in local social, cultural, and political structures.<sup>159</sup> Thus, by way of generalization, one should expect less transplantation and more resistance to transplantation in fields, like family law, that tend to be highly immersed in local social-cultural context. On the other hand, one should expect more successful, resistance-free transplantation in fields that tend to be relatively less entangled in such local context, such as commercial law.<sup>160</sup> Arguably, the Statute of Anne pushed the English copyright regime from one end of the scale to the other. A regime that was once deeply embedded in local political-ideological power structures (the licensing system) and in local social-economic institutions (the Stationers' Company) was severed from all of those entanglements and thus became particularly suitable for transplantation elsewhere.

This explanation is partial at best. To be sure, detaching the English copyright regime from the censorship and guild context was a necessary condition for making it an even plausible source of inspiration for late eighteenth century Americans. Nevertheless, in many respects, the Statute of Anne remained deeply rooted in its local social, political, and institutional context. As explained, the Statute expressed a compromise between the specific conflicting interests and ideological forces of early eighteenth century England: the demands of powerful members of the Stationers' Company; the interests of smaller members of the book trade; hostility towards monopolies and the concentrated power of the Company; the decline of the censorship system; a new interest in the well-being and rights of authors; and a rising concern for the encouragement of learning.<sup>161</sup> Furthermore, the means of implementing the compromise incorporated much of the preexisting institutional framework and retained much of the prior arrangements in the field. What was not in the Statute is just as important. It did not create the conceptual vocabulary necessary for the new authors' rights framework, but simply relied on the traditional form of the publisher's economic privilege. In short, the Statute of Anne was still deeply embedded in the peculiarities of the society and culture that produced it.

Two other elements may help to explain America resorting to the British Statute. First is the mere fact that it was there. The existence of a detailed and

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159. O. Khan-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1 (1974).

160. Ron Harris and Michael Crystal, *Some Reflections on the Transplantation of British Company Law in Post-Ottoman Palestine*, 10 THEORETICAL INQUIRIES IN LAW, 561, 562 (2009).

161. See *supra* text accompanying notes 43–55.

accessible template that could be taken “off the shelf” and implemented in a field whose regulation was desired was not a trivial thing. Despite any anti-British sentiments, the new states relied heavily on British law in general. The common law was broadly adopted,<sup>162</sup> and various strategies were employed for revising and implementing British statutes.<sup>163</sup> There were a variety of reasons for this, including inertia, the need for continuity, demand for the English liberties that were denied beforehand, and the overwhelming task of governing and managing the many aspects of a new nation.<sup>164</sup> Having an organized, ready-made, and somewhat familiar body of law for dealing with the many immediate needs at hand was extremely valuable, whether it was simply implemented or used as a platform for modifications and revisions. Against this backdrop of widespread reliance on British law, the wholesale copying of the Statute of Anne appears a little less remarkable.

The second relevant element was Americans’ vision of England as a bastion of culture and civilization. Comparative law scholars have long identified “prestige” as an important influence on the likelihood of legal transplantation. To the extent the nation in which a particular legal institution originates is perceived as successful, advanced, superior, or enviable, the higher the chance that other nations will transplant that legal institution into their own laws.<sup>165</sup> In the field of literature, culture, and learning, England was the ultimate object of admiration and aspiration for early Americans. When Americans expressed their thoughts about this subject, two themes kept recurring: looking up to the established European nations that were seen as the peak of cultural cultivation and the need for the new nation to achieve its own status among those old powerhouses. In the 1779 preface of his *United States Magazine*, Hugh Henry Brackenridge declared the need to disprove the predictions that Americans would “sink down to so many Ouran-Outans of the wood, lost to the light of science which, for the other side of the Atlantic, had just began to break upon us.”<sup>166</sup> Barlow, in his letter to the Continental Congress, observed that “America has convinced the world of her importance in a political & military line by the wisdom, energy & ardor

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162. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 109–15 (2d ed. 1985); William B. Ewald, *The American Evolution and the Evolution of Law*, 42 *AM. J. COMP. L. SUPP.* 1, 13 (1994).

163. ELIZABETH GASPAR BROWN, *BRITISH STATUTES IN AMERICAN LAW, 1776–1836*, at 23–45 (1964).

164. *Id.* at 23–24; FRIEDMAN, *supra* note 162, at 109–10.

165. See Michele Graziadei, *supra* note 5, at 457–59.

166. *THE UNITED STATES MAGAZINE: A REPOSITORY OF HISTORY, POLITICS AND LITERATURE* 3–4 (1779).



for liberty which distinguish the present era. A literary reputation is necessary in order to complete her national character."<sup>167</sup> Early Americans saw establishing the place of their republic among the civilized and cultivated nations as a project of high national priority. They were looking up to the old world nations in this respect, and their foremost target for envy and imitation was England. This helps explain why, when these hopes were translated to legal means, the British legislation associated with the nourishment of the cultural and scholarly field enjoyed a high status in America.

## V. TRANSPLANTING THE STATUTE OF ANNE AS LEGAL TRANSLATION

If the Statute of Anne was a less than obvious candidate for transplantation in the United States in the first place, it may also appear that once transplanted, it did not have high prospects of being a successful, or at least long-surviving, transplant. The book trade in the United States was about to undergo an extensive transformation in the early nineteenth century. Technological and economic developments related to the production and dissemination of books, together with the spread of literacy, laid the foundation for an emerging national market in books.<sup>168</sup> New patterns of organization, operation, and marketing appeared in the publishing industry.<sup>169</sup> By the second half of the century, copyright would gradually become relevant to other industries beyond the traditional context of the book trade.<sup>170</sup> The Statute of Anne was, in this regard, yesterday's news. It was tailored to deal with the early eighteenth century English book trade and was based on the centuries old stationer's economic privilege. It was completely silent on some of the issues that would become the most important in the era of a new publishing industry and a focus on authors.

And yet, the Statute of Anne's statutory framework, imported in the late eighteenth century, survived for a remarkably long period in the United States. The first half of the nineteenth century saw several amendments to the Copyright Act and one general revision in 1831.<sup>171</sup> Nevertheless, until the second half of the century, the heart of the statutory copyright regime was

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167. IV PAPERS OF THE CONTINENTAL CONGRESS, 1774-1789, No. 78, at 370 (1783).

168. See JOHN WILLIAM TEBBEL, A HISTORY OF BOOK PUBLISHING IN THE UNITED STATES 206-07 (1972); see also James Gilreath, *American Book Distribution*, in 95 PROC. AM. ANTIQUARIAN SOC'Y 501 (1986).

169. See Bracha, *supra* note 133, at 210-12.

170. *Id.* at 213.

171. Act of Apr. 29, 1802, ch. 36, 2 Stat. 171; Act of Feb. 15, 1819, ch. 19, 3 Stat. 481; Act of Feb. 3, 1831, 4 Stat. 436, 436-39.

very much the one created in 1790. The term of copyright protection was extended and certain features were added or modified along the edges, but the Statute of Anne's basic structure and arrangements were still the flesh and bones of the statutory text. Only in the second half of the century, with a few amendments in the 1850s and 1860s<sup>172</sup> that added new entitlements and subject matter and with the new Copyright Act of 1870,<sup>173</sup> did a significant shift in the statutory framework become visible.

How can this remarkable longevity be explained? The short answer is that the statutory text reflected only part, and not necessarily the most important part, of what copyright law was and meant in America. Some of the insights of the legal transplants literature may help explain this. At one point, scholars devoted much energy to debating the question of whether the concept of a legal transplant in the strict sense is ever possible in reality.<sup>174</sup> The attack on the possibility of transplantation was based on the claim that a legal institution, norm, or concept never acquires meaning standing alone.<sup>175</sup> Rather, a legal element is always part of a system. Its meaning and function are determined, in part, not just by its internal features but also by its relationships with other elements in that system. These other elements include other formal parts of the legal system, modes of operation of the legal system, and more general cultural and social elements that interact with the legal field. Understood in this light, the claim that a transplant is impossible means that the duplication of the exact meaning and function of a legal element taken from one society and culture to another is impossible. While a legal form could be closely duplicated, it is unlikely that the entire system, both legal and socio-cultural, from which a legal element derives its meaning, could be transferred to another society.<sup>176</sup> Much ink had been spilled over this debate, but most comparative lawyers today seem to have settled on various versions of a position that recognizes both the prevalence

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172. Act of Aug. 18, 1856, ch. 169, 11 Stat. 138 (1856) (adding a public performance entitlement to dramatic works); Act of Mar. 3, 1865, 13 Stat. 540 (adding photographs as protectable subject matter).

173. Act of July 8, 1870, ch. 230, 16 Stat. 198 (1870).

174. See Graziadei, *supra* note 5, at 465–70.

175. *Id.*

176. Pierre Legrand, *The Impossibility of 'Legal Transplant,'* 4 MAASTRICHT J. EUR. & COMP. L. 111 (1997); Pierre Legrand, *The Same and the Different, in* COMPARATIVE LEGAL STUDIES 240 *passim* (Pierre Legrand & Roderick Munday eds., 2003).

of legal transplants and the fact that exact duplication almost never happens.<sup>177</sup>

Thus, Máximo Langer proposed the metaphor of legal translation.<sup>178</sup> Essentially, just like translation, legal transplantation is a creative process that always involves the creation of new meaning rather than just mechanical duplication. Because of the interaction between the transferred legal element and the different legal and socio-cultural system in which it is placed, transplantation is always a creative and dynamic process. The transplanted element usually adapts to its new environment: its meaning and function transform by its interaction with the local elements, even if on the textual-formal level the duplication seems complete.<sup>179</sup> At the same time, the receiving system often accommodates the new element—the interaction between the existing elements and the new one tend to create new meanings and practices with repercussions throughout the system.<sup>180</sup>

Transplanting the Statute of Anne in America is best understood as such a process of translation. Despite the close duplication of the statutory text, 1710 English copyright was not simply recreated in America. Rather, in a dynamic and ongoing process, the interaction between the imported form and local needs, interests, and influences produced a new body of copyright law. Much of this process happened through case law. A full survey of how American copyright law gradually acquired meaning during its first century cannot be undertaken here. It may be useful, however, to point out some of the main dimensions in which the regime of the Statute of Anne was developed and transformed, while the statutory scheme was hardly touched.

One dimension concerned the legal criterion for identifying authors and works of authorship. As in the Statute of Anne and the state statutes, the constitutional clause and the 1790 Act focused on authors as the primary right owners.<sup>181</sup> But, unsurprisingly for a text that was still immersed in the forms of the stationer's privilege, the statutory scheme contained no attempt to define either authors or works of authorship. Beginning in the 1820s, the courts began to face questions about what could be legitimately included within the purview of copyright protection as works of authorship. Gradually

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177. Michele Graziadei, *Legal Transplants and the Frontiers of Legal Knowledge*, 10 THEORETICAL INQUIRIES IN LAW 723, 728–29 (2009); Graziadei, *supra* note 5, at 470. See generally ADAPTING LEGAL CULTURES (David Nleken & Johannes Fest eds., 2001).

178. Langer, *supra* note 6.

179. *Id.* at 33–34.

180. *Id.* at 34–35.

181. See *supra* Sections III.C, III.D.

they developed what came to be known as the originality requirement.<sup>182</sup> There were conflicting approaches to questions such as the degree of novelty required by a protected work (if any) or the extent to which courts would police copyright protection on the basis of the substantive content or the nature of the work. In the latter part of the nineteenth century, a minimalist version of originality that rejected both a demanding novelty criterion and close scrutiny of the work's content became dominant.<sup>183</sup> Most importantly, however, is that by the end of the century, originality came to be viewed as a fundamental part of copyright law and a body of rules and principles consolidated around it, while leaving hardly any trace in the statutory text.

A second important, mostly non-statutory development was the fundamental transformation of the principles that defined the scope of copyright protection. The statutory scheme inherited from the Statute of Anne had little to say about this subject except a reference to the “sole Right and Liberty of Printing” and the actions of printing, reprinting, selling, and importing the protected book.<sup>184</sup> This was the traditional entitlement of the stationer that was understood to be the exclusive right of making verbatim copies of a text in print.<sup>185</sup> In the nineteenth century, this narrow understanding of the scope of copyright protection came under increasing pressure. The courts gradually moved away from the reprint concept by developing legal tests that focused on increasingly abstract levels of similarity, and thereby protected the copyright owner's interest in a widening sphere of secondary markets.<sup>186</sup> As courts deserted the traditional boundaries created by the reprint concept, new mechanisms had to be created for limiting the scope of copyright protection. These were the fair use doctrine, which was first developed by Justice Joseph Story in the 1830s and 1840s,<sup>187</sup> and the idea/expression dichotomy, which was developed toward the end of the

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182. See Bracha, *supra* note 133, at 201–09.

183. See *id.* On the later part of this process, see Diane L. Zimmerman, *The Story of Bleistein v. Donaldson Lithographing Company: Originality as a Vehicle for Copyright Inclusivity*, in INTELLECTUAL PROPERTY STORIES (Rochelle Cooper Dreyfuss & Jane C. Ginsburg eds., 2006); Robert Brauneis, *The Transformation of Originality in the Progressive-era Debate over Copyright in News*, 27 CARDOZO ARTS & ENT. L.J. 321, 334 (2009).

184. Act for the Encouragement of Learning (Statute of Anne), 8 Ann., c. 19, § 1 (1710) (Gr. Brit.).

185. See Bracha, *supra* note 13, at 188–89.

186. See KAPLAN, *supra* note 10, at 27–32; Bracha, *supra* note 133, at 201–09.

187. See R. Anthony Reese, *The Story of Folsom v. Marsh: Distinguishing Between Infringing and Legitimate Uses*, in INTELLECTUAL PROPERTY STORIES, *supra* note 183, at 259; John Tehranian, *Et Tu, Fair Use? The Triumph of Natural-Law Copyright*, 38 U.C. DAVIS L. REV. 465 (2005); Bracha, *supra* note 133, at 229–30.

century.<sup>188</sup> This fundamental change in the character of copyright protection also took place mainly in the case law. Only in the second half of the century did it receive some statutory expression in the form of additional entitlements, such as translation,<sup>189</sup> dramatization,<sup>190</sup> and public performance,<sup>191</sup> that were slowly being added through statutory amendments.

Perhaps somewhat less central to the fundamental nature of copyright, but at least as important in practical terms, was the issue of remedies. The remedial options in the statutory scheme were very limited.<sup>192</sup> Like the Statute of Anne, the only remedies in the 1790 Act were forfeiture of infringing copies and a per-sheet penalty.<sup>193</sup> There is little information available about the remedial practice of American courts in early copyright cases, but even the little information available shows that in practice courts did not limit themselves to the statutory remedies. In the first reported copyright case in the United States, the 1798 decision *Morse v. Reid*, the circuit court for the District of New York virtually ignored the statutory remedy.<sup>194</sup> In this infringement case involving Jedidiah Morse's *American Geography*, the court ordered an accounting of the defendant's profits arising from the infringement and a monetary relief based on these profits.<sup>195</sup> The remedy was the equitable one of disgorgement of defendant's profits, but the extremely loose way in which the court calculated the profits blurred the distinction between disgorgement of profits and damages.<sup>196</sup> Explicit equity jurisdiction over copyright and patent cases was given to the circuit courts in 1819,<sup>197</sup> but

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188. Pamela Samuelson, *The Story of Baker v. Selden: Sharpening the Distinction Between Authorship and Invention*, in INTELLECTUAL PROPERTY STORIES, *supra* note 183, at 159; Bracha, *supra* note 133, at 235–38.

189. The translation and dramatization rights were added in the 1870 Act. *See* Act of July 8, 1870, ch. 230, 16 Stat. 198 (1870) § 86.

190. *Id.*

191. A public performance entitlement was first extended to dramatic works in 1856 and then to musical compositions in 1897. *See* Act of Aug. 18, 1856, ch. 169, 11 Stat. 138 (1856); Act of Jan. 6, 1897, ch. 4, 29 Stat. 481 (1897). *See generally* Zvi Rosen, *The Twilight of the Opera Pirates: A Prehistory of the Exclusive Right of Public Performance for Musical Compositions*, 24 CARDOZO ARTS & ENT. L.J. 1157 (2007).

192. *See supra* Section III.B.

193. Act for the Encouragement of Learning (Statute of Anne), 8 Ann., c. 19, § 1 (1710) (Gr. Brit.); Act of May 31, 1790, ch. 15, 1 Stat. 124 § 2.

194. A report of the case can be found in 5 COLLECTIONS OF THE MASSACHUSETTS HISTORICAL SOCIETY 123 (1798).

195. *Id.* at 124.

196. *See* John D. Gordan, *Morse v. Reid: The First Reported Federal Copyright Case*, 11 L. & HIST. REV. 21, 33–36 (1993).

197. Act of Feb. 15, 1819, ch. 19, 3 Stat. 481. It is unknown whether federal courts also issued injunctions in copyright cases prior to the 1819 explicit authorization to do so.

here was a court in 1798 freely awarding account of profits and perhaps damages as a matter of routine. In post-1819 cases, the award of defendant's profits was a standard remedy. *Morse v. Reid* gives a reason to suspect that was so even prior to 1819.

It is unclear to what extent early nineteenth century courts were willing to formally award common law damages, but American nineteenth century commentators flatly asserted the applicability of non-statutory remedies with little discussion or support. For example, Joseph Story in his *Commentaries on Equity Jurisprudence* seems to take for granted that both the common law remedy of damages and the equitable one of account were available in copyright infringement cases.<sup>198</sup> George Ticknor Curtis asserted in his 1847 treatise that: "No action on the case for damages is provided by statute; but there can be no doubt that here, as well as in England, such an action lies at common law."<sup>199</sup> He gave no reason whatsoever to this confident assertion. Only in 1908, when the question was of much less practical importance, did the Supreme Court reject common law remedies and rule that copyright protection was limited to the remedies provided in the statute.<sup>200</sup>

The list could be extended, but the point should be clear by now. While the basic statutory framework changed very little during the first half of the nineteenth century and only gradually during the second half, some of the most fundamental elements of the copyright regime were radically changed during this period. When looking only at the formal statutory record, the process of receiving the Statute of Anne in the United States may look like simple duplication. The extent to which the transplant was adapted and transformed within its new environment becomes apparent, however, when one looks at the case law that applied, supplemented and extended the statutory scheme.

Two more general insights about the process of legal transplantation arise from this discussion. First, the process is often dynamic and extends over time. A statutory text was transplanted in the United States in 1790. However, the process of elaborating what this text would mean and how it would function in practice in its new environment continued for many decades. Second, sometimes even the transplantation in the technical sense—

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198. 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE IN ENGLAND AND AMERICA 210, § 932 (2d ed. 1839).

199. GEORGE TICKNOR CURTIS, A TREATISE ON THE LAW OF COPYRIGHT 313 (1847).

200. *Globe Newspaper Co. v. Walker*, 210 U.S. 356, 362–67 (1908) ("[T]he purpose of Congress was not only to create the right granted in the statute, but also to create the specific remedies by which alone such rights may be enforced.").

the transfer of legal elements from one jurisdiction to another—happens not in one fell swoop but as a prolonged process. That was exactly the case with Anglo-American copyright. Unsurprisingly, in Britain too, copyright did not freeze in 1710. During the time the Statute of Anne framework was copied in the United States and later, when it acquired its meaning there, it was also being developed and transformed at home.<sup>201</sup> The legal agents of transplantation in America—people like Justice Story or the treatise writers George Ticknor Curtis and Eaton Drone—kept the importation channel open. In adapting and developing the American copyright framework, they kept injecting legal materials such as court decisions and commentators' analyses from England. This aspect of the transplantation process too did not consist of mere duplication, but contained important adaptive and creative dimensions. Americans borrowed selectively, sometimes misinterpreted (on purpose or by mistake) what they borrowed, and did not hesitate to extend and synthesize what they took. The general picture of transplantation as it emerges from this process is one of an ongoing transatlantic conversation and exchange of ideas, rather than a sudden introduction of a transplant surrounded by disconnect between the two legal cultures.

## VI. SOME ENDURING EFFECTS AND PATH DEPENDENCIES

At this point in the discussion, one may develop heretical thoughts about the point of analyzing the early American copyright regime as a legal transplant. If the framework of the Statute of Anne was not simply duplicated and if the actual meaning and operation of the copyright regime was fundamentally changed in its new environment, then were there any lasting significant effects of the transplantation? In the big scheme of things, did it matter at all that in the late eighteenth century Americans plagiarized the British statutory scheme, or would things have been exactly the same absent such copying? The answer is that the enduring effect of the Statute of Anne is most apparent in a series of path dependencies. Various elements that were introduced at an early stage, often elements that are traceable to the peculiar social context of the Statute of Anne, were entrenched and kept exerting their power even when the reasons for their initial appearance were

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201. See ALEXANDER, *supra* note 12 (surveying the development of British copyright law during the nineteenth century); CATHERINE SEVILLE, LITERARY COPYRIGHT REFORM IN EARLY VICTORIAN ENGLAND: THE FRAMING OF THE 1842 COPYRIGHT ACT (1999) (describing the 1842 Copyright Act and its context).

long gone and forgotten. Some of these path dependencies were merely anecdotal, while others had a more significant influence on central features of American copyright throughout the years. A few examples serve to demonstrate this logic of path dependence.

One obvious example is the talismanic power enjoyed by multiples of the number fourteen for almost two hundred years in American copyright law. We have no direct evidence why the limited term of protection in the Statute of Anne was fourteen years. There is, however, strong circumstantial evidence that it originated in the 1624 Statute of Monopolies.<sup>202</sup> Early in the seventeenth century, when common law courts began to lay restrictions on the royal prerogative power of granting monopoly privileges, they created an exception that later would become the basis for modern patent law.<sup>203</sup> A monopoly grant, the courts held, was lawful and could be tolerated if it was given to the inventor of a new and useful manufacture into the realm, and provided that it was limited in time.<sup>204</sup> When Parliament legislated a general ban on royal monopoly grants in 1624, it adopted the common law's distinction between harmful and unlawful monopolies and the exception of a monopoly beneficial to the public.<sup>205</sup> Accordingly, the Statute of Monopolies had numerous exemptions from the ban, including one for patents to "the true and first inventor" of "any manner of new manufacture."<sup>206</sup> Following the common law, the Statute of Monopolies required a limited term to such grants, but it went further and set a specific cap of fourteen years.<sup>207</sup> Edward Coke, the authoritative commentator on the Statute of Monopolies, later explained that the source of this duration was the traditional length of the apprenticeship period: seven years.<sup>208</sup> The logic was that the public could not be hurt and English freemen's freedom to exercise a lawful trade was not impinged by a monopoly grant for a new manufacture if no one else practiced that trade in England at the time. The apprenticeship period was used as a rough estimate of the point at which locals learned the new trade covered by the grant and acquired a legitimate claim for practicing it.<sup>209</sup> Coke

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202. See Statute of Monopolies, 1624, 21 Jac. 1, c. 3, § 6 (Eng.).

203. Bracha, *supra* note 59, at 191–200.

204. *Darcy v. Allin*, (1602) 74 Eng. Rep. 1131, 1139 (Q.B.); *Clothworkers of Ipswich Case*, (1615) 78 Eng. Rep. 147, 148 (K.B.).

205. Bracha, *supra* note 59, at 196.

206. Statute of Monopolies, § 6.

207. *Id.*

208. 3 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 181 (1644).

209. This idea appeared earlier in common law decisions. See *Clothworkers of Ipswich Case*, 78 Eng. Rep. at 148. The court held that invention patent grants must be limited in time because



was not entirely happy. He thought that the limited duration should have been identical to the apprenticeship period rather than double that length.<sup>210</sup> Eighty years later, one of the main concerns in the public debate surrounding the Statute of Anne was that of the monopoly power of the Stationers' Company and its more prominent members. The limited duration introduced into the Act was one of the main expressions of this concern.<sup>211</sup> Against this backdrop, it seems implausible that the choice of the number fourteen in the Statute of Anne bore no connection to the well-established anti-monopoly tradition.<sup>212</sup>

Although late-eighteenth-century Americans tended to think about the role of time limitation on monopolies in terms similar to the English ones, they were not obliged, of course, to follow the fourteen-year term. Indeed, New Hampshire adopted a twenty-year duration in its copyright enactment.<sup>213</sup> The other states, however, stuck to variations on the theme of fourteen. Likewise, the drafters of the federal act adopted the original figure.<sup>214</sup> From that point, until the shift to a life plus term in the 1976 Copyright Act<sup>215</sup> (and the interim extensions of duration prior to it), inertia had exerted its power. The duration of copyright protection was extended in 1831 (to an initial term of twenty eight years followed by a renewal term of fourteen years)<sup>216</sup> and in 1909 (to two twenty-eight-year terms),<sup>217</sup> but the power of fourteen endured. Apparently, Americans simply stuck with the familiar, even when the reasons for the original arrangement were long forgotten and long after the British commitment to the number fourteen

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at first the people of the kingdom are ignorant, and have not the knowledge or skill to use it; but when the patent is expired, the King cannot make a new grant thereof, for when the trade has become common, and others have been bound apprentices in the same trade, there is no reason why such should be forbidden to use it.

*Id.*

210. COKE, *supra* note 208, at 181.

211. See ALEXANDER, *supra* note 12, at 24.

212. See ROSE, *supra* note 22, at 47. As Deazley points out the choice of the number fourteen was not inevitable and other terms for copyright were proposed prior to the Statute of Anne. DEAZLEY, ORIGIN OF THE RIGHT TO COPY, *supra* note 9, at 42–43.

213. PERPETUAL LAWS OF THE STATE OF NEW HAMPSHIRE, *supra* note 107, at 162.

214. Act of May 31, 1790, ch. 15, 1 Stat. 124 § 1.

215. 17 U.S.C. § 302(a) (2006).

216. Act of Feb. 3, 1831, 4 Stat. 436, 436–39 §§ 1–2.

217. Act of Mar. 4, 1909, ch. 320, § 23, 35 Stat. 1075.

started to crumble with the introduction of a post-mortem term in the 1842 Copyright Act.<sup>218</sup>

Another possibly significant effect (although not necessarily “enduring” in any meaningful sense) was the early shift in the United States from ad hoc privileges to general legislative regimes. The possible effect of the Statute of Anne was not so much on the shift to general regimes (a development that from a historical perspective was over-determined), but on the early timing of it. As explained, the only antecedents of copyright in America prior to the Revolution were occasional ad hoc legislative printing privileges rather than a general copyright regime.<sup>219</sup> A similar situation applied to patents for inventions.<sup>220</sup> It was by no means preordained that when interest in these fields intensified after independence, there would be an immediate shift to general statutory regimes. Indeed, until the end of the eighteenth century, the states issued many ad hoc printing and invention privileges and most known petitions to the states by inventors and authors were for ad hoc privileges rather than general enactments.<sup>221</sup> In Britain, the shift to a general copyright regime was rooted in a specific context that was absent in the United States. When, at the end of the seventeenth century, the old framework for regulating the book trade collapsed, there was almost a century and a half of a general standardized regime, albeit one that was limited to the inner workings of the guild.<sup>222</sup> Against this backdrop, taking the existing guild framework and generalizing it was a natural option.

In the United States, there was no such prior background. When American inventors and authors began clamoring for protection, the natural thing to do was to issue specific privileges. There was no apparent reason why the states could not rely on ad hoc individual acts, which they continued to rely on with corporate charters for decades.<sup>223</sup> The intervening factor in this dynamic was the existence of the Statute of Anne. It was both a precedent for creating a general regime and a ready-made template for it. It is likely that this was a crucial factor in channeling the states in that direction.

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218. 5 & 6 Vict., c. 45, § 3. Under the Act, copyright lasted for seven years after the death of the author, subject to a minimal duration of forty-two years.

219. *Supra* text accompanying note 68.

220. See P.J. Federico, *Colonial Monopolies and Patents*, 11 J. PAT. OFF. SOC'Y. 358; Walterscheid, *supra* note 130.

221. See BUGBEE, *supra* note 70, at 84–103, 107, 110.

222. See *supra* Part II.

223. The states began to shift from ad hoc corporate charters to general incorporation regimes in the 1840s in a gradual process that lasted for decades. See RONALD E. SEAVOY, *ORIGINS OF THE AMERICAN BUSINESS CORPORATION, 1784–1855: BROADENING THE CONCEPT OF PUBLIC SERVICE DURING INDUSTRIALIZATION* (1982).

The story may have been more complex on the federal level. The constitutional clause gave no hint about whether its framers had ad hoc grants or general statutory regimes in mind. It is quite possible, however, that it was understood from the outset that a busy national legislature would be unable to deal on an individual basis with the sheer magnitude of petitions that were likely to stream in from an entire nation. If this was a consideration, however, the existence of institutional precedents, from Britain and from the states, made the choice of a general regime an easy one. Soon after Congress met for the first time, it was bombarded by inventors and authors seeking individual protection.<sup>224</sup> While examining the petitions on an individual basis at first, Congress quickly changed its strategy and appointed a committee charged with drafting general copyright and patent regimes.<sup>225</sup> Their work resulted in the 1790 Copyright Act and the 1790 Patent Act.<sup>226</sup>

Ironically, one outcome was that the United States had a general statutory patent regime prior to Britain. In Britain, copyright and patents followed separate tracks. Patents were issued as ad hoc individual discretionary grants from the Crown (within limitations imposed by the Statute of Monopolies and the common law) well into the nineteenth century. While the system was standardized during the eighteenth century, there was simply no such thing as a general patent regime or patent rights in Britain.<sup>227</sup> In the United States, which was relatively free from the separate institutional histories of patents and copyright that framed the process in Britain, the two kindred subjects could be treated in a parallel fashion. The first sign was the South Carolina copyright statute that attempted to create an equivalent general protection for patents.<sup>228</sup> The two subjects were then merged in the constitutional clause and in the early stages of the federal legislation in which the first bill, H.R. 10, was a joint copyright-patent bill.<sup>229</sup> By the time copyright and patents were decoupled during the legislative process,<sup>230</sup> not passing a general patent statute was not a viable option. Thus, ironically, one of the effects of the Statute of Anne's influence was that the United States had legislated a general statutory patent regime decades before Britain.

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224. BUGBEE, *supra* note 70, at 131–42.

225. U.S. House Journal, 1st Cong., 1st Sess., Apr. 20, 1789, at 18.

226. Act of Apr. 10, 1790, ch. 7, 1 Stat. 109.

227. Bracha, *supra* note 13, at 56–63, 88–96.

228. ACTS, ORDINANCES, AND RESOLVES, *supra* note 110.

229. Compare U.S. CONST. art. I, § 8, cl. 8, with H.R. 10, *supra* note 144.

230. 1 ANNALS OF CONG. 1080 (1789).

Another deep mark left by the Statute of Anne on the American copyright system related to formalities. Registration and deposit were preexisting elements that were incorporated into the Statute of Anne.<sup>231</sup> Registration had been the practice of the Stationers' Company for more than a century,<sup>232</sup> and deposit with various libraries was included as part of the government-stationers deal embodied in the 1662 Licensing Act.<sup>233</sup> In the United States, these elements were adopted as a natural part of a copyright regime, although there was, of course, no necessary connection between general protection of authors' rights and such requirements.<sup>234</sup> Both elements changed their form and exact function throughout the years, but they remained an important part of copyright in America.

A similar observation applies to statutory damages. That the Statute of Anne's remedies were limited to forfeiture and per-sheet penalty is unsurprising, given its origin in the Stationers' Company regulation.<sup>235</sup> Under the regulatory system of the Company, which usually kept disputes out of the general court system, alongside specific settlements often worked out by the Company's Court of Assistants,<sup>236</sup> those were the common enforcement mechanisms since the Star Chamber Decree of 1566.<sup>237</sup> This limited array of remedies was imported into the Statute. As described, in the face of what probably seemed like an inadequate selection of remedial options, American courts quickly expanded the remedies available to copyright owners.<sup>238</sup> There

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231. Act for the Encouragement of Learning (Statute of Anne), 8 Ann., c. 19, §§ 2, 5. (1710) (Gr. Brit.).

232. For information on entrance into the registers, see PATTERSON, *supra* note 8, at 51–55.

233. Act for Preventing the Frequent Abuses in Printing Seditious, Treasonable, and Unlicensed Books and Pamphlets; and for the Regulating of Printing and Printing Presses 1662, 14 Car. 2, c. 33, § 17.

234. Act of Apr. 10, 1790, ch. 7, 1 Stat. 109 §§ 3–4.

235. 8 Ann., c. 19, § 1.

236. See PATTERSON, *supra* note 8, at 33–34.

237. The Star Chamber Decree of 1566 created the strong bond between the governmental licensing system and the Stationers' Company and bestowed broad enforcement powers on the Company. The sanctions imposed by the decree included the forfeiture of unlawful books that were to be brought to the company and destroyed, and a per-copy fine to be divided equally between the crown and the person who seized the books or made the complaint. See *Ordinances Deceid for Reformation of Divers Disorders in Printing and Uttering of Bookes* (1566), in 1 TRANSCRIPT OF THE REGISTERS, *supra* note 23, at 322, ¶¶ 2–4. The sanctions and enforcement powers were intended by the government to be used in the service of censorship, but in practice, the Company used them mainly to enforce its members' commercial printing rights. See Cyprian Blagden, *Book Trade Control in 1566*, 13 LIBR. 287, 290 (5th Ser. 1958).

238. *Supra* text accompanying notes 194–200.

was a flipside, however. The mechanism of penal damages was introduced at the very genesis of the regime and was a natural, available option. In the second half of the century, various interests discovered the attractiveness of monetary relief detached from the need to establish damage. When Congress added a public performance entitlement to dramatic works in 1856, it backed it by a remedy of minimal statutory sums of damages on a per performance basis.<sup>239</sup> The source of this remedy was most probably pressure from lobbying playwrights concerned about effective enforcement.<sup>240</sup> In 1897, likely due to lobbying by music publishers, the public performance entitlement and the statutory damages remedy were extended to music.<sup>241</sup> Statutory damages were then included in the 1909 Act as a general remedy<sup>242</sup> and went on to have a long and complicated career in American copyright law.<sup>243</sup> Thus, what started as a left-over from the seventeenth century guild regulatory framework was turned into one of the most important, often controversial, and somewhat unique remedial elements of American copyright.

One last example of the enduring effect of the Statute of Anne in the United States is the institution of reversion<sup>244</sup> and renewal. The last section of the Statute of Anne, almost as an afterthought, provided that at the end of the first term of protection, the right would return to a surviving author for a second fourteen-year term.<sup>245</sup> The early bill, H.R. 10, simply copied this arrangement.<sup>246</sup> The final American Act, however, introduced a new element. It conditioned the second term of protection on re-registration by the surviving author within six months prior to the expiration of the first term.<sup>247</sup>

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239. Act of Aug. 18, 1856, ch. 169, 11 Stat. 138 (1856). The amendment set a minimum of \$100 for the first and \$50 for subsequent unauthorized performances.

240. See Oren Bracha, *Commentary on the U.S. Copyright Act Amendment 1856*, in PRIMARY SOURCES ON COPYRIGHT (1450–1900) (L. Bently & M. Kretschmer eds., 2008), available at [www.copyrighthistory.org](http://www.copyrighthistory.org).

241. Act of Jan. 6, 1897, ch. 4, 29 Stat. 481 (1897); see also Rosen, *supra* note 191, at 1200–16. The amendment also created for the first time explicit criminal liability (for cases of willful infringement for profit of the public performance entitlement) and separated it from the statutory damages.

242. Act of Mar. 4, 1909, ch. 320, § 23, 35 Stat. 1075 § 2.

243. See Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439 (2009).

244. For a detailed account of the history of the reversion right in Britain and the United States, see Bently & Ginsburg, *supra* note 64.

245. Act for the Encouragement of Learning (Statute of Anne), 8 Ann., c. 19, § 11 (1710) (Gr. Brit.).

246. H.R. 10, *supra* note 144, at 4.

247. Act of May 31, 1790, ch. 15, 1 Stat. 124 § 1.

This was the birth of renewal. It is unknown whether this was intended merely as a mechanical drafting correction or if the drafters were aware of and aiming for the separate function executed by the renewal procedure they created. Whatever the intentions, what probably started in the Statute of Anne as a pure reversion right designed to protect the interest of authors<sup>248</sup> acquired an additional function: filtering. Renewal ensured that those works that lost commercial value or had no sufficient protection interest to owners fell into the public domain after the first term of protection. The second term only applied to those works in which the owners revealed sufficient interest in continued protection by going through the renewal procedure.<sup>249</sup> The reversion right survived in various incarnations in American copyright law uninterrupted,<sup>250</sup> even when it disappeared from British law for almost a century.<sup>251</sup> Renewal and its filtering function survived as a somewhat unique feature of American copyright until the United States shifted to a unitary term with the 1976 Copyright Act.<sup>252</sup> Whether this fundamental feature of the American copyright system that lasted almost two centuries was first introduced as a “translation” accident or if a conscious purpose was originally at work remains shrouded in obscurity.

In these ways and others, the Statute of Anne left its mark on American copyright, even as many of its specific arrangements were deserted or bypassed. Its enduring effects were usually manifested by the phenomenon of inertia and the often ironic logic of path dependence.

## VII. CONCLUSION

The Statute of Anne has had strange adventures in the United States, although perhaps adventures not uncharacteristic of many other legal transplants. It started its American career as a somewhat unlikely candidate for transplantation. The cultural prestige of its native country and the considerable advantages for the new American Republic of a readymade regime for regulating a field of increased public interest made the Statute of Anne a star overnight. It was appealed to as a role model by early advocates of copyright in America. Its principles were relied on and it was copied,

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248. Bently & Ginsburg, *supra* note 64, at 1478–82.

249. See Christopher Sprigman, *Reform(al)izing Copyright*, 57 STAN. L. REV. 485, 519–23 (2004).

250. Bently & Ginsburg, *supra* note 64, at 1522–50.

251. The 1814 Copyright Act shift to a unitary term eliminated the right of reversion in Britain. 54 Geo. 3, c. 156, § 4.

252. 17 U.S.C. § 302(a) (2006).

sometimes very closely, in all of the early constitutive documents of copyright in America.

And yet, the Statute of Anne's regime was not simply duplicated in the United States. Rather, the American adventures of the Statute of Anne nicely demonstrate the dynamics of translation, which are characteristic of legal transplants in general. Despite the close similarity of the statutory forms and the endurance of these forms, American copyright developed its own specific meaning by responding to local pressures and influences. This process extended over a long period of time and involved an ongoing conversation with the British copyright system that was itself experiencing change. At the same time, the introduction of the Statute of Anne as the foundation of American copyright had enduring and significant effects. It initiated a host of path dependencies and introduced entrenched elements that helped shape American copyright law throughout the centuries. When looked at from this perspective, the first British copyright statute left deep marks on American copyright, some of which can still be seen three hundred years after it was passed into law in the eighth year of the reign of Queen Anne.

