Unequal Bargaining Power—Congress Recognizes the Plight of New Creators

The Copyright Act of 1976, which went into effect on January 1, 1978, was an attempt by the U.S. Congress to address and solve a large number of problems that had come to light in the years since its predecessor, the Copyright Act of 1909, had been enacted. It was an effort, like many legislative efforts, that yielded mixed results.

As I noted in the Introduction, I was a law student in those years (1976–79) studying intellectual property law, with a particular focus on the effect of copyright on popular culture (e.g., music, theater, film, television, and literature). It was a great vantage point from which to study and participate in this very significant change in copyright law—the law most relevant to the creative arts.

The Anglo-European version of copyright law1 began with the Statute of Anne, enacted by the Parliament of Great Britain in 1710. The text of the Statute is a good starting point for this book’s analysis of copyright law.

A review of that text allows us to answer two important questions relevant to the study of copyright law’s termination of grant rules. The first question is for whose interests copyright law was developed; and second, why U.S. copyright law initially granted creators first a fourteen-year, and then a twenty-eight–year, term of protection, renewable for a second fourteen years, and then for a second twenty-eight–year period.

Looking at the first question, it is important to understand whose interests the law seeks to protect in order to assess whether the law, in any of its iterations, has met that goal. In recent years this question has been the subject of considerable debate, due in large part to the ability, in the digital era, to widely and cheaply distribute copyright-protected content. The makers of hardware and software who need that content have a vested interest in acquiring it for the lowest cost possible, and being able to distribute it widely for the use of the consumer/buyers of that hardware or software. These manufacturers and distributors of both hardware and software vigorously oppose technological and law-based efforts to regulate and limit the use of content. They oppose technological means like Digital

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1The focus of this book is on U.S. copyright law, with deference given to its beginnings in the laws of Britain and Scotland, later the United Kingdom. The fascinating and diverse array of ways in which copyright has been codified in the laws of other countries is here acknowledged, but is regretfully beyond the scope of this book and will only be referred to in passing where relevant from a comparative law standpoint.
Rights Management (DRM), as well as legislative and judicial action that they believe improperly expands the nature and scope of copyright protections.

The historical argument advanced in support of this opposition is that copyright law was never intended primarily to protect the interests of the content creators. Rather, the argument goes, copyright law initially was designed to protect the publishers of books, who wanted to protect their right to control the creation of copies (hence the term “copy right”) from other publishers who might, in the absence of regulation, make and sell unauthorized copies of a work. This argument then progresses to advance the view that content creators’ claim to rights under copyright law should exist, if at all, only on a footing similar to, and equal to, the rights of the public to enjoy the benefits of those works. This argument has lent support, with varying degrees of success, to cases in which the rights of content creators have been limited. The recent series of cases expanding the fair use defense to include works that are “transformative” is an example of this trend.²

A Western Copyright’s Beginnings—
The Statute of Anne

A review of the text of the Statute of Anne lends little support to the argument that copyright law, in its inception, was not intended for the benefit of authors. Here in their entirety is the preface and first two sections of the Statute of Anne:

8 Anne, c. 19 (1710)

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.

A. Whereas printers, booksellers, and other persons have of late frequently taken the liberty of printing, reprinting, and publishing, or causing to be printed, reprinted, and published, books and other writings, without the consent of the authors or proprietors of such books and writings, to their very great detriment, and too often to the ruin of them and their families: for preventing therefore such practices for the future, and for the encouragement of learned men to compose and write useful books; may it please your Majesty, that it may be enacted, and be it enacted by the Queen’s most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same;

²See, e.g., Cariou v. Prince, 714 F.3rd 694 (2013) in which the Second Circuit Court of Appeals found the appropriation of Cariou’s photos of Jamaican Rasta men by Richard Prince was a fair use because the changes added by Prince to the photos were sufficiently transformative to avoid a valid infringement claim.
II. That from and after the tenth day of April, one thousand seven hundred and ten, the author of any book or books already printed, who hath not transferred to any other the copy or copies of such book or books, share or shares thereof, or the bookseller or booksellers, printer or printers, or other person or persons, who hath or have purchased or acquired the copy or copies of any book or books, in order to print or reprint the same, shall have the sole right and liberty of printing such book and books for the term of one and twenty years, to commence from the said tenth day of April, and no longer; and That the author of any book or books already composed, and not printed and published, or that shall hereafter be composed, and his assignee or assigns, shall have the sole liberty of printing and reprinting such book and books for the term of fourteen years, to commence from the day of the first publishing the same, and no longer; and That if any other bookseller, printer or other person whatsoever, from and after the tenth day of April, one thousand seven hundred and ten, within the times granted and limited by this act, as aforesaid, shall print, reprint, or import, or cause to be printed, reprinted, or imported, any such book or books, without the consent of the proprietor or proprietors thereof first had and obtained in writing, signed in the presence of two or more credible witnesses; or knowing the same to be so printed or reprinted, without the consent of the proprietors, shall sell, publish, or expose to sale, or cause to be sold, published, or exposed to sale, any such book or books, without such consent first had and obtained, as aforesaid: then such offender or offenders shall forfeit such book or books, and all and every sheet or sheets, being part of such book or books, to the proprietor or proprietors of the copy thereof, who shall forthwith damask, and make waste paper of them; and further, That every such offender or offenders shall forfeit one penny for every sheet which shall be found in his, her, or their custody, either printed or printing, published, or exposed to sale, contrary to the true intent and meaning of this act; the one moiety thereof to the Queen's most excellent majesty, her heirs and successors, and the other moiety thereof to any person or persons that shall sue for the same, to be recovered in any of her Majesty's courts of record at Westminister, by action of debt, bill, plaint, or information, in which no wager of law, essoin, privilege, or protection, or more than one imparlance shall be allowed. II. And whereas many persons may through ignorance offend against this act, unless some provision be made, whereby the property in every such book, as is intended by this act to be secured to the proprietor or proprietors thereof, may be ascertained, as likewise the consent of such proprietor or proprietors for the printing or reprinting of such book or books may from time to time be known; be it therefore further enacted by the authority aforesaid,

That nothing in this act contained shall be construed to extend to subject any bookseller, printer, or other person whatsoever, to the forfeitures or penalties herein mentioned, for or by reason of the printing or reprinting of any book or books without such consent, as aforesaid, unless the title to the copy of such book or books hereafter published shall, before such publication, be entered in the
register book of the company of stationers, in such manner as hath been usual, which register book shall at all times be kept at the hall of the said company, and unless such consent of the proprietor or proprietors be in like manner entered as aforesaid, for every of which several entries, six pence shall be paid, and no more; which said register book may, at all seasonable and convenient time, be resorted to, and inspected by any bookseller, printer, or other person, for the purposes before-mentioned, without any fee or reward; and the clerk of the said company of stationers shall, when and as often as thereunto required, give a certificate under his hand of such entry or entries, and for every such certificate may take a fee not exceeding six pence.3

As the sections shown in bold reflect, the intent of the Parliament in the Statute of Anne was to protect the interests of authors and the publishers of their works. Even at this early date, Parliament recognized that without legislative protection, the interests of authors and their families would suffer serious detriment, and even, as Section One notes, “ruin.”

The idea that copyright law was intended initially to protect the interests of publishers and printers, rather than authors, comes from the predecessor to copyright law—which is the print licensing laws that were in effect from the development of the printing press in the mid-1400s in Europe. However, the tyrannical attitudes of publishers, which left authors with no control over their works and little incentive to create new works, led Parliament to make clear, in the Statute of Anne, that this new copyright law in the U.K. was intended to operate for the benefit of authors.4

Why dredge up this centuries-old first copyright law? Because it establishes the through-line of legislative intent to benefit and encourage creators through protection of their copyrights—a line that is at the heart of Congress’s purpose in passing the copyright termination laws that are the subject of this book.

Turning to the second question, of why early U.S. copyright law granted creators a twenty-eight–year term of protection, renewable for a second twenty-eight–year period, the text of the Statute of Anne contains terms that lead to an answer.

As quoted above, Section II of the Act provides, for works not yet published, a right of protection for a period of fourteen years. Section XI of the Act provides for a renewal term, which is for the benefit of the author, if they are still living, for another fourteen years. The Statute of Anne thus created a two-term system, granting protection for a total of twenty-eight years.

This tells us where the term of twenty-eight years likely came from, but doesn’t explain why fourteen years was the initial term granted under the Statute. For the answer to that question, we have to return to the print licensing

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3 Statute of Anne, C. 19, 1710, last viewed at http://avalon.law.yale.edu/18th_century/anne_1710.asp (emphasis added).
laws that pre-dated copyright law. Here we find that the initial term of seven years was granted to the Stationers Company by order of King Charles in 1684.\textsuperscript{5} Why seven years as opposed to five, or ten? The general understanding is that the Stationers felt that seven years was the likely useful life of a book in 1684. After seven years, the market for a book, it was presumed, had largely faded, and the need for protection of the right to print copies was less valuable or needed. The same might be said for software today—the need for copyright protection for the life of an author plus seventy years, which is the current term of copyright protection in the U.S., seems unnecessary for software, which is rarely still in use after a decade or so.

So with seven years as a starting point, the Statute of Anne doubles that period, arriving at a fourteen-year term of protection. When the colonials established the modern United States via the Constitution in 1789, the grant of rights that became the source of intellectual property rights, Article I, Section 8, mirrored the language of Section One of the Statute. Article I, Section 8 provides:

\begin{quote}
"The Congress shall have power...;\\
To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries"\textsuperscript{6};
\end{quote}

and Section One of the Statute of Anne provides:

\begin{quote}
"[f]or preventing therefore such practices for the future, and for the encouragement of learned men to compose and write useful books;..."
\end{quote}

In virtually all other respects, when the U.S. Congress passed the first U.S. copyright law, the Copyright Act of 1790, it mirrored the terms of the Statute of Anne, including the fourteen-year term and the renewal term of a second fourteen years. One-hundred nineteen years later, in passing the Copyright Law of 1909, Congress recognized that the shelf-life of books was now much longer than it had been in the eighteenth century, and so it extended the term of copyright protection to twenty-eight years, with a renewal term of another twenty-eight years.

It is also noteworthy that Congress determined that creators needed the protection of the law to incentivize them to create works of value, and that authors were specifically mentioned in this grant—not publishers, not distributors, and

\textsuperscript{5}Id. The Stationers Company was originally known as the Worshipful Company of Stationers of London, who were granted the first printing license by the Catholic Queen Mary and King Philip by royal charter on May 14, 1557. Their control of the printing business for over 150 years was significantly reduced with the passage of the Statute of Anne, which placed the power of copyright ownership more fully in the hands of the authors.

\textsuperscript{6}U.S. Constitution, Article I, Section 8A (1789), last viewed at http://www.archives.gov/exhibits/charters/constitution_transcript.html.
not consumers of their works, but authors and inventors, the creators of those works.

So did it work? Did the adoption of the grant of copyright, traced back to the Statute of Anne and brought across the Atlantic with the creation of the U.S. Constitution, followed by the Copyright Act of 1790 and the Copyright Act of 1909, protect the rights of authors? For the answer to that question, we have to take a closer look at the history of copyright law in the U.S., and in particular at the seminal act, the Copyright Law of 1909.