# ARTICLE

## THE STATUTE OF ANNE: AN AMERICAN MYTHOLOGY

*Oren Bracha*[*]

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### I. INTRODUCTION

When, in the late eighteenth century, Americans created their first copyright regime—first through state enactments[1] and

* Professor of Law, The University of Texas School of Law. I thank the participants of the ©©© *Conference: Celebrating Copyright's tri-Centennial* held by the University of Houston Law Center's Institute for Intellectual Property & Information Law for their useful comments.

1. During the 1780s all the states except Delaware legislated copyright statutes. *See* BRUCE W. BUGBEE, GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW 104–23 (1967) (summarizing the development of copyright statutes in the states from 1783 to 1786); LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 183–90 (1968) (discussing the various state enactments and their copyright protections); Oren Bracha, *Commentary on the Connecticut Copyright Statute 1783*, PRIMARY SOURCES ON COPYRIGHT (1450–1900) (L. Bently & M. Kretschmer eds., 2008), http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/ausgabeCom/%22us_ 1783a%22 ("[T]he movement toward general copyright laws began at the states, before any development on the national front."). *See generally* Francine Crawford, *Pre-Constitutional Copyright Statutes*, 23 BULL. COPYRIGHT SOC'Y U.S.A. 11 (1976) (detailing the copyright statutes passed by twelve of the thirteen states before the adoption of the Constitution).

then by the federal 1790 Copyright Act[2]—they used the British Statute of Anne[3] as their doctrinal blueprint. Despite a few changes and omissions, the degree of similarity on the level of basic concepts, structure, and text between the 1790 Copyright Act and the 1710 British statute is remarkable.[4] Until the late nineteenth century, this basic statutory framework changed very little.[5] The process of gradual but significant change in copyright law during these decades took place mainly through judicial development.[6] A few statutory amendments and revisions notwithstanding, the statutory design copied from the Statute of Anne remained at the heart of American copyright law at least until 1870, and to an extent until the dawn of the twentieth century. But what did Americans think of the Statute of Anne during these years? How did they understand its greater meaning and, through it, the greater meaning and underlying purposes and rationales of the copyright system? This Article attempts to answer these questions.

For over a century, American jurists, treatise writers, and other public speakers kept going back to the increasingly ancient British statute, relying on it as a justification for whatever agenda they had at hand and reinterpreting its meaning to fit their broad vision of copyright, its foundations, and purposes. In this respect, the Statute of Anne played an important role as a constitutive mythology in the field, a role that was strengthened as its immediate doctrinal relevance gradually faded.

There were three main periods of the mythology of the Statute of Anne in America. In between the Revolution and the end of the eighteenth century was the golden age of the Statute of Anne in American public discourse. It was praised as a role model to be followed and generally seen as the concrete institutional incarnation of both the utilitarian public interest and the authorial property rights justifications of copyright. In

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2. Act of May 31, 1790, ch. 15, 1 Stat. 124 (repealed 1831).

3. Statute of Anne, 1710, 8 Ann., c. 19.

4. *See* PATTERSON, *supra* note 1, at 197–201 (observing that at least section 8 and section 9 of the Statute of Anne were reflected in the 1790 Copyright Act); Oren Bracha, *The Adventures of the Statute of Anne in the Land of Unlimited Possibilities: The Life of a Legal Transplant*, 25 BERKELEY TECH. L.J. (forthcoming 2010) (manuscript at 27–30) (surveying the close similarities between the 1790 Copyright Act and the Statute of Anne).

5. *See Bracha*, *supra* note 4 (manuscript at 33–34) (explaining that a significant shift in the statutory framework gradually became visible only during the second half of the nineteenth century).

6. *See* Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 YALE L.J. 186, 230 (2008) (indicating that copyright protection expanded through judicial decisions after the Civil War).

the second age, which lasted from the third decade of the nineteenth century roughly until its end, the dominant tune had changed. Those who showed interest in sustained engagement with the Statute and its greater meaning were mainly public writers who advocated two copyright reforms: international copyright and the re-creation of copyright in the image of an absolutist property right either through the common law or within the statutory framework.[7] These reformists uniformly relied on a natural property rights theory of copyright and came to see the limited statutory framework epitomized by the Statute of Anne as the antithesis of that theory. As a result, they used two main strategies for removing the threat: reinterpretation of copyright history that reassigned the Statute to a secondary and minor role and disparagement of the Statute and its American progeny.[8] The third, partly overlapping period, which stretched in between the middle of the nineteenth century and the dawn of the twentieth, saw the first wave of great American copyright treatises. The treatise writers followed the grand historical narrative developed by the natural rights reformists, but they also developed more encompassing syntheses of copyright law that infused it with the notion of owning intellectual works.[9] By the end of that period, interest in the Statute of Anne as having high-stakes implications for contemporary copyright debates dwindled, and it gradually lapsed into the status of an antiquarian item.

## II. EARLY INFLUENCE

> *[T]here being no property more peculiarly man's own than that which is produced by the labour of his mind . . . .*[10]

When it came to the Statute of Anne, late eighteenth-century Americans let their actions speak for them. Indeed, they took perhaps the most expressive action imaginable in regard to the eighty-year-old British statute: They copied it and made it their own. The copyright enactments legislated by twelve out

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7. *See infra* pp. 118–19 (explaining that the question of copyright as an absolutist property right and that of international copyright were the most dominant ones in public discourse about copyright during this period).

8. *See infra* pp. 135–37 (discussing the belittling of the role of the Statute of Anne and its disparagement by nineteenth century proponents of international and absolutist copyright).

9. *See infra* text accompanying notes 167–179 (discussing treatises by Curtis, Drone, and Bowker that encompassed the developing body of American copyright law).

10. COPYRIGHT ENACTMENTS OF THE UNITED STATES, 1783–1906, at 14 (Thorvald Solberg ed., 2d ed. 1906) (quoting the preamble to 1783 Massachusetts copyright statute).

of the thirteen states in the 1780s, despite some variance, "were all miniature versions of the Statute of Anne."[11] When, in 1790—following the constitutional grant of power to legislate in this field—Congress enacted the first federal copyright regime, it produced yet another close replica.[12] Some contemporary Americans did speak, however, more directly and elaborately in petition letters, public addresses, official resolutions, and the statutory documents they created. Understanding what they had to say requires a brief description of the context of American copyright in these early years.

Prior to the Revolution, there was no general copyright regime in any of the colonies that would become the United States. The Statute of Anne did not apply to the colonies, and there were no local analogues to it.[13] The only legal mechanism for protecting the product of the printing press was in the form of ad hoc legislative privileges occasionally issued by colonial legislatures.[14] These privileges gave to local printers or publishers limited-time, exclusive printing rights in a specified text, usually one deemed to be of particular interest to the public, such as a collection of the colony's laws.[15] These legislative privileges were not categorically different from others awarded to

11. Bracha, *supra* note 4 (manuscript at 18).

12. *See* BUGBEE, *supra* note 1, at 145–46 (noting the clear similarities between the Statute of Anne and the 1790 Copyright Act).

13. 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, 97–99 (Ronan Deazley et al. eds., 2010) (discussing differences between the American colonies and Europe that influenced the resulting and differing copyright regimes).

14. Some commentators wrongly assumed that the only legislative printing privilege issued in colonial times was the one granted to John Usher by the Massachusetts General Court in 1672. *See* BUGBEE, *supra* note 1, at 106 ("[T]he only American precedents for protection of literary property were the isolated Massachusetts law of 1672 and John Usher's 'copyright' of 1673."); HELLMUT LEHMANN-HAUPT, THE BOOK IN AMERICA 99 (2d ed. 1952) (characterizing the copyright protection for a term of years granted by the General Court of Massachusetts in 1673 as a mere "booksellers' copyright," which did not support the principle of a copyright vested in the author); 1 JOHN TEBBEL, A HISTORY OF BOOK PUBLISHING IN THE UNITED STATES 46 (1972) (indicating the court's action in 1673 "protected publishers, not writers" and "was not duplicated anywhere else in the colonies"). This assumption is wrong. A few more colonial printing privileges are known and further research is likely to discover additional ones. *See* Bracha, *supra* note 13, at 99–100 (highlighting that while legislative privileges were not common, privileges were "granted occasionally as part of the general pattern of colonial regulation and encouragement of the press"); Oren Bracha, *Commentary on John Usher's Printing Privilege 1672*, PRIMARY SOURCES ON COPYRIGHT (1450–1900) (L. Bently & M. Kretschmer eds., 2008), http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/ausgabeCom/%22us_1672%22 (describing colonial printing privileges other than John Usher's).

15. Bracha, *supra* note 13, at 99–100; *see* Bracha, *supra* note 14 (discussing the characteristics of colonial printing privileges).

individuals whose economic activities were seen as aligned with the public interest and therefore worthy of "encouragement." The grantee could be the introducer of a new "manufacture" into the colony, such as the production of salt,[16] or simply someone who offered a publicly useful service, such as the operation of a ferry.[17] Two related intellectual developments that occurred around the Revolution caused two groups of such grants to gradually consolidate as separate and unique categories and eventually be recast as the fields of patents and copyright.

One of those intellectual developments was the rise and spread of a modern version of the notion of progress. Rooted within the intellectual atmosphere of the late eighteenth-century Enlightenment, this was a deep conviction in the ability of human beings through purposeful and calculated action to build a better future for themselves and to set society on a linear upward trajectory both in the intellectual–moral sense and in the material–economic one.[18] The role of government, from this perspective, was to create the conditions for such human action, and foster and encourage those who would be its agents. The following passage from the 1780 Massachusetts Constitution, written by John Adams, crisply captured this outlook:

> Wisdom, and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties, and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of Legislatures and Magistrates, in all future periods of this Commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially the university at Cambridge, public schools and grammar schools in the towns; to encourage private societies and public institutions, rewards and immunities, for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and a natural history of the country . . . .[19]

Here were all the elements of the late eighteenth-century American belief in progress: a material aspect of prosperity and national prowess alongside an intellectual aspect of wisdom and virtue; the grounding of both aspects in the purposeful action of

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16. 1 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 331 (Nathaniel B. Shurtleff ed., Boston, William White 1853).

17. 2 *id.* at 244.

18. *See* Birnhack, *supra* note 8, at 17–21 (suggesting that "progress served as a fertile background and a catalyst" for the political changes of the 1770s and 1780s).

19. MASS. CONST. of 1780, pt. II, chap. V, § 2.

human agents based on the broad dissemination of knowledge; an explicit moral and political dimension; and an active duty on the part of government to foster the conditions and support the institutions that would be the engines of progress.

The second related development was the growing association of the two aspects of progress, the intellectual and the material, with the mental efforts of specific individuals. Progress came to be seen as the result of the intellectual labor and inventiveness of great individual minds creating new ideas. In the material field of "useful arts," the former dominant figures of the entrepreneur or the artisan lost their primacy to that of the inventor: the genius individual located in between the speculative realm of theoretical science and the practical domain of craftsmanship, whose mind originated new technological wonders.[20] In the intellectual field, the same conceptual space came to be occupied by the figure of the author: the originator of new original ideas, the cultivator of culture and knowledge.[21] These ingenious individuals gradually came to be seen as the apostles of progress in its two dimensions.

The belief in progress and in its individual apostles was accompanied by a sense of urgency—a need to build the foundation of the new republic on the principles of progress and knowledge, and a burning desire to establish the place of the new nation in this respect among the powers of the Old World. In the field of the useful arts, this was expressed in a growing conviction that the key for national prosperity was acquiring advanced technology and creating the conditions for domestic technological innovation.[22] A similar understanding of the process

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20. *See* NEIL LONGLEY YORK, MECHANICAL METAMORPHOSIS 183–95 (1985) (finding that while colonial Americans grew more conscious of the potential power of invention during the years just prior to the Revolutionary War, the process was not immediate); Oren Bracha, *Geniuses and Owners: The Construction of Inventors and the Emergence of American Intellectual Property*, *in* TRANSFORMATIONS IN AMERICAN LEGAL HISTORY 369, 373–74 (Daniel W. Hamilton & Alfred L. Brophy eds., 2009) (noting that patents became the "exclusive and unique domain of inventors," and the inventor was gradually recast as an intellectual genius).

21. *See* GRANTLAND S. RICE, THE TRANSFORMATION OF AUTHORSHIP IN AMERICA 1, 76 (1997) ("[I]ndependent public writing, vigorously suppressed in America throughout the seventeenth century and the first decades of the eighteenth century [became] estimable by the time of the early Republic.").

22. *See* DORON S. BEN-ATAR, TRADE SECRETS: INTELLECTUAL PIRACY AND THE ORIGINS OF AMERICAN INDUSTRIAL POWER 79–103 (2004) (chronicling the interest in British technology and the efforts to develop technology in America); JOHN F. KASSON, CIVILIZING THE MACHINE: TECHNOLOGY AND REPUBLICAN VALUES IN AMERICA 3, 6–21 (1976) (discussing the rise of technology in early America and the battle to reduce dependence on British goods); Hugo A. Meier, *American Technology and the Nineteenth-Century World*, 10 AM. Q. 116, 117, 121 (1958) ("Pride in the modest achievements of a native technology replaced complacency and began to find open expression.").

of local growth and cultivation as one of national priority pervaded the intellectual field of learning. In the 1779 preface of his *United States Magazine*, Hugh Henry Brackenridge declared the need to disprove the predictions that, detached from Britain, Americans would "sink down to so many Ouran-Outans of the wood, lost to the light of science which, from the other side of the Atlantic, had just begun to break upon us."[23] He imagined the Revolution as a battle won as much by the power of the pen as by that of arms and claimed that many among the British acknowledged that Americans "fought them no less successfully with the pen than with the sword."[24] His hope was that the new republic would prove to the world that it is "able to cultivate the *belles lettres*, even disconnected with Great-Britain."[25]

One important expression of the belief in intellectual and material progress was a wave of lobbying for the proper governmental measures for supporting the activities of the apostles of progress, a wave that began to form in the early 1780s and gathered momentum throughout the decade.[26] Much of this lobbying was for ad hoc legislative privileges or "encouragements" to be conferred on specific inventors and authors.[27] These privileges were a direct continuation of colonial practice except for their new practical and ideological emphasis on authors and inventors. Some of the claims, however, both on the state and the national level were for more universal legal regimes for supporting and encouraging technological innovation and intellectual creation and learning. This is where the Statute of Anne entered the picture. As mentioned, Americans turned to the Statute of Anne for the most mundane and perhaps most significant of purposes: they used it as the direct doctrinal source for the copyright regimes they enacted.[28] The appeal of the Statute, however, was broader and deeper than the mere economizing of the process of forming and drafting legal technicalities. It served as a general ideological role model and as

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23. Hugh Henry Brackenridge, *Preface*, 1 U.S. MAG.: REPOSITORY HIST., POL. & LITERATURE 3 (1779).

24. *Id.* at 4.

25. *Id.*

26. *See* BUGBEE, *supra* note 1, at 106–08, 117 (discussing Noah Webster's efforts to convince the states to pass copyright protections and his rapid success as twelve of the thirteen states had done so within four years of the commencement of his lobbying efforts).

27. *See id.* at 84–91, 106–24 (describing early grants of patents to individuals and recounting Noah Webster's attempts to obtain similar individual protection for his book).

28. *See* Bracha, *supra* note 4 (manuscript at 18–30) (discussing the direct influence of the Statute of Anne on the copyright statutes of the states and the 1790 Copyright Act).

an institutional precedent from a nation that was seen as a leader in the cultural and scholarly fields.

When examined as a source of inspiration and support for the early American campaign for state encouragement of progress, the Statute of Anne did not have an unblemished record. In fact, the Statute was an eclectic compromise produced by a host of competing powers and concerns.[29] Those forces and influences included the attempt of the London publishers' guild—the Stationers' Company—to preserve as much as possible of its traditional privileges and powers; fears over the monopoly and economic power of the Company; a new interest in protecting the wellbeing of authors; and the public policy of the encouragement of learning.[30] The two latter purposes were introduced into the public debate by the Stationers, mainly as a pretext for promoting their own interests.[31] To an extent, however, they took a life of their own, and some aspects of the Statute reflected a genuine attempt to promote those purposes.[32] Those two last purposes and the rhetorical and institutional marks they left on the Statute were the features that attracted Americans. Indeed, given the prevalence of ideas about progress through knowledge and authorship, it is hardly a surprise that a statute entitled "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"[33] attracted their attention. Here was a detailed statutory framework of a

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29. *See* ISABELLA ALEXANDER, COPYRIGHT LAW AND THE PUBLIC INTEREST IN THE NINETEENTH CENTURY 17, 23–26 (2010) (noting that the Statute attempted a compromise with some provisions of the Statute aimed at booksellers, some to authors, and some to public interest concerns).

30. *See id.* at 23–25 (listing the areas aimed at encouragement of learning, concerns regarding monopolistic practices by booksellers, and the introduction of the author); *see also* JOHN FEATHER, A HISTORY OF BRITISH PUBLISHING 73–74 (1988) (chronicling the efforts of the Stationers' Company to secure the passage of legislation that would protect its privileges).

31. *See* FEATHER, *supra* note 30, at 74–75 (suggesting that the act was "a booksellers' act not an authors' act"); JOHN FEATHER, PUBLISHING, PIRACY AND POLITICS: AN HISTORICAL STUDY OF COPYRIGHT IN BRITAIN 56–62 (1994) [hereinafter FEATHER, PUBLISHING, PIRACY AND POLITICS] (noting that the Stationers worded their petition such that they "gave prominence to the protection of authors without in any way compromising their own interests"); *see also* BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 7–9 (1967) (proposing that the Stationers understood the strategic advantage of promoting authors' interests with their own).

32. RONAN DEAZLEY, ON THE ORIGIN OF THE RIGHT TO COPY: CHARTING THE MOVEMENT OF COPYRIGHT LAW IN EIGHTEENTH CENTURY BRITAIN (1695–1775), at 44–46 (2004); *see* ALEXANDER, *supra* note 29, at 26 (positing that the Statute of Anne appeared "to represent an attempt by Parliament to recognize the conflicting interests of different booksellers, as well as the claims of authors and more general social concerns," but was really "contingent and unformed," although not entirely "without real effect").

33. Statute of Anne, 1710, 8 Ann., c. 19.

nation seen as standing at the apex of human civilization for advancing learning and securing the interests of authors. It was too valuable not to be used by Americans making public arguments about the ways in which their young republic should establish its own rank in the civilized world. The England of 1710 may have had a somewhat narrower and more elitist notion of the encouragement of learning than late eighteenth-century Americans steeped in republican ideals and standing on the verge of an unprecedented spread of literacy.[34] Americans may have been a little more sincere about securing the interests of authors than some of those who raised that banner in England in support of the Statute of Anne. But none of this prevented Americans from taking the forms and concepts from the British statute, pouring their own content into them, and using them in furtherance of their purposes.

The Statute of Anne was first and foremost a precedent, a role model to be imitated from the civilized nations among which the republic had to take its place.[35] In 1782, Thomas Paine observed that "in all countries where literature is (protected, and it never can flourish where it is not,) the works of an author are his legal property; and to treat letters in any other light than this, is to banish them from the country, or strangle them in the birth."[36] He predicted that "[t]he state of literature in America must one day become a subject of legislative consideration."[37] When Samuel Stanhope Smith wrote a recommendation letter to Noah Webster in support of his efforts to convince state legislatures to award him legislative privileges in his *A Grammatical Institute of the English Language*, he argued that:

> Every attempt of this nature undoubtedly merits the encouragement of the public; because it is by such attempts that systems of education are gradually perfected in every

34. *See* ALEXANDER, *supra* note 29, at 26 (describing the concept of public interest in England as "particularly vague" and noting that "only a small fraction of the population had any learning at all"); Diane Leenheer Zimmerman, *The Statute of Anne and Its Progeny: Variations Without a Theme*, 47 HOUS. L. REV. 965, 972 (2010) ("[T]he promotion of learning would only have been of interest to a small elite of scholars and educated persons [in Britain].").

35. Letter from Joel Barlow to Elias Boudinot (Jan. 10, 1783), *microformed on* 4 Papers of the Continental Congress, 1774–1789, No. M247, Roll 92, Item 78, at 369–70 (Nat'l Archives Microfilm Publ'ns) (noting "civilized nations" had already made progress towards "literary emulation" and discussing the need for America to expand its importance in the world through a "literary reputation").

36. 1 THOMAS PAINE, *A Letter Addressed to the Abbe Raynal, on the Affairs of North America; in Which the Mistakes in the Abbe's Account of the Revolution of America, Are Corrected and Cleared Up* (1782), *in* THE POLITICAL WORKS OF THOMAS PAINE, Part 5, at iv (London, W.T. Sherwin 1817).

37. *Id. at* iv (unnumbered footnote).

> country, and the elements of knowledge rendered more easy to be acquired. Men of industry or of talents in any way, have a right to the property of their productions; and it encourages invention and improvement to secure it to them by certain laws, as has been practiced in European countries with advantage and success.[38]

It is very likely that the major European example that both Paine and Smith had in mind was the Statute of Anne.

The reliance on the British statute became explicit and more elaborate, however, in the letter written by Joel Barlow to Elias Boudinot, who was then the president of the Continental Congress.[39] Barlow, who was Webster's classmate at Yale, settled in Hartford near the end of the Revolutionary War and encountered troubles in finding patronage for his writings.[40] In the early 1780s, Barlow was probably active in trying to solicit general copyright legislation from some states, particularly Massachusetts and Connecticut. He wrote Boudinot in the hope of receiving support from the Continental Congress in this endeavor. In the letter, Barlow referred to "the embarrassment which bears upon the interests of Literature [and] works of genius in the United States" and pointed out "the encouragement that has been universally given in other countries to the exertions of genius, in every way which might serve to elevate the sentiments [and] dignify the manners of a nation" and specifically to the fact that "most of the civilized nations have removed the natural obstructions which lie in the way of literary emulation, [and] given the consequent encouragement to every species of laudable ambition."[41] Unlike Paine and Smith, Barlow specified which civilized nation he had in mind. "In England," he wrote, "the copy-right of any book or pamphlet is holden by the Author [and] his assigns for the term of fourteen years from the time of its publication; [and], if he is then alive, for fourteen years longer."[42]

Barlow explicitly suggested following the precedent of the Statute of Anne:

> If the passing of statutes similar to this were recommended by Congress to the several States, the measure would be undoubtedly adopted, [and] the consequences would be extensively happy upon the spirit of the nation, by giving a

38. NOAH WEBSTER, A COLLECTION OF PAPERS ON POLITICAL, LITERARY AND MORAL SUBJECTS 173–74 (New York, Webster & Clark 1843).

39. *See* Letter from Joel Barlow to Elias Boudinot, *supra* note 35 (suggesting that America had arrived at the stage of improvement that required legislative attention).

40. JAMES WOODRESS, A YANKEE'S ODYSSEY: THE LIFE OF JOEL BARLOW 74–77 (1958).

41. Letter from Joel Barlow to Elias Boudinot, *supra* note 35, at 369–70.

42. *Id.* at 370–71.

> laudable direction to that enterprising ardor of genius which is natural to our stage of society, [and] for which the Americans are remarkable.[43]

He grounded his appeal in the need of the United States to establish its status among the leading civilized nations, arguing as follows:

> America has convinced the world of her importance in a political [and] military line by the wisdom, energy [and] ardor for liberty which distinguish the present era. A literary reputation is necessary in order to complete her national character; and she ought to encourage that variety [and] independence of genius, in which she is not excelled by any nation in Europe.[44]

Interestingly, Barlow offered a thesis according to which the relatively egalitarian character of American society made the need of a state regime for the encouragement of learning an even more necessary measure than in Europe. Given this character, the United States could rely neither on a scholarly class of gentlemen free from the pressures of the market nor on patronage. In Barlow's words: "As we have few Gentlemen of fortune sufficient to enable them to spend a whole life in study, or enduce others to do it by their patronage, it is more necessary, in this country than in any other, that the rights of authors should be secured by law."[45] Thus in the argument that Barlow conjured up, the Statute of Anne was even more adequate and necessary in America than in its homeland.

The Continental Congress was duly impressed. While it did not name the Statute of Anne in its recommendation to the states to enact copyright laws, it left no doubt what the role model to be followed was. The resolution recommended to the states:

> [T]o 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 certain time, not less than fourteen years from the first publication; and to secure to the said authors, if they shall survive the term first mentioned, and to their executors, administrators and assigns, the copyright of such books for another term of time not less than fourteen years . . . .[46]

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43. *Id.* at 371.

44. *Id.* at 370.

45. *Id.* at 370–71.

46. 24 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 326–27 (1922); *see also* Report of Hugh Williamson (Apr. 28, 1783), *microformed on* 4 Papers of the

The Continental Congress, in other words, recommended that the states enact the Statute of Anne subject to modifications that "may seem proper."[47]

Perhaps the most remarkable feature of the way late eighteenth-century Americans conceptualized the Statute of Anne was the lack of any perception of tension between its narrow and restrictive statutory framework and arguments about copyright as a natural property right. Jane Ginsburg has shown that, contrary to conventional wisdom, early American copyright discourse was not limited to utilitarian public-interest claims and was quite hospitable to arguments about authors' property rights (just as early French copyright discourse, alongside its emphasis on authors' rights, was not impervious to utilitarian arguments).[48] As striking as the coexistence of the two modes of justification, however, was the total absence of any recognition of a conflict between the two or of the possibility that the specific institutional details of the legal regimes supported by each justification may differ greatly. For those Americans who considered copyright or spoke of it at the time, there was a seemingly harmonious convergence between natural property rights arguments and justifications of copyright grounded in the public policy of encouraging learning. The model offered by the Statute of Anne was generally conceived of as the concrete consequence resulting from either mode of justification. No one seemed to think that the abundance of formal requirements for protection; the many other restrictions and prerequisites, which in the American versions included *inter alia* a limitation of protection to local citizens or residents; the scant array of statutory remedies; or, indeed, the limited duration of protection clashed with a natural property right justification.

By the time Americans began to publicly consider the Statute of Anne, Britain had already undergone the episode known as the literary property debate. Taking place between the late 1730s and 1774, the literary property debate revolved around a series of litigated cases—the heart of which was the question of whether copyright was a property right protected under the common law, notwithstanding the statutory framework

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Continental Congress, 1774–1789, No. M247, Roll 31, Item 24, at 91–92 (Nat'l Archives Microfilm Publ'ns).

47. JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 46, at 327.

48. *See* Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TUL. L. REV. 991, 999–1000, 1005–06, 1014 (1990) (discussing how both early American and early French copyright legislation and discourse combined public interest and authors' rights rationales).

and irrespective of it.[49] The source of the debate is better captured perhaps by the alternative title of the episode: "the battle of the booksellers."[50] The argument of common law copyright was concocted and brought to the courts as part of the attempt by the London Stationers to ensure the formal persistence of perpetual copyright protection to which they were used prior to the Statute of Anne's introduction of a limited term.[51] The conflict over economic benefits, however, sparked an elaborate conceptual and ideological exchange. For decades, jurists, pamphlet and essay writers, and public speakers debated the nature of copyright and the fundamental justifications behind it.[52] After a brief period of recognition of common law copyright following the 1769 *Millar v. Taylor*[53] case, the debate was formally concluded with the decision of the House of Lords in *Donaldson v. Becket*[54] that rejected the existence of common law copyright, at least in the post-Statute of Anne era. The literary property debate, however, left behind deep intellectual residues that would go on informing copyright thinking in Britain (and later in America) for centuries to come.[55] One of those effects in Britain was a pervasive recognition of the tensions between utilitarian public interest justifications of copyright and natural property rights ones.[56] To be sure, proponents of common law copyright did not hesitate to supplement their Lockean style arguments with claims

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49. *See* DEAZLEY, *supra* note 32, at 115–210 (detailing the legal conflicts that arose in the decades following the Statute of Anne); FEATHER, PUBLISHING, PIRACY AND POLITICS, *supra* note 31, at 77–83 (cataloguing the complications that arose in England after the Copyright Act of 1710); PATTERSON, *supra* note 1, at 151–79 (chronicling the attempts by booksellers to circumvent the Statute of Anne through favorable legislative actions and judicial opinions); MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT 67–69 (1993) (discussing the decades-long debate on the status of common law literary property). On the literary property debate, see generally BRAD SHERMAN & LIONEL BENTLY, THE MAKING OF MODERN INTELLECTUAL PROPERTY LAW: THE BRITISH EXPERIENCE, 1760–1911, at 19–42 (1999), which expressly states that "during the literary property debate, the most interesting discussion was reserved for . . . whether or not . . . the ideas, sentiments, words, letters and style [of a book] . . . could be conceived as a distinct species of property."

50. *See* AUGUSTINE BIRRELL, SEVEN LECTURES ON THE LAW AND HISTORY OF COPYRIGHT IN BOOKS 99 (1899).

51. DEAZLEY, *supra* note 32, at 100–01.

52. *See id.* at 149–51 (discussing publications that contributed to the "developing debate over literary property outside the confines of the courtroom"); ROSE, *supra* note 49, at 67–129 (illustrating the wide variety of persons involved in the conflict and the depth and breadth of legal and philosophical concepts animating the debate).

53. Millar v. Taylor, (1769) 98 Eng. Rep. 201 (K.B.); 4 Burr. 2303.

54. Donaldson v. Beckett, (1774) 1 Eng. Rep. 837 (H.L.) 846; 2 Brown 129.

55. SHERMAN & BENTLY, *supra* note 49, at 39–42.

56. *See* ALEXANDER, *supra* note 29, at 31–35 (discussing both the arguments and supporters of the debates).

about the public benefit that would supposedly flow from perpetual protection.[57] By the end of the eighteenth century, however, it was generally clear in Britain that, at a minimum, very different positions about the specific institutional form of certain parts of the copyright regime would follow from taking a stand in regard to the natural-rights/public-policy divide. The literary property debate and the very concrete doctrinal question at its heart brought that fact home inescapably.

Americans generally had at least some level of knowledge of the literary property debate in Britain. At this point, however, it was seen by them mainly as a general ideological marker—yet another source of justification to be appropriated and used in their campaign for getting government to make good on its promise of being an inducer of progress. This attitude obscured both the specific doctrinal question that ignited the literary property debate in Britain and the stakes of making a choice between the competing views of copyright. Americans constantly mixed and matched arguments from the two justificatory systems, paying little heed to any incongruities.

In the *Federalist No. 43*, James Madison famously supported the 1789 constitutional grant of congressional power in the field of patents and copyright[58] with the following reasoning:

> The utility of this power will scarcely be questioned. The copy right of authors has been solemnly adjudged in Great Britain, to be a right at common law. The right to useful inventions, seems with equal reason to belong to the inventors. The public good fully coincides in both cases, with the claims of individuals.[59]

Writing in 1788, Madison was either ill-informed or slightly misrepresenting the situation in Britain, where in 1774 the House of Lords rejected common law copyright.[60] More

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57. *See id.* at 31–33 ("On the part of those who supported the perpetual right, natural rights-based arguments were closely aligned to appeals to the public interest.").

58. U.S. CONST. art. I, § 8, cl. 8.

59. THE FEDERALIST NO. 43, at 57 (James Madison) (New York, J. & A. McLean 1788).

60. Alternatively, Madison was stating somewhat obscurely what later became a common though questionable interpretation of the *Donaldson v. Becket* decision. *See* Edward C. Walterscheid, *Understanding the Copyright Act of 1790: The Issue of Common Law Copyright in America and the Modern Interpretation of the Copyright Power*, 53 J. COPYRIGHT SOC'Y U.S.A. 313, 327 (2006) (noting that contrary to the popular assumption that Madison was referring to *Millar v. Taylor*, "Madison's words make much more sense, if it is assumed he was referring to . . . *Donaldson v. Becket*"). According to this interpretation of the decision, the House of Lords held that copyright did exist as a common law right, but was superseded by the Statute of Anne. L. RAY PATTERSON & STANLEY F. BIRCH, JR., A UNIFIED THEORY OF COPYRIGHT (Craig Joyce ed., 2009), *printed in* 46 HOUS. L. REV. 215, 255–56 (2009).

significant was his insistence that public policy "fully coincides" with individual right claims.[61] Six years earlier, Smith in his letter for Webster wrote that "[m]en of industry or of talents . . . have a right to the property of their productions; and it encourages invention and improvement to secure it to them by certain laws" and "it can be of no evil consequence to the state, and may be of benefit to it."[62] Barlow, in his letter soliciting recommendation of copyright enactments, warned 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,"[63] but included also the following prose:

> 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 [and] perhaps his health in improving his knowledge [and] 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, as a compensation for his labor in producing them, [and] his risque of reputation in offering them to the Public.[64]

The three-man committee charged by Congress with examining the issue echoed the same combination of reasons when it reported favorably finding that "nothing is more properly a man's own than the fruit of his study, and that the protection and security of literary property would greatly tend to encourage genius, to promote useful discoveries and to the general extension of arts and commerce."[65]

The same phenomenon occurred in the preambles contained by all but two of the copyright enactments legislated by twelve of the states in the 1780s.[66] All of the preambles mixed in different measures the same three reasons for legislating copyright protection: a national and universal duty of government to promote knowledge and progress; the public interest in the encouragement of learning produced by copyright; and a natural property right of authors in the fruit of

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61. THE FEDERALIST NO. 43, *supra* note 59, at 57.

62. WEBSTER, *supra* note 38, at 173–74.

63. Letter from Joel Barlow to Elias Boudinot, *supra* note 35, at 371.

64. *Id.* at 370.

65. JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 46, at 326; Report of Hugh Williamson, *supra* note 46, at 91.

66. *See* COPYRIGHT ENACTMENTS OF THE UNITED STATES, *supra* note 10, at 11–31 (compiling the copyright laws passed by twelve of the original states).

their intellectual labor.[67] The Massachusetts statute preamble read:

> Whereas the improvement of knowledge, the progress of civilization, the publick weal of the Commonwealth, and the advancement of human happiness, greatly depend on the efforts of learned and ingenious persons in the various arts and sciencs: As the principal encouragement such persons can have to make great and beneficial exertions of this nature, must exist in the legal security of the fruits of their study and industry to themselves, and as such security is one of the natural rights of all men, there being no property more peculiarly man's own than that which is produced by the labour of his mind.[68]

Connecticut's statute—the first one to be enacted—included a somewhat different version:

> 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.[69]

All the other preambles were variations on the same three themes.[70] Scholars sometimes classify the preambles according to the measure of emphasis put on the natural rights or the utilitarian rationales.[71] Far more important, however, is the fact that all of them included both elements, and none of them showed any hint of perceiving incongruity between the two. The 1790 Copyright Act legislated by Congress following the constitutional grant of power contained no preamble and the record is scant on the exact reasons motivating its drafters.[72] There is no reason to suspect, however, that any major shift had occurred in the course of a few years and that the federal legislators, many of whom were members of the state legislatures that passed the state enactments, had changed their views about the reasons justifying copyright.

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67. *See id.*

68. An Act for the Purpose of Securing to Authors the Exclusive Right and Benefit of Publishing their Literary Productions, for Twenty-one Years (1783), *reprinted in* COPYRIGHT ENACTMENTS OF THE UNITED STATES, *supra* note 10, at 14–15.

69. An Act for the Encouragement of Literature and Genius (1783), *reprinted in* COPYRIGHT ENACTMENTS OF THE UNITED STATES, *supra* note 10, at 11 (providing for the "encouragement of literature and genius" through copyright protections).

70. COPYRIGHT ENACTMENTS OF THE UNITED STATES, *supra* note 10, at 11–31.

71. *See, e.g.*, Birnhack, *supra* note 8, at 29–30 (discussing how the Massachusetts and Connecticut preambles treat the concepts of natural rights and public utility).

72. Act of May 31, 1790 (Copyright Act of 1790), ch. 15, 1 Stat. 124 (repealed 1831).

To a large extent, the ability to maintain this conceptual duality with no sense of tension or dissonance is attributable to the fact that Americans creating their first copyright regimes first shot the arrow and then drew the mark around it. Working under the large shadow cast by the Statute of Anne, when the pressure to make good on the ideological commitment for promotion of progress and securing the interest of authors was translated into specific legal institutional design, there was no doubt what this design would be. Given this early consensus on the end product, Americans could simply appropriate any justification of copyright that was available, whether it originated in supporting a limited statutory regime or in the more ambitious claim of common law property rights, and attach it to the known statutory outcome. There were no serious concrete institutional design questions at hand—such as international protection, perpetual protection, or the scope of protection—that could expose the possible conflicts between the two modes of reasoning. As long as a limited statutory framework after the fashion of the Statute of Anne was taken for granted, those tensions could remain buried deep.

Ironically, when the Statute of Anne effectively became the law of the land, rather than just an ideological construct to be employed as an argument and aspired to, it was also the end of its honeymoon in American public discourse. Soon new questions and debates about the proper shape of copyright law would arise. Unsurprisingly, being an early eighteenth-century regulation deeply embedded in specific characteristics of the English book trade of that period, the Statute of Anne was of little relevance for many of those new questions. Worse still, in regard to some of the controversies that would begin to emerge early in the nineteenth century, the framework of the Statute represented an outright threat or an obstacle, at least from the viewpoint of one side in those debates.

## III. THE STATUTE OF ANNE, COMMON LAW COPYRIGHT, AND INTERNATIONAL COPYRIGHT

> *[N]ever, in the annals not only of legislation and jurisprudence, but also of robbery by sea and land, was a more dishonest and insolent sentence uttered, than that of Lord Camden in the House of Lords, in Great Britain, in the case of* Donaldson versus Becket.[73]

73. *International Copyright*, 48 N. AM. REV. 257, 257 (1839) (reviewing PHILIP H. NICKLIN, REMARKS ON LITERARY PROPERTY (1938)).

The Statute of Anne was hardly pertinent to much of the great doctrinal and conceptual transformation undergone by American copyright law during the nineteenth century.[74] While marking the shift to a general regime of authors' rights, the Statute incorporated much of the framework of the pre-existing publisher's privilege guild regime.[75] The Statute was also mainly preoccupied with and rooted in the concerns surrounding the early eighteenth-century English book trade.[76] It is a small wonder then that the Statute of Anne often had little to say and offered scarce ammunition to nineteenth-century Americans trying to deal with the demands and concerns of an emerging modern mass-market publishing industry and elaborate the implications of the principles of authorship and ownership of intangibles on which they built their system. American jurists wrestling with such questions as the criteria for identifying authors and works of authorship or the scope and nature of ownership of an intangible object of property could not find any answers in the Statute of Anne. They had to rely, rather, on their own wits and emerging jurisprudence as well as on a newer crop of English precedents dating from the late eighteenth century and onward.

In two contexts, however, the Statute of Anne continued to play a significant role, even if by that time it became a supporting rather than a leading role. Those two contexts were the question of copyright as an absolute property right (a branch of which was the issue of common law copyright) and that of international copyright. In the long run it is unclear whether those were the two most important issues in the development of American copyright during this period. There is no doubt, however, that those were the two questions that most captured the public eye and sentiment at the time. They also involved issues that naturally lent themselves to discussions about the origins and fundamentals of copyright and thus, were bound to lead by one way or another to the Statute of Anne. The first issue involved the question of whether copyright was a full-fledged absolute property right that should be treated accordingly or a regulative regime that could legitimately provide only limited protection subject to various requirements and limitations. At first, especially prior to 1834, the emphasis of the absolute

74. *See generally* Bracha, *supra* note 4 (explaining the changing nature of copyright protection in the second half of the nineteenth century).

75. *See* ALEXANDER, *supra* note 29, at 23–24 (showing that many of the provisions of the Statute of Anne were in direct response to the concerns of Britain's booksellers).

76. *See id.*

property argument was on copyright as a perpetual property right protected under the common law. When, in that year, a majority of the Supreme Court rejected common law copyright in *Wheaton v. Peters*,[77] the balance tended to shift toward claims for recognition of copyright as an absolute property right within the statutory framework. The second question involved a controversy over whether the United States had an obligation to provide copyright protection to foreign authors, especially British authors, or could, on grounds of policy and expediency, limit such protection to its own citizens.

The specific arguments that were made in those two debates varied greatly, but a general repetitive pattern emerged quickly. Within this pattern, the Statute of Anne—the unchallenged hero of the late eighteenth century—was recast, usually concurrently, in two new roles: that of a minor development of little monumental significance within the evolution of copyright and that of a villain despite itself. In each of the debates, proponents of absolute property or of international copyright rested their case on a theory of copyright as a natural property right. The arguments that grounded copyright in the author's property right in the product of his intellectual labor were the same as those wrought in the British literary property debate and deployed in the late eighteenth-century American copyright campaign, but now the American borrowers developed them with more care and detail. The crucial difference from the earlier use of these arguments in America was that a perfect harmony with the limited statutory framework inherited from the Statute of Anne was no longer assumed. On the contrary, the conceptual framework of natural property rights was now used as the centerpiece of an attack on what critics saw as the deficiencies of that framework.

This pattern and the reconceptualizing of the Statute of Anne within it began to emerge in the late 1820s. Prior to that time, Americans sometimes publicly debated issues related to the nature and purposes of copyright[78] and amended the Copyright Act several times.[79] But the widely publicized copyright controversies that would leave a lasting mark only erupted in the second quarter of the century. In 1826, Noah Webster—the

77. Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 658–62 (1834).

78. *See* Elise Tillinghast, A Literary Controversy in 1807 New York: Early Americans' Competing Views of Copyright Law (2002) (unpublished manuscript) (on file with author).

79. The Copyright Act was amended in 1802 and in 1819. Act of Apr. 29, 1802, ch. 36, 2 Stat. 171 (repealed 1831); Act of Feb. 15, 1819, ch. 19, 3 Stat. 481 (repealed 1870).

veteran of the 1780s copyright lobbying campaigns[80]—fired one of the first shots in the new copyright battles that would be waged throughout the century. In September of that year, he wrote to Daniel Webster, who was then a member of the House of Representatives and the head of the Judiciary Committee.[81] Noah Webster had recently returned from England where he learned (probably for the first time) of the extension of the duration of copyright in the 1814 Copyright Act.[82] Instead of the Statute of Anne's two fourteen year terms, the 1814 Act provided an initial twenty-eight year term followed by a protection for the rest of the life of a surviving author.[83] This must have been very interesting for Webster who had just completed the manuscript of *An American Dictionary of the English Language* on which he worked for two decades.[84] He was approaching seventy, had a large family to support, and could hardly expect to live to renew the copyright in his yet unpublished work for the second fourteen year term.[85]

Webster had ideas about how American copyright law could be reformed and how Daniel Webster could help. He began his argument in the letter by alluding to the literary property debate and admitting that "[s]ince the celebrated decision, respecting copy-right, in the highest British tribunal, it seems to have been generally admitted that an author has not a permanent [and] exclusive right to the publication of his original works, at common law."[86] He immediately added, however, that "I firmly believe this decision to be contrary to all our best established principles of *right* [and] *property*" and also concluded (while offering no support) that "I have reason to think such a decision would not now be sanctioned by the authorities of this country."[87] What he wanted from Daniel Webster, he said, was

80. *See supra* notes 26–27 and accompanying text (discussing the movement to persuade states to grant copyright and patent protections and Noah Webster's lobbying efforts advancing that cause).

81. *See* 1 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 1.23 (2010) (discussing efforts made by Noah Webster and Daniel Webster to revise the original copyright act); Letter from Noah Webster to Daniel Webster (Sept. 30, 1826), *available at* http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/showThumb/%22us_1826%22/start/%22yes%22.

82. Copyright Act, 1814, 54 Geo. 3, c. 156, § 4; *see* DAVID MICKLETHWAIT, NOAH WEBSTER AND THE AMERICAN DICTIONARY 211 (2000) (discussing Noah Webster's reaction to the 1814 Copyright Act).

83. Statute of Anne, 1710, 8 Ann., c. 19; Copyright Act, 1814, 54 Geo. 3, c. 156, § 4.

84. MICKLETHWAIT, *supra* note 82, at 171.

85. *See id.* at 211 (explaining Noah Webster's personal interest in an increased copyright protection).

86. Letter from Noah Webster to Daniel Webster, *supra* note 81.

87. *Id.*

that "your talents may be exerted in placing this species of property, on the same footing, as all other property, as to exclusive right [and] permanence of possession."[88] This was followed by a lengthy exposition of the claim that copyright was a natural property right that closely replicated the arguments made during the literary property debate. The gist of it was phrased as a series of rhetorical questions:

> Upon what principle, let me ask, can my fellow-citizens declare that the productions of the farmer [and] the artisan shall be protected by common law, or the principles of natural or social right; without a special statute, [and] without paying a premium for the enjoyment of their property; while they declare that I have only a temporary right to the fruits of my labor [and] even this cannot be enjoyed without a premium? Are such principles as these consistent with the established doctrines of property [and] of moral right [and] wrong among an enlightened people? Are such principles consistent with the high [and] honorable notions of justice [and] equal privileges, which our citizens claim to entertain [and] to cherish, as characteristic of modern improvements in civil society? How can the *recent origin* of a particular species of property vary the principles of *ownership*?[89]

In light of this, Webster proposed legislating in the United States "a new act, the preamble to which shall admit the principle that an author has, by common law, or natural justice, the sole [and] *permanent* right to make profit by his own labors, [and] that his heirs [and] assigns, shall enjoy the right, unclogged with conditions."[90] When years later he wrote his copyright lobbying memoirs, Webster, referring to the 1814 British statute, described this plea as an attempt to "procure a new law in the United States, giving a like extension to the rights of authors."[91] His exact request in the letter, however, is hard to decipher. Perhaps he was simply stating an initial bargaining position, or seeking a declaratory legislative recognition of the perpetual nature of copyright as a natural right, while admitting that the positive legislation prescribing the "mode by which it shall be ascertained, secured and enjoyed,"[92] could impose a limited duration, albeit a longer one than the existing term. The plain and most probable meaning of Webster's early plea, however, is

88. *Id.*
89. *Id.*
90. *Id.*
91. WEBSTER, *supra* note 38, at 175.
92. Letter from Noah Webster to Daniel Webster, *supra* note 81.

that he sought a firm legislative recognition of perpetual copyright that would acknowledge the existence of an underlying copyright in common law, supply additional remedies and penalties, and make sure that the right remains "unclogged with conditions" such as deposit and perhaps other formal prerequisites for protection.

Daniel Webster's reply brought mixed results. He promised to lay the letter "before the committee on the judiciary next session," mentioned he was willing to extend the duration of protection "further than at present," and agreed that "it ought to be relieved from all charges."[93] The congressman also agreed that Webster's views of copyright as a property right were "in the abstract, . . . right and uncontrovertible," and that "[a]uthorship is, in its nature, ground of property,"[94] but he added:

> Most people, I think, are as well satisfied, (or better) with the reasoning of Mr. Justice Yates, as with that of Lord Mansfield, in the great case of Miller and Taylor. But after all, property, in the social state, must be the creature of law; and it is a question of expediency, high and general, not particular expediency, how and how far, the rights of authorship should be protected. I confess frankly, that I see, or think I see, objections to make it perpetual.[95]

Aligning himself with Justice Yates, the great judicial opponent of common law copyright in Britain, and professing sympathy to objections to perpetual copyright, Daniel Webster could not know that in a few years he would find himself as part of the legal team representing Henry Wheaton and arguing before the Supreme Court in favor of perpetual common law copyright in America's own version of the literary property debate.[96]

Following this first step, there was still a long struggle before Noah Webster. It included extensive efforts by William Ellsworth, his son-in-law and a member of the judiciary committee,[97] a committee report that repeated, in strong terms,

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93. Letter from Daniel Webster to Noah Webster (Oct. 14, 1826), *reprinted in* WEBSTER, *supra* note 38, at 176–77.

94. *Id.* at 176.

95. *Id.*

96. *See* Craig Joyce, *The Story of* Wheaton v. Peters*: A Curious Chapter in the History of Judicature*, *in* INTELLECTUAL PROPERTY STORIES 36 (Jane C. Ginsburg & Rochelle Cooper Dreyfuss eds., 2006); Craig Joyce, *"A Curious Chapter in the History of Judicature":* Wheaton v. Peters *and the Rest of the Story (of Copyright in the New Republic)*, 42 HOUS. L. REV. 325 (2005) (describing the events behind the *Wheaton v. Peters* case and the role played in them by Daniel Webster).

97. *See* PATRY, *supra* note 81, § 1.23 (discussing Noah Webster's request that William Ellsworth attempt to procure the enactment of a new copyright law); *see also* Oren Bracha, *Commentary on the U.S. Copyright Act 1831*, PRIMARY SOURCES ON COPYRIGHT (1450–1900) (L.

Webster's thesis of copyright as a natural property right,[98] and a personal appearance in Washington meant to impress a reluctant and indifferent Congress with his fame and charm.[99] All of this resulted eventually in the 1831 Copyright Act.[100] The Act gave Webster neither recognition of common law copyright nor perpetual statutory protection. But it did achieve at least some of what Webster was seeking: an extended initial term of twenty-eight years and a renewal term of fourteen, both extending to existing works under protection;[101] abolishing the stipulation of the renewal term upon survival of the author and making it available to family members;[102] and a minor relaxation of formalities in the form of deleting the newspaper publication requirement that came to be widely seen as redundant after the addition of a notice requirement in 1802.[103]

The main significance of this episode for the current analysis is in the pattern it established. A constituency interested in the expansion and strengthening of copyright protection framed its argument in terms of copyright as a natural property right. The ideological and conceptual materials employed in constructing such arguments were available in abundance—baggage left behind by the British literary property debate. When translated into concrete doctrinal claims, these arguments took two alternative forms. One was a straightforward claim for common law copyright protection, or in Webster's somewhat idiosyncratic version, a claim for statutory recognition of common law copyright. Such common law property right independent of the statutory framework would be perpetual like any other property right and free from burdensome formal prerequisites such as deposit or notice. This brand of the property rights thesis reached its apex in *Wheaton v. Peters*, where the Supreme Court was

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Bently & M. Kretschmer eds., 2008), http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/ausgabeCom/%22us_1831%22 (explaining that as Noah Webster's son-in-law, William Ellsworth had a substantial interest in the amendment of the copyright law).

98. *See* H.R. REP. NO. 21-3, at 2 (1830).

99. *See* HARLOW GILES UNGER, NOAH WEBSTER: THE LIFE AND TIMES OF AN AMERICAN PATRIOT 315–16 (1998) (showing that Emily Ellsworth, Noah Webster's daughter, believed her father's trip was enough to pass the new copyright law); MICKLETHWAIT, *supra* note 82, at 215–18 (discussing the friendly reception Webster received from the members of Congress); Bracha, *supra* note 97 (describing Webster's trip to Washington as "one of the first celebrity lobbying appearances before Congress").

100. Act of Feb. 3, 1831 (Copyright Act of 1831), ch. 16, 4 Stat. 436 (repealed 1870).

101. Copyright Act of 1831, ch. 16, secs. 1–2, 4 Stat. 436, 436–37 (repealed 1870).

102. Copyright Act of 1831, ch. 16, sec. 2, 4 Stat. 436, 436–37 (repealed 1870).

103. The Act retained the newspaper publication requirement in regard to the renewal term. Copyright Act of 1831, ch. 16, secs. 3, 5, 4 Stat. 436, 437 (repealed 1870); Act of Apr. 29, 1802, ch. 36, sec. 1, 2 Stat. 171, 171 (repealed 1831).

presented head on with the theory of common law copyright.[104] While *Wheaton v. Peters* had some aspects that were peculiar to the United States,[105] the main question of copyright as a common law property right was identical to that litigated in the British literary property debate, and most of the opposing sides' arguments on this issue were duplication of that debate.[106] When a majority of the Supreme Court ruled against common law copyright,[107] hope of achieving recognition of absolute property rights through this channel dwindled.

Decades later, some still entertained hopes for recognition of common law copyright in the United States and tried to devise strategies that would turn the table. In 1845, for example, one New York lawyer named E.P. Hurlbut included in his book *Essays on Human Rights and Their Political Guaranties* an essay entitled "Of Intellectual Property."[108] Referring to Justice Thompson's emphatic dissent in *Wheaton*, he remarked that "the unsatisfactory opinion of the majority of the Court was opposed by a Judge in whom conscience reigned supreme, and who, compared with his associates on the Bench, was second only to Marshall in his endowment of the reasoning faculties."[109] Showing a remarkable degree of optimism, Hurlbut wrote that "the question may not be considered as finally settled—there may possibly be a common law remedy for authors, both foreign and domestic, in some of the States."[110] As an example, he referred to New York, where "[n]o doubt exists . . . as to the adoption of the common law."[111] This was to be contrasted with Pennsylvania, the state whose common law (alongside the possibility of federal common law) was implicated in *Wheaton* and whose incorporation of British common law was doubted by Justice McLean's majority opinion.[112]

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104. *See* Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 657–58 (1834).

105. *See* Meredith L. McGill, *The Matter of the Text: Commerce, Print Culture, and the Authority of the State in American Copyright Law*, 9 AM. LITERARY HIST. 21, 23–25 (1997) (noting the "ideological bent of the new nation" influenced the American approach to common law copyright).

106. *See* PATTERSON, *supra* note 1, at 203 (characterizing *Wheaton v. Peters* as the American version of *Donaldson v. Becket*).

107. *Wheaton*, 33 U.S. at 661–62.

108. E.P. HURLBUT, ESSAYS ON HUMAN RIGHTS AND THEIR POLITICAL GUARANTIES 198–219 (New York, Greeley & McElrath 1845).

109. *Id.* at 214.

110. *Id.* at 215.

111. *Id.*

112. *See Wheaton*, 33 U.S. at 658–60. The idea of distinguishing *Wheaton v. Peters* on the grounds that the adoption of English common law in Pennsylvania was doubtful and achieving local recognition of common law copyright continued to

There were others who still dreamed of common law copyright after *Wheaton v. Peters*, but by and large the focus had shifted to a different brand of argument, one that demanded realizing the nature of copyright as an absolute property right through the legislative scheme, as happened with the 1831 Act.[113] An early example of this line of argument was an article published in the *American Jurist, and Law Magazine* in 1829, entitled like many others on this subject, "Literary Property."[114] It was probably published in an attempt to influence the copyright reforms Congress began to consider a few years earlier. The premise of the writer was that "[t]he property of an author in his works rests on at least as firm a foundation as any property in material objects, whether it be considered to originate in occupancy or labor."[115] After a long exposition of the literary property debate and of the argument for common law copyright, the writer turns to the United States context and asks: "A question might be made, whether authors who have published their works still retain any common law copyright in this country, and whether there is any mode in which this right might be claimed and maintained beyond the term secured by the United States statutes."[116] While observing that "these speculations might be interesting," this line of questioning is abandoned due to the conviction that "the national government is the only source from which any valuable protection for literary property can be expected."[117] At this point, the article shifts to a detailed account of necessary statutory reforms warranted by copyright's nature as an author's property right. The first relates to duration. While recognizing the fact that the Constitution only allows Congress to protect authors for "limited terms," the claim is that "the present term ought to be very much extended" to match that of Britain or "for a still longer period" and not be conditioned on the contingency of the author's survival for its

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attract New York lawyers for decades. It was finally crushed when, in an 1880 high profile case, the Supreme Court of New York refused to accept the argument and rejected a claim of common law copyright in New York. G.P. Putnam's Sons v. Pollard & Moss (N.Y. Sup. Ct. Oct. 13, 1880), *in* 14 DECISIONS OF THE UNITED STATES COURTS INVOLVING COPYRIGHT AND LITERARY PROPERTY, 1789–1909, at 2128 (Wilma S. Davis ed., 1980).

113. *Literary Property*, 2 AM. JURIST & L. MAG. 248, 249–50, 267 (1829) (reviewing ROBERT MAUGHAM, A TREATISE ON THE LAWS OF LITERARY PROPERTY (1828)) (arguing that the legislature should address literary property rights).

114. *Id.* at 248–67.

115. *Id.* at 257.

116. *Id.* at 254–63.

117. *Id.*

later part.[118] Second, the article turns to a "peculiarity in the laws of the United States," namely, the limitation of protection to American citizens.[119] The property principle is used to expose the fallacy of this peculiarity: "If the right of an author in his own composition be absolute and perpetual, it is but common justice for the laws to give him the power of vindicating this right, at all times and in every country."[120] The next "peculiarities" marked for elimination are the formalities of newspaper publication, deposit, and notice.[121] Next comes a proposal "that literary piracy ought to be punished criminally by fine and imprisonment."[122] Here was a complete reform agenda that may seem oddly familiar to an early twenty-first century observer. Its heart was the claim that "[t]he time for which the right is secured ought to be much extended; and the security of the right should not be made to depend on the performance of needless and irritating formalities."[123]

This was the paradigm that gradually became dominant in later decades: broad theoretical claims about copyright as a natural property right, accompanied by somewhat circumscribed reform proposals to be carried out within the statutory framework. A similar strategy had been employed in the patent context since the end of the eighteenth century.[124] The strategy, as applied in the copyright context, involved a certain discrepancy between the theoretical argument that insisted that copyright was an absolute property right and the concrete reforms advocated, as evidenced most clearly in the duration context. The discrepancy notwithstanding, as it became clear that recognition of common law copyright was unlikely, this became the common mode of argument in this vein.

An identical pattern appeared in the context of the international copyright debate. U.S. copyright law, which for most of the nineteenth century limited protection to citizens, had two main results: a vibrant local industry of cheap reprints of British books and a multitude of outraged British authors and publishers whose frustration increased in direct proportion to the

118. *Id.* at 263–64.
119. *Id.* at 264.
120. *Id.*
121. *Id.* at 264–67.
122. *Id.* at 267.
123. *Id.*
124. *See* Bracha, *supra* note 20, at 371–81 (discussing the use of such arguments in favor of patent protection by American inventor Joseph Barnes).

developing attractiveness of the American market.[125] Serious pressures to change the law and obtain copyright protection to foreign authors started in the late 1820s and continued in waves throughout the century.[126]

Two main groups agitated for international copyright: British authors who regularly initiated petitions to Congress and public appeals, and a group of Americans composed of some authors as well as self-styled friends of authors and literature including, in the later part of the century, some prominent American publishers.[127] The arguments used to advocate international copyright were many and included: appeals to principles of justice and equity, invocation of the principle of reciprocity between nations, claims about the supposedly destructive effect of lack of international protection on American authors and literature, and refutations of the adverse effects of such protection claimed by its opponents.[128] One of the most striking features of this eclectic group of arguments and appeals is the fact that the overwhelming majority of them were grounded in the same overarching abstract theory of copyright.[129] This was once again a strong depiction of copyright as a natural property right with strong moralistic undertones. One contemporary observer referred to this mode of arguing for international copyright with a tinge of sarcasm as "the first time that international relations have been adjusted, by high-minded statesmen, on this pure, magnanimous principle of action—this exemplification of the stoic morality, *fiat justitia ruat cælum*."[130]

The attraction of this mode of argument for proponents of international copyright was considerable. It allowed them to take the moral high ground, present their adversaries as advocating

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125. *See* AUBERT J. CLARK, THE MOVEMENT FOR INTERNATIONAL COPYRIGHT IN NINETEENTH CENTURY AMERICA 37–40 (1960) (noting that pirated novels typically sold for a fraction of the cost of their original counterparts); JAMES J. BARNES, AUTHORS, PUBLISHERS AND POLITICIANS: THE QUEST FOR AN ANGLO-AMERICAN COPYRIGHT AGREEMENT, 1815–1854, at 28–29 (1974) (discussing Charles Dickens's efforts to prevent British authors from selling their works to American editors).

126. BARNES, *supra* note 125, at 49, 74–75 (explaining various pressures placed on Congress throughout the nineteenth century); *see* CLARK, *supra* note 125, at 41–45, 56, 82–83, 86–87, 98–99 (discussing the attempts and results of authors, publishers, and senators to reform copyright laws).

127. *See* BARNES, *supra* note 125, at 64–66 (noting the increasingly apparent relationship between players "on both sides of the Atlantic").

128. *See, e.g.*, *Literary Property*, 2 U.S. MAG. & DEMOCRATIC REV. 289, 289–90 (1838) (reviewing PHILIP H. NICKLIN, REMARKS ON LITERARY PROPERTY (1938)).

129. *See, e.g.*, *id.* at 292–94 (arguing that the principle of copyright is founded on the "sacred and inviolable" right to property).

130. *Id.* at 292. The Latin phrase "*fiat justitia ruat cælum*" means "be justice done though the heavens fall."

violation of fundamental precepts of justice for the sake of petty material interests, and claim that international protection followed inevitably from universally accepted principles. As one writer in this vein put it, "[t]he proposition on which [international copyright] rests is so simple, and the appeal to equity so straight-forward, that its reasoning with every candid mind must be conclusive."[131]

The broader conceptual image of copyright within which such arguments were made was identical to that used by proponents of domestic reforms.[132] Almost every detailed appeal for international copyright started with a long theoretical exposition of copyright as a pre-political natural property right rooted in the intellectual labor of the author and the equivalent of any other property right.[133] The reasoning for such expositions was borrowed again from the British literary property debate. The moment copyright was framed this way, the considerable justificatory power of natural property rights ideology was mobilized to support international protection. A right that was presented as pre-political and prior to any positive enactment by the state did not seem to lose its power in the crossing of sovereign borders. The claim of "absoluteness"—a feature inherently associated with natural rights—also supported the extension of the right irrespective of place and sovereignty. Against this backdrop, any attempt of the state to limit protection to its citizens was easily redescribed through the powerful trope of "confiscation,"[134] or sometimes more colorfully as "robbery."[135] Finally, in a move that characterized the use of natural rights rhetoric in the context of copyright since the mid-eighteenth century, a powerful parallel was created between literary property and more traditional forms of property. Accordingly, the refusal to recognize international copyright could be contrasted with the taken-for-granted universal norm of recognizing property rights of foreigners irrespective of nationality or location.

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131. *The New Copyright Law*, 5 AM. MONTHLY MAG. 105, 106–07 (1838).

132. *See, e.g.*, HURLBUT, *supra* note 108, at 198–99 (discussing copyright in terms of incorporeal property and natural property right stemming from the labor of one's mind).

133. *See, e.g.*, *International Copyright*, *supra* note 73, at 257–58 (noting that the protection of one's property and rights is a "transcendent principle of the unwritten law" applying to foreign and domestic authors alike).

134. *See, e.g.*, J.K.A., *Literary Property*, 10 AM. JURIST & L. MAG. 62, 68 (1833) (deriding Parliament for "sequestrating" authors from their private rights for the "encouragement of literature").

135. *See, e.g.*, *International Copyright*, *supra* note 73, at 257 (declaring that Lord Camden's arguments that copyright limitations would advance the cause of learning was the most "dishonest and insolent" statement in the annals of "robbery by sea and land").

The variations on these themes in the international copyright polemics were endless. One example will suffice to convey their flavor:

> What ground of distinction, then, is there between a foreign and domestic author? If the domestic author has "a title, perfect and absolute," to the profits of his labor, why not the foreign? It is only in the most barbarous and savage countries, that the inhabitants rob and plunder, indiscriminately, all foreigners, who come upon their shores. . . . If a foreigner brings into the country any material product of his labor, wherever produced, and whether he hail from the rising sun or the setting; whatever his nation, his color, or his product, we receive him hospitably, and extend protection to his person and his property. Why, then, if he brings an immaterial product, a literary work, shall we rob him? The true nature of literary property being once admitted, the right, we say the absolute *right*, of the foreigner to have it protected and guarantied to him follows of course.[136]

Many of the writers saw the homology between the use of natural property rights arguments in the domestic and international contexts. In the one, the supposed absolute and pre-political nature of copyright was used to demand the abolition of boundaries on copyright protection in the temporal dimension (perpetual duration being the most conspicuous demand domestically); in the other, it was used to attack boundaries in the geographical and political sense.[137]

How did American constructions of the Statute of Anne fit into this picture? There were two main obstacles that had to be overcome in reasoning based on painting copyright in the colors of a natural property right either domestically or internationally. First, there was the decision of the House of Lords in *Donaldson v. Becket* that ended the literary property debate. Inconveniently, the decision rejected common law copyright and possibly the natural right theory underlying it.[138] This was no mere technicality. The question of common law copyright and the philosophical grounding of protection of one's literary product in natural property rights were not easily separable. In the nineteenth century natural property rights thought the two were, to a large extent, synonymous.[139]

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136. *Id.* at 266.

137. *See* F.B., *Copyright*, 1 ME. MONTHLY MAG. 358, 358–60, 363–65 (1837).

138. *See* Donaldson v. Beckett, (1774) 1 Eng. Rep. 837 (H.L.) 847; 2 Brown. 129, 145.

139. *See* PATTERSON & BIRCH, *supra* note 60, at 253 (discussing how natural rights theory and common law arguments were jointly at odds with theories of positive law,

Protection under the common law was usually seen as both the effect and the proof of the existence of a natural property right.[140] Therefore, if the House of Lords decision in *Donaldson* prevailed and was accepted, the philosophical justification was likely to sink with the common law right.

The second difficulty was the Statute of Anne. The Statute and its American progeny were the epitome of a limited statutory regime full of limitations and restrictions, the very antithesis of the absolute inviolable property right depicted by the various American writers. Many of the American restrictions and "peculiarities" that copyright expansionists were arguing against in the domestic context, such as the limited duration and formalities, were a direct inheritance from the Statute of Anne. In the international context, there was nothing in the Statute of Anne that required per se denial of protection to foreign authors, but its basic logic suggested that the question of whether to extend it internationally was one of mere policy. If the Statute could limit the duration in regard to domestic authors, why couldn't it deny it altogether to foreign authors on public policy grounds? Here the symmetry drawn between the domestic and international context threatened to backfire. Just as the natural rights thesis equally supported an absolute right both domestically and internationally, the positivist state-created privilege nature of the Statute of Anne threatened not only to limit the right at home but also to make international extension a question of expediency. If the Statute of Anne was the source of modern copyright, if indeed it was synonymous with a general regime of authors' rights as eighteenth-century public discourse assumed, how could its limited statutory framework and obvious character as a state-made positivist measure be reconciled with the grand claims of natural property rights?

It was this positivist logic of the Statute and its acknowledged influence in the United States, given its dominance at the foundational moment of American copyright, that proponents of the natural rights thesis detested and feared the most. In the words of one of them:

> In this country as well as Great Britain every one has now been so long accustomed to view the property of authors only as it is limited and regulated by statute, that when this question is first proposed it will seem at once to most persons that the rights of authors are created by statute; and that the exclusive privilege of publishing their works

represented in the copyright context by the Statute of Anne).

140. *See id.* at 255–56 (noting Lord Mansfield's argument that principles of right and wrong as applied to copyright are within common law jurisprudence).

> for fourteen or twenty-eight years is a bounty and favor granted them by the legislature.[141]

In fact, in the United States the situation was even worse. There the vicious statutory logic captured the nation's soul at the very constitutive moment of creating the Constitution. As a result, this logic was enshrined, at least inasmuch as duration was concerned, on the constitutional level, thereby foreclosing the possibility of recognizing the true absolute nature of the right:

> But so deeply has the notion taken root, that an author has only a temporary right to an exclusive property in what is more emphatically his own creation than any material product of labor can be, that the framers of our constitution do not seem to have dreamed of his having any thing more than such temporary exclusive right; since they provided, *for the encouragement of learning*, only that Congress might grant the exclusive privilege of publication for a "limited time." Singular *encouragement* this![142]

On second thought, the writer of the above passage concluded that perhaps, given a correct understanding of the nature of copyright, the constitutional obstacle was not quite insurmountable. Demonstrating that early twenty-first century economists were not the first to conceive that in economic terms a long enough limited duration could be the equivalent of perpetual protection,[143] he suggested that:

> [A]s the constitution gives Congress an indefinite latitude of discretion, as to what "limited time" copyrights shall be allowed for, it leaves room for substantial justice to authors, or, rather, does not impose upon Congress the necessity of a flagrant and outrageous wrong to them, since the period may be so extended, as to be substantially equivalent in present value to a perpetual right.[144]

Others too preached amendment or evasion. Amusingly (to modern eyes), one of them suggested one hundred years as a term close enough to approximate perpetuity.[145] Still, the positivist

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141. *Literary Property*, *supra* note 113, at 257.

142. *International Copyright*, *supra* note 73, at 259.

143. A brief submitted to the Supreme Court by a group of eminent economists in the case of *Eldred v. Ashcroft* argued that the *ex ante* present value of the existing limited term of copyright is very close to that of perpetual protection. Brief of George A. Akerlof et al. as Amici Curiae Supporting Petitioners at 8, Eldred v. Ashcroft, 537 U.S. 186 (2003) (No. 01-618).

144. *International Copyright*, *supra* note 73, at 260.

145. *Literary Property*, *supra* note 128, at 306 (explaining that the limited times restriction in the Constitution is "of an indefinite nature, admitting legitimate extension to a hundred years, or even a longer term").

statutory logic that hijacked American copyright at its birth posed a deadly threat to the natural rights thesis. Its undeniable grounding on the constitutional level added insult to injury.

American proponents of natural property rights dealt with this difficulty by composing a grand narrative of the history of copyright. This narrative had three interlinked (nonchronologically organized) chapters: the original sin was the 1774 *Donaldson v. Becket* case, a misguided and unfortunate decision of monumental consequences; the Statute of Anne, originally harmonious with a natural property right protected under the common law, was fundamentally misconstrued by that decision; and American copyright law created on the heels of the original sin tragically and naively adopted and perpetuated its error, a mistake that now had to be corrected.

Starting with the first chapter, *Donaldson v. Becket* was described as a mistaken and unfortunate decision made by second-rate jurists. It was contrasted with the supposed brilliance of the earlier *Millar v. Taylor* case and the fame of some of the great English jurists that were associated with common law copyright.[146] *Donaldson* was the moment when "the rights of authors were frittered away by judicial construction, notwithstanding the eloquence and learning of Mansfield and Blackstone."[147] In this narrative, an absolute property right under the common law was recognized for centuries until, at a moment of great eclipse, it was taken away and destroyed by the House of Lords decision:

> Literary property . . . which the common sense of the British nation had treated for centuries as quite as sacred and inviolable as any other property, now existed only by the special favor of Parliament; and Parliament, while thus riding over private rights, and sequestrating, as it were, individual earnings, claimed credit in so doing for their encouragement of literature. That such a specimen of inconsistency and injustice should have been displayed in Great Britain, where the general right of property is universally acknowledged and effectually guarded, is unaccountable.[148]

But what of the Statute of Anne? If an absolute property right existed for centuries and lasted until 1774, how could one account for the Statute of Anne and its limited copyright framework? Luckily for the American writers, the British

146. F.B., *supra* note 137, at 359–60.

147. *Id.* at 360.

148. J.K.A., *supra* note 134, at 68.

proponents of common law copyright had to answer exactly the same question in court and in the public arena fifty years earlier. The answer they devised was now appropriated in the American debate. The Statute, in this account, was merely an attempt to provide better remedies for safeguarding rights that were recognized and protected for generations prior to it and existed independently of it.[149] In relation to this understanding of the Statute, the holding of *Donaldson v. Becket* was given a narrow and somewhat questionable interpretation based on the questions presented to the common law judges in the case.[150] Under this interpretation of the holding, a majority of the judges thought that common law copyright existed prior to the Statute of Anne in both published and unpublished works, but a smaller majority found that the right was taken away by the Statute of Anne in regard to published works.[151] This, although by that time a common and entrenched understanding of the decision, was both erroneous as to the opinions of the judges[152] and misleading as to the meaning of the proceedings in the House of Lords where the case was decided by a majority vote of the peers to dissolve the Chancery injunction without any reasons given (which means that the exact reasons for the decision cannot be known for certain).[153] The upshot of this account, however, was that in the American narrative even the House of Lords in its despised *Donaldson* decision did not deny the existence of common law

149. *See* Millar v. Taylor, (1769) 98 Eng. Rep. 201 (K.B.) 217–18, 226–27, 256–57; 4 Burr. 2303, 2332–35, 2349–52, 2405–07 (explaining that the Statute of Anne gave additional security to authors beyond the remedies available at common law); *see also* Howard B. Abrams, *The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright*, 29 WAYNE L. REV. 1119, 1154 (1983) ("The Statute [of Anne] was characterized as a measure designed to provide a temporary set of additional quasi-criminal remedies in support of the common law right."); PATTERSON & BIRCH, *supra* note 60, at 253 ("[T]he tactic was to convince courts that the Statute of Anne was intended only to provide a statutory remedy for violation of the author's supposed continuing rights under common law.").

150. American accounts usually referred to three questions presented by the Lords to the judges in the case: whether there existed a common law right in an author's composition; whether such right was terminated by publication; and whether, if such a right did exist, it was taken away by the Statute of Anne. Technically, there were five questions presented to the judges, although the two questions added to the original three by Lord Camden amounted to the same substance. *See* DEAZLEY, *supra* note 32, at 195–96.

151. Patterson & Birch recently repeated this common reading of the holding of the case. PATTERSON & BIRCH, *supra* note 60, at 255 ("[T]he Lords followed the advice of the common law judges and held that the author did possess a common law copyright in his or her writings, but that the common law right was lost upon publication.").

152. Ronan Deazley has shown recently that there was in fact a majority of the judges who thought that a common law right in published works existed and was not taken away by the statute, which means that the Lords voted against the opinion of the majority of the judges. DEAZLEY, *supra* note 32, at 205.

153. *Id.* at 210; ALEXANDER, *supra* note 29, at 31; ROSE, *supra* note 49, at 102–03.

copyright. It merely mistakenly ruled that the Statute of Anne took away that right. This reading made American commentators regard the whole episode as an "unfortunate step," which "verified in its eventual result the fable of the horse and the man."[154] The story became one of dark tragedy and irony: The Statute of Anne, designed to help authors better protect their antecedent rights, ended up depriving them of those rights just as the fabled man who climbed the horse's back promising to help protect his meadow ended up enslaving it.[155]

The third part of the narrative was the American one. In it, Americans who created their copyright system exactly at the moment that the tragedy reached its climax in Britain naively adopted and perpetuated the error. They mistakenly assumed that the rights of authors could only be protected under statutory arrangements based on reasons of expediency and failed to see their natural property rights, thereby building their system on shaky foundations. One writer described it as follows:

> It was an example which, for obvious reasons, had its influence in our own country. When public attention was first drawn to the subject of literary property in the United States, an author seemed to be regarded as a kind of outlaw, so far as relates to the fruits of his mind, no one appeared to think that he could lay claim to such fruits without the will of the legislature to that effect expressed in the direct terms of a statute. The owner of property in general, it was at the same time well understood, was shielded by outworks which even the legislature could not surmount; and yet the owner of a literary composition was considered entirely dependent upon the caprice of the legislature.[156]

The variant of the narrative claiming that common law copyright did exist in the United States did not adopt this conclusion, of course. Rather, it claimed that the American statutory regime, like the Statute of Anne, was merely an auxiliary measure that did not affect the absolute common law right.[157] Later, however, as the hope for common law copyright seemed to dissolve, the standard version was to bemoan the mistaken understanding on which Americans built their system attributable to the original sin in Britain.

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154. *Literary Property*, *supra* note 128, at 304–05.

155. *See* AESOP'S FABLES 26 (Laura Gibbs trans., 2002) (Fable 47: *The Stag, the Horse, and the Man*).

156. J.K.A., *supra* note 134, at 68.

157. *See* Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 685 (1834) (Thompson, J., dissenting) ("[The copyright act] presuppose[s] the existence of a right, which is to be secured and not a right originally created by the act."); HURLBUT, *supra* note 108, at 76.

This grand narrative conjured up a very different image of the Statute of Anne than the one that pervaded late eighteenth-century American public discourse. The Statute was dethroned from its formerly unquestioned glorious position. It was no longer presented as the source of authors' rights in civilized nations and as the main paradigm for protecting such rights. It was now clothed in the garments of a minor and procedural measure, secondary to the main regime of common law copyright that predated it by centuries. The difference followed from the broader ideological contexts of the periods. As long as natural property rights justifications of copyright were seen as fundamentally consistent with a limited and restrictive statutory regime, the Statute of Anne could be at the front of the stage. When a significant copyright constituency began to advocate specific reforms and heavily rested the justification of those reforms on a theory of natural property rights that sharply contrasted such rights with a limited statutory framework, the Statute of Anne became an embarrassment. The strategy for reconciling its embarrassing existence with the bold claims of ancient, absolute common law rights was pushing it into a secondary status.

Secondly, the Statute of Anne, the former celebrated role model, was assigned a new role—that of the villain despite itself in the grand historical narrative of copyright. It was not a villain at its origin in 1710. It was forced into that role by *Donaldson v. Becket* in 1774. At that point, however, it became the instrument of evil, used as the means for depriving authors of their rights and distorting justice. The *Encyclopædia Americana* described this moment of downfall as follows:

> [W]hile the poverty of authors and scholars—the great leaders and champions of civilization and intellectual advancement—has been proverbial all the world over, the government has interposed, or is construed to have interposed, with its mighty arm, not for their protection and reward, but to despoil them of their property, the fruits of their own labor, and sequestrate it for the public use.[158]

Thus, the Statute of Anne found itself disparaged and despised:

> This regulation must not only strike every person as a palpable incongruity in the code of the law of *meum* and *tuum*; but it has been most surprisingly misnamed, 'the *encouragement* of literature.' We are naturally led to

158. *Literary Property*, *in* 8 ENCYCLOPÆDIA AMERICANA 15 (Francis Lieber et al. eds., 1831).

> inquire how so offensive a discrepancy in the otherwise harmonious system of property law came to exist . . . .[159]

In the United States, the evils of the limited statutory framework of the Statute of Anne were even worse. There, the misguided logic was planted in the system at its inception and worked its way into the Constitution through "[t]he framers" who were "evidently under that influence."[160]

That was the new dominant image of the Statute of Anne in nineteenth-century American public discourse. Proponents of natural property rights were not unopposed, of course. Both the specific reforms they proposed and the reasons they offered for supporting them were met with adamant opposition.[161] In the international copyright context, this opposition held its ground until the very last decade of the century.[162] However, the arguments made by those opposing the agenda of copyright expansionists usually showed little interest in meeting their arguments on the level of grand historical narratives. Even when such arguments did allude to the fundamental principles of the copyright regime, they hardly devoted the same attention to the British history of copyright or to the Statute of Anne as did proponents of natural property rights.

When, in 1838, the Committee on Patents issued a report that opposed an international copyright bill and refuted the various arguments underlying it, it made a rare reference to the British history. It adopted the basic narrative under which common law copyright existed, but was restricted by the Statute of Anne, and concluded that "[s]ince that period, copyright in England as elsewhere has been defined, limited, and protected by special enactments, on which alone it rests."[163] "The right of the author," it concluded, "is *property* of a peculiar character, not absolute but special, subject to conditions and limitations."[164]

Even this cursory treatment was the exception. When, in 1873, the Committee on the Library submitted another report, opposing yet another international copyright bill, it made the

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159. J.K.A., *supra* note 134, at 64.

160. *Literary Property*, *supra* note 128, at 305.

161. *See, e.g.*, S. REP. NO. 42-409, at 2 (1873) (observing that any actions by Congress addressing copyright must occur within the confines created by the Constitution).

162. *See, e.g.*, *The Authors' Interests*, N.Y. TIMES, Jan. 26, 1890 at 14 ("Gardiner G. Hubbard continued his argument in opposition to the international copyright law before the House Committee on Judiciary this morning. He said that it was for the good of the people that we should have a domestic copyright law, but its benefits should be confined to American. citizens.").

163. S. REP. NO. 25-494, at 2 (1838).

164. *Id.*

same point but started its discussion with the constitutional clause. It explicitly remarked that it is not "important to consider whether any such [common law property] rights had been recognized in England or in the American States anterior to the Constitution."[165] Due to the lack of interest of the opposing camp in meeting the historical arguments of proponents of natural property rights on their own terms, there developed no counter-narrative of the Statute of Anne and its greater meaning. Thus the nineteenth century American public discourse on the subject came to be dominated by the grand narrative that assigned the Statute a secondary and pernicious role in the historical drama of copyright.

## IV. CONCLUSION: THE AGE OF TREATISES

> *The conclusion, then, is inevitable, that the copyright statute which deprives authors of property in their intellectual productions after a term of years, cannot be defended on any principle which sanctions the taking of private property for public uses, or which justifies the regulation of private property for the common welfare*.[166]

The second half of the nineteenth century was the age of the first great treatises in American copyright law. The first edition of the pioneering treatise by George Ticknor Curtis was published in 1847[167] and gathered influence in the next decades. Eaton Drone published his tome in 1879,[168] and R. R. Bowker marked the end of the first wave of treatises and the shift to the new 1909 regime with his 1912 treatise.[169] Those treatise writers were the first great synthesizers of American copyright law. Their works, which tried to encompass systematically this entire developing body of law, reflected the great change undergone by it during the nineteenth century. At the same time, all three of those writers were not merely passive reflectors of copyright trends. They were, rather, active agents and movers of change who did not hesitate to inject their agenda for the proper development of copyright law into their work.

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165. S. REP. NO. 42-409, at 2 (1873).

166. EATON S. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES 19 (Boston, Little, Brown & Co. 1879).

167. GEORGE TICKNOR CURTIS, A TREATISE ON THE LAW OF COPYRIGHT (Boston, Charles C. Little & James Brown 1847).

168. DRONE, *supra* note 166.

169. RICHARD ROGERS BOWKER, COPYRIGHT: ITS HISTORY AND ITS LAW (1912).

When it came to grand narratives of the history of copyright and the place of the Statute of Anne within them, none of the three works had much new to say. All three writers supplied, in elaborate chapters about the history and theory of copyright, various versions of the thesis of copyright as a natural property right and of the matching account of the Statute of Anne developed in the preceding decades.[170] In fact, all three were professed supporters of the reform agendas in whose service such accounts were created. While their treatises were not focused on those issues, they all stood firmly at the side of international copyright, and they all dreamed of an absolutist copyright protection either through common law copyright or through the familiar host of statutory reforms.[171]

The most important, novel aspect of the treatises was the incorporation of the underlying vision of an absolutist property right in the product of the creative intellect into the general synthesis of copyright in its entire manifold of doctrinal manifestations. In these works, the attempt to translate the abstract notion of authorial ownership of intellectual works into concrete institutional terms was no longer limited to international copyright and the familiar short list of statutory reforms. Instead, the treatises infused with their understanding of ownership of creative works each and every part of their analysis of the doctrines and concepts of copyright law. Those doctrines and concepts changed profoundly during the

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170. *Id.* at 1–7, 23–34; CURTIS, *supra* note 167, at 1–82; DRONE, *supra* note 166, at 1–96.

171. Curtis and his treatise were universally praised by reviewers as strengthening the case for international copyright and for longer and stronger protection. *See* Oren Bracha, *Commentary on George Ticknor Curtis's Treatise on the Law of Copyright (1847)*, PRIMARY SOURCES ON COPYRIGHT (1450–1900) (L. Bently & M. Kretschmer eds., 2008), http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/ausgabeCom/%22us_1847%22 (describing the enthusiasm with which Curtis's work was met as a key work advancing the rights of authors). One reviewer claimed that the work of Curtis "must place his name hereafter with that of TALFOURD, among the benefactors of literature and civilization." Book Review, 3 LITERARY WORLD 1, 2–3 (1848) (reviewing GEORGE TICKNOR CURTIS, A TREATISE ON THE LAW OF COPYRIGHT (1847)). He compared Curtis to the famous English crusader for extending the copyright term because of the contribution of his treatise to the causes of international copyright and term extension. *Id.* Bowker was one of the most vocal and influential supporters of international copyright for decades beginning in the early 1870s. *See* CLARK, *supra* note 125, at 106–08 (describing Bowker as a "staunch advocate[ ] of international copyright" whose articles in *Publishers' Weekly* "provide[d] the public discussion which some advocates . . . considered to be the necessary preliminary to overcome the ignorance and inertia of people and politicians"). He used the journal he owned and edited—the *Publisher's Weekly*—as a horn for this cause. *Id.* at 107–08. Drone argued in his treatise for perpetual protection and for international copyright. DRONE, *supra* note 166, at 19, 96. See also the essay written by Drone and published anonymously three years prior to his treatise advancing similar arguments for perpetual copyright protection: Eaton Sylvester Drone, *Is Copyright Perpetual? An Examination of the Origin and Nature of Literary Property*, 10 AM. L. REV. 16 (1876).

nineteenth century and were pushed toward more change by the treatises' synthesis of them and its underlying understanding of copyright as a property right in an intangible creation of the intellect.

At the heart of this new construct of authorial ownership, stood two dovetailing ideas: the concept of the owned work as an intellectual essence that could take many different concrete forms and the notion of ownership as the total control of the market value of the work in all of its concrete manifestations. The concept of the intellectual work developed by the treatise writers replaced the traditional understanding of copyright as a narrow exclusive right of printing a copy of a protected text[172] with a much broader one. Thus, Curtis explained in 1847 that "[t]he property of the original author embraces something more than the words in which his sentiments are conveyed. . . . [H]is right may be invaded, in whatever form his own property may be reproduced."[173] Three decades later, Drone wrote that "[t]he means of communication are manifold; but the invisible, intangible, incorporeal creation of the author's brain never loses its identity."[174] This, as Drone saw, led to a great expansion of the scope of copyright protection, by comparison to the traditional understanding:

> The definition that a copy is a literal transcript of the language of the original finds no place in the jurisprudence with which we are concerned. Literary property, as has been shown, is not in the language alone; but in the matter of which language is merely a means of communication. It is in the substance, and not in the form alone. That which constitutes the essence and value of a literary composition . . . may be capable of expression in more than one form of language different from that of the original.[175]

Accompanying this understanding of the intellectual work was a new understanding of copyright as the right of controlling and enjoying all the market profits generated by the work. In the words of Curtis: "[T]o the author belongs the exclusive right to

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172. The classic statement of the traditional concept of copyright's scope in nineteenth-century American copyright law is that of Justice Grier in *Stowe v. Thomas*. Deciding that a translation of a protected work was not an infringement of copyright, Grier observed that "exclusive property in the creation of his mind, cannot be vested in the author as abstractions, but only in the concrete form which he has given them, and the language in which he has clothed them. . . . This is what the law terms copy, or copyright." Stowe v. Thomas, 23 F. Cas. 201, 206–07 (C.C.E.D. Pa. 1853) (No.13,514).

173. CURTIS, *supra* note 167, at 292–93.

174. DRONE, *supra* note 166, at 97–98.

175. *Id.* at 451 (footnote omitted).

take all the profits of publication which the book can, in any form, produce."[176] The two ideas reinforced each other in a powerful circular way: the principle of control of all market profits entailed seeing increasingly remote derivative works—such as translations, abridgments, and dramatizations—as versions of the original intellectual work; the concept of the work as capable of taking many concrete forms while retaining its identity facilitated seeing the markets for these derivative works as markets attributable to the original.

These two abstract ideas about ownership of intellectual works developed by Curtis and Drone both reflected and pushed further a radical change in the doctrines defining the scope and strength of copyright protection.[177] The new ideas and the doctrinal change implicated by them, unlike the older notion of copyright as an absolutist property right, were no longer focused on common law copyright. Thus, when Bowker published his treatise in 1912, he distinguished between common law copyright (applicable to unpublished works) and statutory copyright, and still described the former as providing broader protection.[178] However, the long list of entitlements he listed and the broad scope of protection he described[179] in regard to statutory copyright demonstrated that the differences were shrinking. The stakes of choosing between tracing copyright historically and theoretically to a common law property right or seeing it as originating in a statutory regime declined.

The first wave of native legal treatises marked the gradual decline of American interest in the Statute of Anne as a topic of great import to present debates about the goals and shape of copyright law. As early as 1879, one reviewer of Drone's treatise observed that his lengthy chapters about the history and theory of common law copyright and the effect of the Statute of Anne upon it dealt with "a question which has not much practical importance at this day, although it is of interest to the legal antiquarian."[180] At the dawn of the twentieth century, interest in the Statute of Anne waned or assumed an antiquarian character.[181] Gradually the stakes in the meaning and history of the Statute of Anne in regard to current copyright questions

176. CURTIS, *supra* note 167, at 237–38.

177. Bracha, *supra* note 6, at 225–38.

178. BOWKER, *supra* note 169, at 44–46.

179. *See id.* at 42–44 (enumerating the copyright protections available under the restructuring of the American copyright regime in 1909).

180. *Drone on Copyright*, 19 ALBANY L.J. 288, 288 (1879).

181. *Id.*

declined. Trying to uncover the exact reasons for this process and its timing is bound to be a speculative endeavor. One probable factor was the decline in progressive, and later realist, jurisprudence of a natural rights understanding of property rights and its replacement by a more positivistic view that regarded property rights as state-created entitlements,[182] a process that encompassed the field of intellectual property.[183] To be sure, arguments about the rights of authors to enjoy the fruits and value of their intellectual labor did not disappear from the landscape of copyright rhetoric. Such modes of reasoning would keep cropping up in both legislative and adjudicative contexts. But the nineteenth-century style of absolute natural property rights theory, and especially its tendency to equate such rights with the common law, was falling out of fashion.[184] In such an atmosphere, even if one appealed to arguments about the fairness of authors' just reward for their intellectual labor, it became gradually less important to know whether a particular entitlement was protected by ancient English common law and whether the Statute of Anne had taken it away.

A second reason for the declining interest in the Statute of Anne within copyright's public discourse may have been the fact that its diminished relevance to contemporary copyright questions and modes of thinking became increasingly apparent. The 1710 regulation of the book trade, still rooted in the notion of the exclusive privilege of reprinting a book, had little to say about such questions as the extent to which copyright protection covered derivative markets, the extension of copyright protection to new expressive media, or the creation of new entitlements covering various modes of exploitation. In discussing such questions, the dominant paradigm was that of ownership of

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182. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960, at 158–59, 165–67 (1992); Kenneth J. Vandevelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325, 357–66 (1980).

183. Justice Holmes made some of his more resounding descriptions of a positivist concept of property in the context of intellectual property. *See* Int'l News Serv. v. Associated Press, 248 U.S. 215, 246–48 (1918) (Holmes, J., concurring) (stating that property is "a creation of law"); White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1, 19 (1908) (Holmes, J., concurring) (noting that copyright "hardly can be conceived except as a product of statute"). Decades later, Felix Cohen framed his iconic anti-conceptualist and positivist manifesto as an attack on common concepts of trademark law as a property right based on the protection of value. *See* Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 814–17 (1935).

184. *See* Morton J. Horwitz, *Natural Law and Natural Rights*, *in* LEGAL RIGHTS: HISTORICAL AND PHILOSOPHICAL PERSPECTIVES 39, 44 (Austin Sarat & Thomas R. Kearns eds., 1996) (describing how both Progressives and legal realists rallied around Holmes's assertions that property exists only through positive law).

intellectual works developed in the first wave of great copyright treatises. For the writers of those treatises, that paradigm was still linked to the grand theoretical and historical narrative of copyright as a property right of which the Statute of Anne was a part. But during the twentieth century, that narrative fell into disuse and was gradually cast aside—a crutch no longer necessary for supporting the ownership of intellectual works paradigm it helped to construct.

This was, then, the strange career of the mythology of the Statute of Anne in its adoptive country: an enthusiastic reception accompanied by glorification, a subsequent period of vilification, and a gradual retreat from contemporary public debate into the status of a historical monument.