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The Anti-Monopoly Origins of the Patent and Copyright Clause

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The Anti-Monopoly Origins of the Patent and Copyright Clause¹

Tyler T. Ochoa² and Mark Rose³

ABSTRACT

The British experience with patents and copyrights prior to 1787 is instructive as to the context within which the Framers drafted the Patent and Copyright Clause. The 1624 Statute of Monopolies, intended to curb royal abuse of monopoly privileges, restricted patents for new inventions to a specified term of years. The Stationers' Company, a Crown-chartered guild of London booksellers, continued to hold a monopoly on publishing, and to enforce censorship laws, until 1695. During this time, individual titles were treated as perpetual properties held by booksellers. In 1710, however, the Statute of Anne broke up these monopolies by imposing strict term limits on copyright, and in the 1730s Parliament twice rejected booksellers' attempts to preserve their monopolies by extending the copyright term. Failing to achieve their ends through legislation, the booksellers sought to circumvent Parliament by arguing that the Statute of Anne was only supplementary to an underlying common-law right that was perpetual; but this effort, too, was rebuffed when the House of Lords determined in 1774 that the only basis for copyright was the Statute of Anne.

In America, too, anti-monopoly sentiment was strong; and when the Constitution was being drafted, the Framers, influenced by the British experience, specified that patents and copyrights could only be granted "for limited Times." The Patent and Copyright Acts of 1790 copied the limited terms of protection provided by the Statute of Monopolies and

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the Statute of Anne. As in England, advocates of perpetual copyright argued that statutory copyright merely supplemented an existing perpetual common-law right. But following the precedent set by the House of Lords, in 1834 the U.S. Supreme Court rejected the common-law argument and perpetual copyright, confirming the Framers' view that patents and copyrights should be strictly limited in duration in order to serve the public interest.

INTRODUCTION	911
<i>I. ENGLISH ANTECEDENTS</i>	
A. <i>The Statute of Monopolies</i>	912
B. <i>The Statute of Anne</i>	914
C. <i>Donaldson v. Beckett</i>	916
<i>II. THE PATENT AND COPYRIGHT CLAUSE OF THE CONSTITUTION</i>	
A. <i>Colonial Patent and Copyright Laws</i>	919
B. <i>State Copyright and Patent Laws under the Articles of Confederation</i>	920
C. <i>The Constitutional Convention and Ratification Debates</i>	922
<i>III. STATUTORY AND JUDICIAL INTERPRETATION</i>	
A. <i>The Copyright and Patent Acts of 1790</i>	928
B. <i>Private Patent and Copyright Laws</i>	930
C. <i>The Copyright Act of 1831</i>	931
D. <i>Wheaton v. Peters</i>	933
CONCLUSION	940

AUTHORS' NOTE

This fall, the U.S. Supreme Court will consider *Eldred v. Ashcroft*,⁴ a case challenging the constitutionality of the Sonny Bono Copyright Term Extension Act of 1998.⁵ This article is an expanded version of an *amicus* brief which the authors filed with the U.S. Supreme Court in *Eldred*.⁶ Unfortunately, Supreme Court etiquette did not allow Prof. Rose to be credited as a co-author of the brief.⁷ This article corrects that omission, and it also includes material which could not be included in the *amicus* brief because of space constraints.

INTRODUCTION

The Constitutional provision granting Congress the power “To promote the Progress of Science and useful Arts” by securing copyrights and patents “for limited Times,”⁸ and the implementation of that power by the First Congress in 1790, both reflect the Framers’ knowledge of and reliance on the earlier British experience with patents and copyrights.⁹ Indeed, the 1790 Copyright Act is directly modeled on the British Statute of Anne,¹⁰ both in its title (“An Act for the

4 *Eldred v. Reno*, 239 F.3d 372 (D.C. Cir. 2001), *petition for reh'g and reh'g en banc denied sub nom. Eldred v. Ashcroft*, 255 F.3d 849 (D.C. Cir. 2001), *cert. granted*, 122 S.Ct. 1062 (Feb. 19, 2002), *order amended*, 122 S.Ct. 1170 (Feb. 25, 2002) (No. 01-618). For an analysis of the opinions below, see Tyler T. Ochoa, *Patent and Copyright Term Extension and the Constitution: A Historical Perspective*, 49 J. Copyr. Soc'y USA 19, 109-124 (2002).

5 P.L. No. 105-298, 112 Stat. 2827 (1998). For an analysis of the issue, see Ochoa, *supra* note 1, at 97-109.

6 See Brief *Amici Curiae* of Tyler T. Ochoa, Mark Rose, Edward C. Walterscheid, the Organization of American Historians, and H-Law: Humanities and Social Sciences OnLine in Support of Petitioners, in *Eldred v. Ashcroft*, *cert. granted*, 125 S.Ct. 1062 (Feb. 19, 2002) (No 01-618).

7 See Sup. Ct. R. 34.1(f) (“Names of persons other than attorneys admitted to a state bar may not be listed”); William K. Suter, Clerk of the Court, Memorandum to Those Intending to Prepare a Petition for a Writ of Certiorari, at 2-3 (“names of non-lawyers ... may not appear on the cover under any circumstances. Nor are they to be credited with having contributed to the preparation of the petition either in the text, in a footnote, or at the conclusion of the petition.”), <http://www.supremecourtus.gov/casehand/casehand.html> (last visited May 16, 2002).

8 U.S. Const. Art. 1, §8, cl. 8.

9 See *Graham v. Deere*, 383 U.S. 1, 5 (1966) (“The clause ... was written against the backdrop of the practices—eventually curtailed by the Statute of Monopolies—of the Crown in granting monopolies to court favorites in goods or business which had long before been enjoyed by the public.”).

10 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, 8 Anne, ch. 19. (1710)(Eng.).

Encouragement of Learning”) and in many of its provisions, notably its specification of the basic term of copyright as fourteen years.¹¹ An understanding of the prior British experience with patents and copyrights – and specifically with the matter of the limited term – is thus essential to understanding the Framers’ approach to copyright.

I. ENGLISH ANTECEDENTS

A. The Statute of Monopolies

Around 1550, British monarchs began the practice of granting monopoly privileges by means of “letters patent,” in order to encourage foreign tradesmen and manufacturers to introduce their trades into England, and to train apprentices in their craft.¹² During the second half of Elizabeth’s reign, however, the Queen began to dispense monopoly patents not for the introduction of new trades, but as rewards for political patronage.¹³ Her 1598 grant of a monopoly over the manufacture of playing cards led to the landmark case of *Darcy v. Allen*,¹⁴ in which the judges of the King’s Bench held that the patent was invalid. The grounds for the decision can be discerned in the argument of Allen’s counsel:

[W]here any man by his own charge and industry, or by his own wit or invention doth bring any new trade into the realm, or any engine tending to the furtherance of a trade that never was used before; and that for the good of the realm; that in such cases the King may grant to him a monopoly patent for some reasonable time, until the subjects may learn the same, in consideration of the good that he doth bring by his invention to the commonwealth; otherwise not.¹⁵

Similar conditions were imposed on the Crown’s use of monopoly patents in *The Clothworkers of Ipswich*,¹⁶ in which it was held:

¹¹ “An Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned,” §1, ch. 15, 1 Stat. 124 (1790).

¹² See Adam Mossoff, *Rethinking the Development of Patents: An Intellectual History, 1550-1800*, 52 *Hast. L.J.* 1255, 1259-64 (2001).

¹³ *Id.* at 1264-67; Malla Pollack, *Purveyance and Power, or Over-Priced Free Lunch: The Intellectual Property Clause as an Ally of the Takings Clause in the Public’s Control of Government*, 30 *Sw. U. L. Rev.* 1, 40-54 (2000).

¹⁴ 74 Eng. Rep. 1131 (K.B. 1603).

¹⁵ *Id.* at 1139.

¹⁶ 78 Eng. Rep. 147 (K.B. 1615).

[I]f a man hath brought in a new invention and a new trade within the kingdom, ... or if a man hath made a new discovery of any thing, ... [the King] may grant by charter unto him, that he only shall use such a trade or trafique for a certain time.... [B]ut when that patent is expired, the King cannot make a new grant thereof; for when the trade is become common, and others have been bound apprentices in the same trade, there is no reason that such should be forbidden to use it.¹⁷

Despite these rulings, King James I continued to abuse the royal privilege of granting monopolies.¹⁸ This led to the enactment in 1624 of the Statute of Monopolies,¹⁹ which declared broadly that all monopoly grants were invalid. The Statute, however, had a number of exceptions, including one for new inventions:

Provided also ... That any Declaration before mentioned shall not extend to any Letters Patents and Grants of Privilege for the Term of fourteen Years or under, hereinafter to be made, of the sole Working or Making of any Manner of new Manufactures within this Realm, to the true and first Inventor and Inventors of such Manufactures, which others at the Time of the Making such Letters Patents and Grants shall not use....²⁰

The Statute also contained an exception for *existing* monopoly patents for inventors, “for the Term of one and twenty Years only, to be accounted from the Date of the first Letters Patents and Grants thereof made.”²¹ This was a transitional measure, in effect imposing a term limit on those patents which had been granted for longer terms or which had been unlimited in time.

Two additional exceptions to the Statute of Monopolies were made for Crown-chartered guilds²² and for letters patent “of, for or concerning Printing.”²³ Almost a century would pass before the publishing monopolies which flourished under these exceptions would be limited in a similar manner by the Statute of Anne.

17 *Id.* at 148.

18 Pollack, *supra* note 10, at 65-70.

19 21 Jac. I, ch. 3 (1624)(Eng.).

20 *Id.* §6.

21 *Id.* §5.

22 *Id.* §9.

23 *Id.* §10. For details concerning the use of printing patents in England, see LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 78-113 (1968).

B. The Statute of Anne

The Statute of Anne was enacted in 1710 in response to petitions from the Stationers' Company, a Crown-chartered guild of booksellers and printers which held a near-monopoly on printing and publishing in England until 1695.

Prior to 1710, the Stationers maintained a system whereby guild members could register their "copies," as publishing rights were called, with the guild.²⁴ Once secured by registration, the right to print a book continued forever, and might be bequeathed or sold to other stationers.²⁵ These rights were available only to guild members – booksellers and printers, not authors – and thus were not properties that might be freely exchanged in a public market. Under the terms of the Licensing Act of 1662²⁶ and its predecessors, no book could be printed in England unless it had first been registered with the Stationers.²⁷

In 1695, the Licensing Act of 1662 expired, throwing the book trade into disarray.²⁸ The Stationers at first sought the revival of licensing,²⁹ but when that attempt failed,³⁰ they petitioned Parliament for an act that would re-institute their traditional guild system by confirming the Stationers' Company copyrights.³¹ As introduced, the proposed legislation did not limit the duration of the Stationers' copyrights.³²

Parliament was sympathetic to the booksellers' claims about disorders in the trade following the expiration of licensing, but it was not sympathetic to the monopolizing practices whereby the booksellers had turned the literary classics into perpetual private estates. Accordingly, the Statute of Anne acted in two ways to break the booksellers' monopolies. First, the Act established authors as the original proprietors

24 See generally CYPRIAN BLAGDEN, *THE STATIONERS' COMPANY: A HISTORY, 1403-1959* (1960); PATTERSON, *supra* note 20, at 28-77.

25 See PATTERSON, *supra* note 20, at 47-49, 76.

26 14 Car. 2, ch. 33 (1662) (Eng.).

27 This requirement was used by the Crown as an instrument of censorship. See PATTERSON, *supra* note 20, at 36-41, 114-142.

28 See Raymond Astbury, *The Renewal of the Licensing Act in 1693 and its Lapse in 1695*, 33 Lib. 296 (1978); MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 31-34 (1993).

29 See PATTERSON, *supra* note 20, at 138-42. One of the House of Commons' principal objections to renewing the Licensing Act was the monopoly enjoyed by the Stationers' Company. *Id.* at 139-40.

30 It was during this period that party politics first emerged, and neither party trusted the other with the power of press censorship. See FREDRICK SEATON SIEBERT, *FREEDOM OF THE PRESS IN ENGLAND 1476-1776: THE RISE AND DECLINE OF GOVERNMENT CONTROLS* 260-63 (1952).

31 See ROSE, *supra* note 25, at 42-43.

32 *Id.* at 43.

of copyrights. Thus, for the first time, one no longer had to be a member of the Stationers' Company to own copyrights.³³ Second, the proposed legislation was amended to impose term limits modeled on those in the Statute of Monopolies.³⁴ The term of copyright in new works was limited to 14 years,³⁵ with the possibility of renewal for a second 14-year term if the author were still living at the end of the first.³⁶ For books that were already in print, including such valuable old literary properties as the works of Shakespeare and Milton, the act provided a single 21-year term.³⁷ Like the parallel provision in the Statute of Monopolies, this was a transitional measure. The stationers had always treated their guild publishing rights as perpetual; thus, the effect of the 21-year provision was to limit rights that previously had been regarded as unlimited.³⁸

The great London booksellers could accept some of the novel provisions of the Act, but not the limited terms of protection, which struck at the heart of the Stationers' Company system. For a time they simply ignored the term limit provision and continued to buy and sell copyrights as if they were still perpetual. Then in 1735, when they believed that the political climate favored their cause, the booksellers asked Parliament to change the term of copyright for all books, old and

33 See PATTERSON, *supra* note 20, at 147; ROSE, *supra* note 25, at 47-48.

34 See PATTERSON, *supra* note 20, at 144, 147-150; ROSE, *supra* note 25, at 43-45; 2 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 407 (Philadelphia 1771) (noting that the terms of protection in the Statute of Anne "appear to have been suggested by the exception in the statute of monopolies" for patents for new inventions).

35 "[T]he author of any book or books already composed, and not printed or 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 first publishing the same, and no longer." 8 Anne, ch. 19 (1710).

36 "Provided always, that after the expiration of the said term of fourteen years, the sole right of printing or disposing of copies shall return to the authors thereof, if they are then living, for another term of fourteen years." *Id.*

37 "[T]he 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 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." *Id.*

38 The purpose of these changes were emphasized by other changes to the language of the Act. The booksellers' petition had requested a bill "for securing to them the Property of Books, bought and obtained by them." ROSE, *supra* note 25, at 42. The bill as drafted stated that authors had "the undoubted property" in their books and writings. *Id.* When the Statute of Anne was passed, however, it was titled "A Bill for the Encouragement of Learning," and the language in the preamble concerning the "undoubted property" of authors was deleted. *Id.* at 45-46.

new, to 21 years.³⁹ The booksellers argued that the proposed change would improve the author's position and foster learning and knowledge; but in fact the consequences for living authors would have been minimal. The most significant consequence would have been to extend the statutory copyright on classics such as Shakespeare and Milton until 1756. The booksellers' purposes in requesting the new term did not go unremarked at the time. As one anonymous pamphleteer said:

I see no Reason for granting a further Term now, which will not hold as well for granting it again and again, as often as the Old ones Expire; so that should this Bill pass, it will in Effect be establishing a perpetual Monopoly, a Thing deservedly odious in the Eye of the Law; it will be a great Cramp to Trade, a Discouragement to Learning, no Benefit to the Authors, but a general Tax on the Publick; and all this only to increase the private Gain of the Booksellers ...⁴⁰

Not surprisingly, the booksellers' bill failed in the House of Lords, which was particularly hostile to anything that smacked of monopoly.⁴¹ Two years later in 1737, when the booksellers again sought a term extension, a second bill was also defeated by the House of Lords.⁴²

C. Donaldson v. Beckett

In the 1730s and 1740s, as titles began entering the public domain, a group of Scottish booksellers began printing their own editions of out-of-copyright titles. Despite the legitimacy of this activity according to the Statute of Anne, the great London booksellers regarded these reprints as piracies, and they employed aggressive and sometimes collusive business practices to drive them off the market. At the same time, the London booksellers took their case to the common law courts where they sought to establish the illegality of all unauthorized reprints. Their argument was that copyright was fundamentally a matter of common law, not statutory law. Labor, they maintained, gave authors a natural

³⁹ See ROSE, *supra* note 25, at 52-53. This bill actually reduced the copyright on new books from two 14-year terms, or a total of 28 years, to a single 21-year term. In effect, it traded a shorter term on new books for extended protection of valuable old books.

⁴⁰ A LETTER TO A MEMBER OF PARLIAMENT CONCERNING THE BILL NOW DEPENDING IN THE HOUSE OF COMMONS (1735). A transcript of this pamphlet is attached as an Appendix to this article.

⁴¹ See PATTERSON, *supra* note 20, at 155; ROSE, *supra* note 25, at 56. The bill died when the second reading was postponed. 24 H.L. Jour. 550 (1735).

⁴² See PATTERSON, *supra* note 20, at 155-57; ROSE, *supra* note 25, at 56 n.3. Again, the Lords allowed the bill to die at the end of the term. 25 H.L. Jour. 91, 99, 106 & 111-12 (1737).

right of property in their works, a right that lasted forever just like a right in a parcel of land or a house; and this right passed undiminished to the booksellers when they purchased literary works from authors.⁴³ The Statute of Anne merely provided supplemental remedies to an underlying common-law right that was perpetual; therefore all reprints of fairly purchased copyrights were illegal, no matter how old the work in question.

Starting in the 1740s, the booksellers pressed their common-law argument in a series of cases. No decision on the question of a common-law right was reached, however, until 1769, when in *Millar v. Taylor*⁴⁴ the court of King's Bench ruled by a three-to-one vote that there was indeed a common-law right and that literary property was perpetual. As an English court, however, the jurisdiction of King's Bench did not extend to Scotland, where the reprint industry continued to thrive. In 1773, in *Hinton v. Donaldson*,⁴⁵ the Scottish Court of Sessions reached the opposite decision, determining that in Scotland there was no such thing as a common-law right of literary property. Finally, in the landmark decision of *Donaldson v. Beckett*,⁴⁶ the House of Lords, acting as the Supreme Court of Great Britain, decisively rejected the claim of perpetual common-law copyright and established that the only basis for copyright was the Statute of Anne.

The historical record left the basis for the Lords' decision somewhat unclear. In 1774 the House of Lords still decided cases by a general vote of the peers, lawyers and laymen alike. In important cases such as *Donaldson*, the twelve common-law judges of the realm (the judges of King's Bench, Common Pleas, and the Exchequer) would be summoned to the House to give their advice on matters of law, after which the peers would debate the issue and vote. The judges were very closely divided in their advisory opinions in *Donaldson*, and the most widely cited report of the case indicates that while seven of the eleven judges believed there was a common-law copyright that survived publication, a bare majority of six believed that the common-law right had been

⁴³ See ROSE, *supra* note 25, at 4-8 & 67-91.

⁴⁴ 4 Burr. 2303, 98 Eng. Rep. 201 (1769).

⁴⁵ See JAMES BOSWELL, THE DECISION OF THE COURT OF SESSION UPON THE QUESTION OF LITERARY PROPERTY IN THE CAUSE OF HINTON AGAINST DONALDSON (Edinburgh 1774), reprinted in THE LITERARY PROPERTY DEBATE: SIX TRACTS 1764-1774 (Stephen Parks, ed. 1975).

⁴⁶ 4 Burr. 2408, 98 Eng. Rep. 257 (H.L. 1774).

divested by the Statute of Anne.⁴⁷ Contemporary accounts of the subsequent debate, however, indicate that the claim of common-law copyright was vigorously disputed, and that the peers rejected perpetual copyright by a strong majority.⁴⁸

The great booksellers of London regarded *Donaldson* as a disaster, claiming with some justification that in an instant hundreds of thousands of pounds worth of literary properties had been annihilated.⁴⁹ But for the publishing trade as a whole and for the public at large, which was now able to buy cheap reprints of classic works, the decision had positive effects.⁵⁰ It also had positive effects on authors. Prior to *Donaldson* the most valuable properties were the old classics that the booksellers could count on as perennials. The *Donaldson* decision meant that now publishers had to pay greater attention to living authors in order to replenish their continually expiring stock of copyrights.⁵¹ In several ways, then, *Donaldson* contributed to the statutory goal of “the encouragement of learning.” As a result of the Lords’ decision, classic books became more readily accessible and living authors acquired new incentives to write.

47 4 Burr. at 2408, 2417, 98 Eng. Rep. at 257-58, 262. In fact, historians now believe that one vote was incorrectly recorded, and that the judges had voted six-to-five that a common-law copyright had survived the Statute of Anne. See ROSE, *supra* note 25, at 98-99, 154-58; Howard B. Abrams, *The Historic Foundation of American Copyright Law: Exploding the Myth of Common-Law Copyright*, 29 Wayne L. Rev. 1119, 1164-71 (1983). This error allowed advocates of common-law copyright to later claim that the peers had simply followed the vote of the judges, which was not the case. *Id.* at 1169-70; ROSE, *supra* note 25, at 107-10.

48 See ROSE, *supra* note 25, at 97-103. Although it is unclear whether a formal division of the house occurred, *id.* at 102, an often-cited account published in 1813 reports that the vote was 22-11 against perpetual copyright. *Donaldson v. Beckett*, 17 Parl. Hist. Eng. 953, 992-1003 (H.L. 1774). See Abrams, *supra* note 44, at 1159-64.

49 On the day after the vote, the following paragraph appeared in several newspapers: “By the above decision of the important question respecting copy-right in books, near 200,000 l. worth of what was honestly purchased at public sale, and which was yesterday thought property is now reduced to nothing. The Booksellers of London and Westminster, many of whom sold estates and houses to purchase Copy-right, are in a manner ruined, and those who after many years industry thought they had acquired a competency to provide for their families now find themselves without a shilling to devise to their successors.” MORNING CHRONICLE, Feb. 23, 1774, *quoted in* ROSE, *supra* note 25, at 97.

50 For example, it made possible the vast (109 volumes), popularly-priced reprint series POETS OF GREAT BRITAIN (Edinburgh 1776-82) that the Scottish publisher John Bell began issuing shortly after the decision came down. This edition was the prototype for the many popular reprint series, such as the Everyman’s Library or the Modern Library, that have been a feature of publishing ever since.

51 On the impact of the *Donaldson* decision, see Terry Belanger, *Publishers and Writers in Eighteenth-Century England*, in BOOKS AND THEIR READERS IN EIGHTEENTH CENTURY ENGLAND 5-25 (Isabel Rivers ed. 1982).

II. THE PATENT AND COPYRIGHT CLAUSE OF THE CONSTITUTION

The history of copyright in the United States bears many similarities to the history of copyright in England prior to the Revolution. In America, as in England, proponents of the natural right view of copyright repeatedly sought a perpetual copyright; in America, as in England, the term of copyright was instead strictly limited in order to serve the public interest; and in America, as in England, it took an authoritative decision by the highest court in the land to firmly establish the utilitarian rationale as the dominant rationale for copyright.

A. Colonial Patent and Copyright Laws

Following the Statute of Monopolies, some of the colonies enacted anti-monopoly statutes of their own. In 1641 the General Court of Massachusetts approved a "Body of Liberties," which included the provision "No monopolies shall be granted or allowed amongst us, but of such new Inventions that are profitable to the Country, and that for a short time."⁵² Connecticut enacted a similar anti-monopoly statute in 1672.⁵³ Although these restrictions were sometimes violated,⁵⁴ both colonies and several others granted exclusive rights to individual inventors, for periods of time ranging between two and twenty-one years.⁵⁵

Although one scholar has asserted otherwise,⁵⁶ the weight of evidence indicates that the Statute of Anne did not apply of its own force in the American colonies.⁵⁷ Even if it had, the statute required that an

⁵² THE COLONIAL LAWS OF MASSACHUSETTS, REPRINTED FROM THE EDITION OF 1660 34-35 (Boston 1889), *quoted in* BRUCE W. BUGBEE, THE GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW 61 (1967).

⁵³ "It is ordered; That there shall be no Monopolies granted or allowed amongst us, but of such new Inventions as shall be judged profitable for the Country, and that for such time as the General Court shall judge meet." THE LAWS OF CONNECTICUT: AN EXACT REPRINT OF THE ORIGINAL EDITION OF 1673 52 (1865), *quoted in* BUGBEE, *supra* note 49, at 69.

⁵⁴ See BUGBEE, *supra* note 49, at 61-62 & 70.

⁵⁵ *Id.* at 58-82.

⁵⁶ See Karl Fenning, *The Origin of the Patent and Copyright Clause of the Constitution*, 17 Geo. L.J. 109, 116 (1929) ("Of course, copyright and invention patent protection were extended to the colonies by the English laws.").

⁵⁷ See EDWARD C. WALTERSCHEID, THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE 209 (2002) ("Because the Statute of Monopolies and the Statute of Anne made no express reference to the American colonies, they were by crown interpretation not automatically applicable to all those colonies."); *see also id.* at 204-09 (discussing the question in detail); I BLACKSTONE, *supra* note 31, at 107-08 ("Our American plantations ... are subject however to the control of the parliament, though ... not bound by any acts of parliament, unless particularly named."). *Cf.* PATTERSON, *supra* note 20, at 183 ("Copyright was not secured by law in colonial America"); BUGBEE, *supra* note 49, at 104 (noting "the absence of both legal protection and such a [literary] tradition in colonial America").

author register his or her work with the Stationer's Company in London,⁵⁸ a formality with which American authors could not easily comply. As a result, American authors desiring copyright protection sought help from colonial (and later state) legislatures.⁵⁹ In a largely agrarian society, however, copyright protection was not a high priority. Thus, only three private copyright acts are known to have been passed in America prior to 1783.⁶⁰ All three were limited in duration to a short term of years.

B. State Copyright and Patent Laws under the Articles of Confederation

In March 1783, in response to several authors' petitions,⁶¹ the Continental Congress appointed a committee "to consider the most proper means of cherishing genius and useful arts throughout the United States by securing to the authors or publishers of new books their property in such works."⁶² The committee reported that it was "persuaded 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

58 The statute barred monetary remedies "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." 8 Anne, ch. 19 (1710)(Eng.). The Act provided an alternative of registration "by an advertisement in the Gazette" in the event the Stationers Company refused to register the work. *Id.*

59 See BUGBEE, *supra* note 49, at 104-08.

60 In 1672-73, the General Court of the Massachusetts Bay Colony contracted with John Usher to publish a compilation of laws, and granted him a monopoly "for at least Seven years, unless he shall have sold them all before that time." See BUGBEE, *supra* note 49, at 65-67. In 1772, the Massachusetts House of Representatives passed an act granting to William Billings a seven-year copyright to publish a book of church music, but the royal governor refused to sign the act into law. See I WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE 16 (1994). In 1781, the Connecticut General Assembly passed an act granting to Andrew Law a five-year copyright in another book of church music, on the condition that Law furnish "a sufficient number of copies of the said tunes for the use of the inhabitants of this State at reasonable prices." *Id.* at 17.

61 It was recorded that Congress received "sundry papers and memorials from different persons on the subject of literary property." 24 JOURNALS OF THE CONTINENTAL CONGRESS 326 (May 2, 1783). However, the most influential appears to have been a letter from Connecticut author Joel Barlow to Elias Boudinot, President of the Continental Congress, dated January 10, 1783, in which Barlow set forth both natural right and utilitarian justifications for copyright, and urged Congress to recommend that the States adopt legislation similar to the Statute of Anne. See BUGBEE, *supra* note 49, at 111-13.

62 NATIONAL ARCHIVES, PAPERS OF THE CONTINENTAL CONGRESS, No. 36, II, folios 113-114, *reprinted in* BUGBEE, *supra* note 49, at 112. The Committee consisted of Hugh Williamson of North Carolina, Ralph Izard of South Carolina, and James Madison of Virginia. See 24 JOURNALS OF THE CONTINENTAL CONGRESS 211n (March 24, 1783).

the general extension of arts and commerce.”⁶³ Under the Articles of Confederation, the Continental Congress had no authority to issue copyrights; so on May 2, 1783, the Continental Congress passed a resolution encouraging the States

to secure to the authors or publishers of any new books not hitherto printed ... the copy right 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, ... the copy right of such books for another term of time not less than fourteen years.⁶⁴

Three states had already enacted copyright statutes earlier that year;⁶⁵ and within three years all of the remaining states except Delaware had followed suit.⁶⁶ As had the Continental Congress’ resolution, the preambles of several of these statutes set forth both natural right and utilitarian justifications for copyright.⁶⁷ Significantly, however, all of them were limited to a specified term of years. Seven of the States followed the Statute of Anne and the Continental Congress’ resolution in providing two fourteen-year terms.⁶⁸ The five remaining States granted copyrights for single terms of fourteen,⁶⁹ twenty,⁷⁰ and twenty-one⁷¹ years’ duration, with no right of renewal.

South Carolina’s copyright statute also included the only general

63 24 JOURNALS OF THE CONTINENTAL CONGRESS 326 (May 2, 1783). In so stating, this report echoed Barlow’s letter in setting forth both natural right and utilitarian justifications for copyright.

64 Resolution of May 2, 1783, *reprinted in* COPYRIGHT ENACTMENTS OF THE UNITED STATES 1783-1906 11 (2d ed. 1906).

65 See Act of Jan. 29, 1783 (Conn.), *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 61, at 11-13; Act of March 17, 1783 (Mass.), *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 61, at 14-15; and Act of April 21, 1783 (Md.), *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 61, at 15-16.

66 See COPYRIGHT ENACTMENTS, *supra* note 61, at 16-31.

67 For example, Connecticut’s statute states “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 ...” Act of Jan. 29, 1783 (Conn.), *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 61, at 11.

68 In addition to Connecticut and Maryland, see Act of May 27, 1783 (N.J.), *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 61, at 16-17; Act of March 15, 1784 (Pa.), *reprinted in* COPYRIGHT ENACTMENTS at 20-21; Act of March 26, 1784 (S.C.), *reprinted in* COPYRIGHT ENACTMENTS at 21-24; Act of Feb. 3, 1786 (Ga.), *reprinted in* COPYRIGHT ENACTMENTS at 27-29; Act of April 29, 1786, (N.Y.), *reprinted in* COPYRIGHT ENACTMENTS at 29-31.

69 Act of November 18, 1785 (N.C.), *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 61, at 25-27.

70 Act of November 7, 1783 (N.H.), *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 61, at 18.

71 In addition to Massachusetts, see Act of December 1783 (R.I.), *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 61, at 19; Act of October 1785 (Va.), *reprinted in* COPYRIGHT ENACTMENTS *supra* note 61, at 24-25.

state patent law enacted prior to the Constitution. It provided “that the inventors of useful machines shall have a like exclusive privilege of making or vending their machines for the like term of fourteen years, under the same privileges and restrictions hereby granted to, and imposed on, the authors of books.”⁷² Throughout this time period, however, the states continued to enact individual patents.⁷³ The terms of these patents were sometimes as short as five years;⁷⁴ but the English fourteen-year term became “almost universal among state patents issued in 1786 and thereafter.”⁷⁵

C. The Constitutional Convention and Ratification Debates

At the Constitutional Convention of 1787, both James Madison of Virginia and Charles Pinckney of South Carolina submitted proposals to give Congress the power to grant copyrights.⁷⁶ Madison’s proposal read: “To secure to literary authors their copy rights for a limited time.”⁷⁷ Pinckney’s proposal read: “To secure to Authors exclusive rights for a certain time.”⁷⁸ Pinckney also proposed that Congress be given the power “to grant patents for useful inventions.”⁷⁹ These proposals were referred to the Committee on Detail.⁸⁰ Later, provisions which had not been acted upon by the Committee on Detail were referred to the Committee of Eleven (of which Madison was a member),⁸¹ which drafted the Patent and Copyright Clause as it exists today, and recommended its adoption.⁸² The clause was unanimously

⁷² Act of March 26, 1784 (S.C.), reprinted in COPYRIGHT ENACTMENTS, *supra* note 61, at 23.

⁷³ See BUGBEE, *supra* note 49, at 84-103; WALTERSCHEID, *supra* note 54, at 56-58.

⁷⁴ See BUGBEE, *supra* note 49, at 85-87.

⁷⁵ *Id.* at 101.

⁷⁶ One month before the Convention, in a paper discussing the weaknesses of the Articles of Confederation, Madison noted that “Instances of inferior moment are the want of uniformity in the laws concerning ... literary property.” Observations by J.M. (April 1787), reprinted in 4 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 1786-1870 (State Dept. 1905) at 128.

⁷⁷ JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 (Ohio Univ. Press 1966) at 477 (Aug. 18, 1787). Madison also proposed the power “To encourage by premiums & provisions, the advancement of useful knowledge and discoveries.” *Id.*

⁷⁸ *Id.* at 478.

⁷⁹ *Id.* In the manuscript version of his Notes, Madison wrote that he had made a similar proposal, “to secure to the inventors of useful machines and implements the benefits thereof for a limited time”; but when Madison edited his notes for publication, he pasted over the manuscript with an edited version that did not contain this proposal, leaving his role in regard to patents unclear. See WALTERSCHEID, *supra* note 54, at 101-03.

⁸⁰ NOTES OF DEBATES, *supra* note 74, at 478.

⁸¹ *Id.* at 569 (Aug. 31, 1787).

approved by the delegates with no debate.⁸³

The language of the Clause is ambiguous when it speaks of “securing” exclusive rights.⁸⁴ For the next 47 years, this meaning of this term would be debated, with proponents of perpetual copyright arguing that “securing” meant the affirmation of pre-existing rights, and proponents of the utilitarian view arguing that “securing” meant nothing more than “to obtain” or “to provide.”⁸⁵ In *Wheaton v. Peters*,⁸⁶ the U.S. Supreme Court held that the utilitarian view was correct, noting that the term “securing” applies to both “authors” and “inventors,” and that in England, it had always been the case that inventors did not have a natural right to an exclusive right in their inventions.⁸⁷

In the subsequent ratification debates, the Clause was rarely mentioned. The most significant reference came in the Federalist No. 43, authored by James Madison:

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 coincides in both cases with the claims of individuals. The States cannot separately make effectual provision for either of the cases, and most of them have anticipated the decision of this point by laws passed at the instance of Congress.⁸⁸

In light of the decision in *Donaldson v. Beckett*,⁸⁹ Madison’s statement that copyright had been adjudged to be a common-law right is problematic. It has been suggested⁹⁰ that Madison was relying on the first American edition of Blackstone’s *Commentaries*, which reported the decision in *Millar v. Taylor*, but not its subsequent overruling in

⁸² *Id.* at 580 (Sept. 5, 1787).

⁸³ *Id.* at 581 (Sept. 5, 1787).

⁸⁴ See WALTERSCHEID, *supra* note 54, at 212-20.

⁸⁵ *Id.* at 226-34.

⁸⁶ 33 U.S. (8 Pet.) 591 (1834). See Section III.D., below.

⁸⁷ *Id.* at 661. See also CHRISTINE P. MACLEOD, *INVENTING THE INDUSTRIAL REVOLUTION: THE ENGLISH PATENT SYSTEM 1660-1800* 198 (1988) (noting that in *Donaldson v. Beckett*, “the lack of a natural right in mechanical inventions provided a fixed pole of the debate.”) (emphasis in original). In an 1813 letter to Isaac MacPherson, Thomas Jefferson set forth a famous critique of the natural rights view with regard to inventions. See Letter of Aug. 13, 1813, in *THE COMPLETE JEFFERSON* 1011, 1015-16 (Saul K. Padover ed. 1943)

⁸⁸ James Madison, The Federalist No. 43 at 279 (Modern Library ed. 1941).

⁸⁹ 4 Burr. 2408, 98 Eng. Rep. 257 (H.L. 1774). See Section I.C., above.

⁹⁰ See John F. Whicher, *The Ghost of Donaldson v. Beckett: An Inquiry Into the Constitutional Distribution of Powers Over the Law of Literary Property in the United States*, 9 Bull. Copyr. Soc’y 102 (1962).

Donaldson.⁹¹ It has also been suggested that Madison was relying on Burrow's report of the *Donaldson* case, in which it was reported that the advisory judges were of the opinion that copyright was a common-law right, but one that had been divested by the Statute of Anne.⁹² It is also possible that Madison was referring only to the common-law right of first publication; or that he was simply trying to win the support of those who believed that copyright was a natural right.⁹³ In any case, Madison later took the position that the English common law was deliberately not made applicable in the United States by the new Constitution.⁹⁴ This seems to preclude any argument that Madison believed that the Clause was "securing" a pre-existing right.⁹⁵

What is clear from the *Federalist* is that Madison believed that the state copyright laws were ineffectual. This point was also made during the ratification debates by Thomas McKean of Pennsylvania,⁹⁶ and future Justice James Iredell of North Carolina.⁹⁷ Iredell also set forth the utilitarian justification for copyright, and defended the Clause against charges that it could be used for censorship:

The Liberty of the Press is always a grand topic for declamation; but the future Congress will have no authority over this than to secure to authors for a limited time the exclusive privilege of publishing their works. This authority has long been

91 See 2 BLACKSTONE, *supra* note 31, at 405-07 (Philadelphia 1771). Blackstone qualified his report of *Millar v. Taylor*, however, stating that "[n]either with us in England hath there been any final determination upon the right of authors at the common law." *Id.* at 406-07. It should be noted that Blackstone was a prominent advocate of the natural rights view, and that he argued the booksellers' cause in both *Tonson v. Collins* (1760) and *Millar v. Taylor* (1769) before becoming a judge.

92 See 4 Burr. 2408, 98 Eng. Rep. 257 (H.L. 1774), and the discussion in Section I.C., above. The fourth volume of Burrow's reports was published in 1776, and citations to it are found in early Pennsylvania cases. See, e.g., *Respublica v. Doan*, 1 U.S. (1 Dall.) 86, 90-91 (Pa. 1784); *Nathan v. Virginia*, 1 U.S. (1 Dall.) 77, 78 (Pa. C.P. 1781).

93 See Abrams, *supra* note 44, at 1177-78.

94 See Letter from James Madison to George Washington (Oct. 18, 1787), in 3 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 129-30 (1911).

95 For a more extensive analysis, see WALTERSCHEID, *supra* note 54, at 220-26.

96 "The power of securing to authors and inventors the exclusive right to their writings and discoveries could only with effect be exercised by the Congress. For, sir, the laws of the respective states could only operate within their respective boundaries and therefore, a work which had cost the author his whole life to complete, when published in one state, however it might there be secured, could easily be carried into another state in which a republication would be accomplished with neither penalty nor punishment—a circumstance manifestly injurious to the author in particular and the cause of science in general." 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 415 (Merrill Jensen, ed. 1976) [hereinafter DOCUMENTARY HISTORY].

97 "If this provision had not been made in the new Constitution, no author could have enjoyed such an advantage in all the United States, unless a similar law constantly subsisted in each of the States separately." 16 DOCUMENTARY HISTORY, *supra* note 93, at 386 note (c).

exercised in England, where the press is as free as among ourselves, or in any country in the world, and surely such an encouragement to genius is no restraint on the liberty of the press, since men are allowed to publish what they please of their own; and so far as this may be deemed a restraint upon others it is certainly a reasonable one, and can be attended with no danger of copies not being sufficiently multiplied, because the interest of the proprietor will always induce him to publish a quantity fully equal to the demand—besides, that such encouragement may give birth to many excellent writings which would otherwise have never appeared.”⁹⁸

The stipulation that patent and copyright protection be granted only “for limited Times,” only to “authors” and “inventors,” and only “[t]o promote the Progress of Science and useful Arts,” appears to have been aimed at preventing the kinds of abuses that had prompted the Statute of Monopolies 150 years earlier. It is clear that many of the Framers were concerned with restraining monopolies of all kinds. This concern was most clearly expressed in correspondence between Thomas Jefferson and James Madison concerning the proposed Constitution.

After receiving a draft of the Constitution, Jefferson wrote to Madison, saying: “I will now add what I do not like. First, the omission of a bill of rights providing clearly and without the aid of sophisms for ... restriction against monopolies.”⁹⁹ Jefferson amplified his views in a letter to Madison dated July 31, 1788:

[I]t is better to ... abolish ... Monopolies, in all cases, than not to do it in any.... The saying there shall be no monopolies lessens the incitements to ingenuity, which is spurred on by the hope of a monopoly for a limited time, as of 14 years; but the benefit even of limited monopolies is too doubtful to be opposed to that of their general suppression.¹⁰⁰

Madison replied in a letter dated October 17, 1788:

⁹⁸ *Id.* at 382. Iredell also specifically responded to George Mason’s criticism that Congress could grant monopolies in trade and commerce, saying “I am convinced Mr. Mason did not mean to refer to this clause. He is a gentleman of too much taste and knowledge himself to wish to have our government established on such principles of barbarism as to be able to afford no encouragement to genius.” *Id.* at 386 note (a).

⁹⁹ Letter from Jefferson to Madison (Dec. 20, 1787), in 12 THE PAPERS OF THOMAS JEFFERSON 440 (Princeton 1955).

¹⁰⁰ Letter from Jefferson to Madison (July 31, 1788), in 13 THE PAPERS OF THOMAS JEFFERSON 442-43 (Princeton 1956). Jefferson has expressed similar sentiments in an earlier letter to a French inventor who inquired about interest in his method of preserving flour. Jefferson replied: “Though the interposition of government in matters of invention has its use, yet it is in practice so inseparable from abuse, that they think it better not to meddle with it.” Letter from Jefferson to Jeudy de L’Hommande (Aug. 9, 1787), in 12 THE PAPERS OF THOMAS JEFFERSON 11 (Princeton 1955).

With regard to Monopolies they are justly classed among the greatest nuisances in Government. But is it clear that as encouragements to literary works and ingenious discoveries, they are not too valuable to be wholly renounced? Would it not suffice to reserve in all cases a right to the public to abolish the privilege at a price to be specified in the grant of it? Is there not also infinitely less danger of this abuse in our Governments than in most others? Monopolies are sacrifices of the many to the few. Where the power is in the few it is natural for them to sacrifice the many to their own partialities and corruptions. Where the power, as with us, is in the many not in the few, the danger can not be very great that the few will be thus favored. It is much more to be dreaded that the few will be unnecessarily sacrificed to the many.¹⁰¹

Madison's explanation is revealing in several respects. First, it clearly endorses the utilitarian justification for copyrights and patents. Second, in using the words "privilege" and "grant," it clearly indicates that patents and copyrights are bestowed by the government, rather than merely confirming existing rights. Third, in recommending that the public reserve the right to buy out the author or inventor during the term of the grant, Madison suggests that even the 14-year terms with which he was familiar might work a hardship upon the public in certain circumstances.

Jefferson was apparently persuaded by Madison's argument; but he remained concerned that the power to grant exclusive rights could be abused. Upon receiving Madison's draft of the Bill of Rights, Jefferson wrote:

I like it as far as it goes; but I should have been for going further. For instance, the following alterations and additions would have pleased me.... Art. 9. Monopolies may be allowed to persons for their own productions in literature and their own inventions in the arts for a term not exceeding __ years but for no longer term and for no other purpose.¹⁰²

Jefferson's concerns were widely shared by others at the time. George

¹⁰¹ Letter from Madison to Jefferson (Oct. 17, 1788), *in* 14 THE PAPERS OF THOMAS JEFFERSON 21 (Princeton 1958).

¹⁰² Letter from Jefferson to Madison (Aug. 28, 1789), *in* 15 THE PAPERS OF THOMAS JEFFERSON 367-68 (Princeton 1958). Jefferson added: "These restrictions I think are so guarded as to hinder evil only. However if we do not have them now, I have so much confidence in our countrymen as to be satisfied that we shall have them as soon as the degeneracy of our government shall render them necessary." *Id.* at 368.

Mason, a delegate to the Constitutional Convention from Virginia, refused to sign the proposed Constitution, in part because “[u]nder their own construction of the general clause at the end of the enumerated powers, the Congress may grant monopolies in trade and commerce.”¹⁰³ Elbridge Gerry of Massachusetts also refused to sign for similar reasons.¹⁰⁴ In New York, “A Son of Liberty” wrote that “Monopolies in trade [will be] granted to the favorites of government, by which the spirit of adventure will be destroyed, and the citizens subjected to the extortion of those companies who will have an exclusive right.”¹⁰⁵ And in Massachusetts, “Agrippa” wrote:

The unlimited right to regulate trade, includes the right of granting exclusive charters.... We hardly find a country in Europe which has not felt the ill effects of such a power.... [I]n the British islands all these circumstances together have not prevented them from being injured by the monopolies created there. Individuals have been enriched, but the country at large has been hurt.¹⁰⁶

The ratifying conventions of Massachusetts, New Hampshire, and North Carolina all requested an amendment “that congress erect no company of merchants, with exclusive advantages of commerce.”¹⁰⁷ The ratifying convention of New York likewise recommended an amendment “[t]hat the congress do not grant monopolies, or erect any company with exclusive advantages of commerce.”¹⁰⁸

Proponents of the Constitution responded to these concerns not by denying that monopolies were generally harmful, but by emphasizing the utilitarian justification for copyrights and patents, and the limitations placed on them by the Clause:

As to those monopolies, which, by way of premiums, are granted for certain years to ingenious discoveries in medicine, machines and useful arts; they are common in all countries, and more necessary in this, as the government has no resources to reward extraordinary merit.¹⁰⁹

Expressions of anti-monopoly sentiment were sometimes qualified in

¹⁰³ 8 DOCUMENTARY HISTORY, *supra* note 93, at 45.

¹⁰⁴ 4 DOCUMENTARY HISTORY, *supra* note 93, at 14.

¹⁰⁵ 13 DOCUMENTARY HISTORY, *supra* note 93, at 482.

¹⁰⁶ 4 DOCUMENTARY HISTORY, *supra* note 93, at 428.

¹⁰⁷ 2 THE DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 1786-1870 95, 142, 274 (State Dept. 1894).

¹⁰⁸ *Id.* at 198.

¹⁰⁹ Remarks on the Amendments to the Federal Constitution by the Rev. Nicholas Cottin, in 6 THE AMERICAN MUSEUM 303 (1789), *reprinted in* WALTERSCHEID, *supra* note 54, at 10.

this regard. James Kent of New York wrote to Nathaniel Lawrence, a delegate to the New York ratifying convention:

I have just been reading Smith *on the Wealth of Nations* & he has taught me to look with an unfavorable eye on monopolies—But a monopoly of the mental kind I take to be laudable & an exception to the Rule.¹¹⁰

And in Pennsylvania, “Centinel” wrote “that monopolies in trade or arts, other than to authors of books or inventors of useful arts, for a reasonable time, ought not to be suffered.”¹¹¹

Many years later, in a manuscript that was published after his death, Madison summed up his views as follows:

Monopolies though in certain cases useful ought to be granted with caution, and guarded with strictness against abuse. The Constitution of the U.S. has limited them to two cases, the authors of Books, and of useful inventions, in both which they are considered as a compensation for a benefit actually gained to the community as a purchase of property which the owner otherwise might withhold from public use. There can be no just objection to a temporary monopoly in these cases; but it ought to be temporary, because under that limitation a sufficient recompense and encouragement may be given....¹¹²

Thus, the Clause appears to have been designed not so much to limit the means by which Congress could promote the progress of science and useful arts, but rather to limit the duration and purposes for which exclusive rights could be granted.

III. STATUTORY AND JUDICIAL INTERPRETATION

A. *The Copyright and Patent Acts of 1790*

The Copyright Act of 1790 granted copyrights for a term of “fourteen years from the time of recording the title thereof”;¹¹³ with a right of renewal “for the further term of fourteen years” if the author survived to the end of the first term.¹¹⁴ The Act covered “any map,

¹¹⁰ 14 DOCUMENTARY HISTORY, *supra* note 93, at 76.

¹¹¹ 13 DOCUMENTARY HISTORY, *supra* note 93, at 466.

¹¹² JAMES MADISON, WRITINGS 756 (Jack N. Rakove ed. 1999). Madison’s essay was published posthumously in 1914. See James Madison, *Aspects of Monopoly One Hundred Years Ago*, 128 HARPER’S MAG. 489, 490 (1914).

¹¹³ An Act for the encouragement of learning, §1, ch. 15, 1 Stat. 124 (1790).

chart, book or books already printed within these United States,” as well as “any map, chart, book or books already made and composed, but not printed or published, or that shall hereafter be made and composed.”¹¹⁵ Except for the addition of maps and charts, this language was copied almost verbatim from the Statute of Anne.

Granting federal copyrights to previously published works was consistent with the Statute of Anne and with the utilitarian justification for copyright. Just as the Statute of Anne had provided a period of 21 years for previously published works, in order to limit previously unlimited guild rights and to ease the transition from a state-licensed monopoly to a free market,¹¹⁶ the Copyright Act of 1790 likewise may have provided protection to previously published works in order to limit the term of any claims based on state or common law, and to ease the transition from uncertain and largely ineffective state copyright protection to a single federal copyright. The initial 14-year term was shorter than the term provided by four of the states;¹¹⁷ but the availability of a renewal term ensured that no author would be deprived of the term that he or she had been promised under previous state legislation.

The Patent Act of 1790 permitted patents to be granted “for any term not exceeding fourteen years.”¹¹⁸ No provision was made for the extension or renewal of a patent.¹¹⁹ Unlike the Copyright Act of 1790, the Patent Act of 1790 did not expressly address the issue of retroactivity; but the Patent Act of 1793 expressly required that an inventor relinquish any state patent rights as a condition of obtaining a federal patent.¹²⁰

B. Private Patent and Copyright Laws

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ See notes 31-35 and accompanying text.

¹¹⁷ See notes 65-68 and accompanying text.

¹¹⁸ An Act to promote the progress of useful Arts, §1, ch. 7, 1 Stat. 110 (1790).

¹¹⁹ Because of this omission, many inventors petitioned Congress for an extension or renewal of their individual patents. See Section III.B., below. In 1832, Congress enacted a statute specifying the conditions under which it would consider such petitions. Act of July 3, 1832, §2, ch. 162, 4 Stat. 559. In 1836 this was replaced with an administrative procedure by which a single extension of seven years could be granted. Patent Act of 1836, §18, ch. 357, 5 Stat. 124-25. The provision was repealed in 1861, when the basic patent term was increased from 14 years to 17 years. Act of March 2, 1861, ch. 88, §16, 12 Stat. 249. For more details, see Ochoa, *supra* note 1, at 52-54.

¹²⁰ Patent Act of 1793, §7, ch. 11, 1 Stat. 322.

In 1808, Congress extended by private act the term of a patent owned by inventor Oliver Evans.¹²¹ Evans' patent had been held invalid because the face of the document did not recite the allegations made in the patent application.¹²² The form of the document, however, was drafted by the Secretary of State, not by Evans. James Madison, then Secretary of State, reported that "a compliance with [the decision] would admit the invalidity of all the patents issued in the same form since the commencement of the Government."¹²³ As a result, Congress agreed to extend the term of Evans' patent to compensate him for the administrative error. While this action indicates that the Congress of 1808 believed it could extend the term of a patent for equitable reasons,¹²⁴ it is also consistent with the utilitarian rationale. Evans had relied on the benefit of a 14-year patent term, and he was deprived of a portion of that term not through any fault of his own, but as a result of an administrative error. Granting an extension restored to Evans the benefit of his patent bargain.¹²⁵ Similar extensions of individual patents have been granted in recent years for reasons beyond the inventor's control, such as war, judicial corruption, and delay in FDA approval.¹²⁶

In 1828, Congress extended by private act the copyright in a book of tables of discount and interest compiled by John Rowlett.¹²⁷ Rowlett had invested a great deal of time and money in ensuring the accuracy of his tables, and he sought an extension to recover some of the money he had lost on publishing the first edition.¹²⁸ At that time, the investment of time and money was at least arguably an acceptable basis for copyright protection; but now that the U.S. Supreme Court has firmly rejected the "sweat of the brow" doctrine as inconsistent with the Patent and Copyright Clause,¹²⁹ the basis of Rowlett's claim to an extension has

121 An Act for the relief of Oliver Evans, ch. 13, 6 Stat. 70 (1808).

122 *Evans v. Chambers*, 8 F. Cas. 837 (C.C.D. Pa. 1807) (No. 4,555).

123 See AMERICAN STATE PAPERS, No. 231, 1 Misc. 646 (1807).

124 Congress also extended the terms of nine more patents between 1809 and 1836. See *Bloomer v. McQuewan*, 55 U.S. (14 How.) 539, 543 (1852) (listing extensions). Little is known about the reasons for these individual extensions. It should be noted, however, that by 1808 only one delegate to the 1787 Constitutional Convention, Nicholas Gilman of New Hampshire, remained in Congress; and that of the nine additional extensions, only one was enacted prior to Gilman's leaving Congress in 1814.

125 In fact, however, Congress was more generous than necessary, granting Evans a full 14-year extension. For a more extensive analysis, see Ochoa, *supra* note 1, at 58-72, 97-109.

126 *Id.* at 72-82.

127 An Act to continue a copy-right to John Rowlett, ch. 145, 6 Stat. 389 (1828).

128 See Ochoa, *supra* note 1, at 46-48.

been eroded.¹³⁰ Since then, Congress has extended a copyright by private act only once,¹³¹ and that extension was held invalid.¹³²

C. *The Copyright Act of 1831*

In 1826, Noah Webster wrote to Daniel Webster, who was then representing Massachusetts in the House, seeking his assistance in securing a perpetual copyright:

I sincerely wish our legislature would come at once to the line of right and justice on this subject, and pass 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 labor, and that his heirs and assigns shall enjoy the right, unclogged with conditions.¹³³

Daniel Webster replied that he would forward the letter to the Judiciary Committee, but he added “I confess frankly that I see, or think I see, objections to make it perpetual. At the same time I am willing to extend it further than at present.”¹³⁴

In 1828, Noah Webster’s son-in-law, William W. Ellsworth, was elected to Congress, and he was appointed to the Judiciary Committee. Webster “applied to him to make efforts to procure the enactment of a new copy-right law.”¹³⁵ The Report prepared by Ellsworth for the Committee shows the influence of Webster’s views. It states: “[u]pon the first principles of proprietorship in property, an author has an exclusive and perpetual right, in preference to any other, to the fruits of his labor.”¹³⁶ It also asserts (erroneously) that:

In England, the right of an author to the exclusive and perpetual profits of his book was enjoyed, and never questioned, until it was decided in Parliament, by a small vote ... that the statute of Ann had abridged the common law right, which, it was conceded, had existed, instead of merely guarding and securing it by forfeitures for

129 *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991).

130 See Ochoa, *supra* note 1, at 50-51.

131 Priv. L. No. 92-60, 85 Stat. 857 (1971).

132 *United Christian Scientists v. Christian Science Board of Directors*, 829 F.2d 1152 (D.C. Cir. 1987).

133 Noah Webster, *Origin of the Copy-Right Laws in the United States*, in A COLLECTION OF PAPERS ON POLITICAL, LITERARY AND MORAL SUBJECTS 176 (1843).

134 *Id.* at 176-77.

135 *Id.* at 177.

136 7 GALES & SETON’S REGISTER OF DEBATES IN CONGRESS cxx (Dec. 17, 1830).

a limited time, as was obviously intended.”¹³⁷

Despite this endorsement of perpetual copyright as a natural right, the bill provided only for an initial term of 28 years and a renewal term of 14 years,¹³⁸ the term of which was extended to all subsisting copyrights.¹³⁹

When the bill was debated in Congress, Rep. Michael Hoffman of New York complained that it would “establish a monopoly of which authors alone would reap the advantage, to the public detriment.”¹⁴⁰ He noted that patents were limited in duration to 14 years, and argued:

So it should be ... with the author or publisher. There was an implied contract between them and the public. They, in virtue of their copyright, sold their books to the latter at an exorbitant rate; and the latter, therefore, had the right to avail themselves of the work, when the copyright expired.¹⁴¹

Ellsworth replied, arguing that the bill would “enhance the literary character of the country, by holding forth to men of learning and genius additional inducements to devote their time and talents to literature and the fine arts.”¹⁴² Ellsworth did not explain how this justified the retroactive extension; but Rep. Gulian C. Verplanck of New York maintained that “[t]here was no contract; the work of an author was the result of his own labor. It was a right of property existing before the law of copyrights had been made. That statute did not give the right, it only secured it.”¹⁴³ Verplanck also stated (erroneously) that in “the great case of literary property ... the judges were unanimously of opinion that an author had an inherent right of property in his works.”¹⁴⁴

This record reveals that the 1831 term extension was based on the view that copyright was a natural right of the author.¹⁴⁵ Three years later, this view was rejected by the U.S. Supreme Court in *Wheaton v. Peters*.

¹³⁷ *Id.* The report also erroneously states that the vote occurred “in the case of Miller [sic] vs. Taylor, in the year 1769,” rather than in the case of *Donaldson v. Beckett* in 1774. *Id.* Apparently the Committee was relying on Burrow’s Reports, in which *Donaldson* was reported as an appendix to *Millar v. Taylor*. See 4 Burr. 2303, 98 Eng. Rep. 201 (K.B. 1769); 4 Burr. 2408, 98 Eng. Rep. 257 (H.L. 1774).

¹³⁸ Copyright Act of 1831, §§1-2, ch. 16, 4 Stat. 436.

¹³⁹ *Id.* §16, 4 Stat. 439.

¹⁴⁰ 7 GALES & SETON’S REGISTER OF DEBATES at 423 (Jan. 6, 1831).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 424.

¹⁴⁴ *Id.*

¹⁴⁵ Again, it is worth noting that by 1831, not a single member of the Constitutional Convention or the First Congress remained in Congress.

D. Wheaton v. Peters

In 1827, Richard Peters succeeded Henry Wheaton as the official reporter of decisions for the U.S. Supreme Court.¹⁴⁶ In 1829, Peters began to publish “Condensed Reports” of the cases that had been decided prior to his appointment.¹⁴⁷ When Volume 3 of Peters’ Condensed Reports was published, Wheaton and his publisher sued, alleging that Peters had copied “without any material abbreviation or alteration, all the reports of cases in volume 1 of Wheaton’s Reports.”¹⁴⁸ Peters answered that Wheaton had not complied with the requirements for obtaining a statutory copyright, and that no right to common-law copyright existed.¹⁴⁹ Circuit Judge Joseph Hopkinson agreed, dismissing the complaint and dissolving the preliminary injunction on January 9, 1833.¹⁵⁰

On appeal in the U.S. Supreme Court, Elijah Paine, arguing for Wheaton, contended that “An author was entitled, at common law, to a perpetual property in the copy of his works, and in the profits of their publication.”¹⁵¹ He argued that in using the term “secure,” the Constitution did not grant Congress the power to divest Wheaton of his pre-existing common-law copyright.¹⁵² Conceding that there was no common-law right in inventions, he argued that the term “secure” must mean different things with regard to patents and copyrights.¹⁵³

Representing Peters, Joseph Reed Ingersoll contended that “[t]he states themselves at no time ever treated this as a common law right,”¹⁵⁴ and he argued that Wheaton’s view was inconsistent with the Patent and Copyright Clause, saying “[t]here would be no occasion to secure for a

¹⁴⁶ See Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*, 83 Mich. L. Rev. 1291, 1351-58 (1985).

¹⁴⁷ *Id.* at 1362-70.

¹⁴⁸ *Id.* at 1370.

¹⁴⁹ *Id.*

¹⁵⁰ *Wheaton v. Peters*, 29 F. Cas. 862 (C.C.E.D. Pa. 1832) (No. 17,486), *rev’d*, 33 U.S. (8 Pet.) 591 (1834). Although the judgment was reversed and remanded for a determination whether Wheaton had complied with the requirements for a statutory copyright, the opinion made it clear that Wheaton could not claim a common-law copyright. See Joyce, *supra* note 143, at 1384-85.

¹⁵¹ 33 U.S. at 595-96, *citing* *Millar v. Taylor*, 4 Burr. 2303 (K.B. 1769).

¹⁵² 33 U.S. at 600-01.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 627. This point was amplified by Ingersoll’s co-counsel, Thomas Sergeant, who said: “It is clear that there was no such thing in any of the states prior to the constitution, but by the invitation of congress, under the confederation.” *Id.* at 639.

limited time, if the exclusive right already existed in perpetuity.”¹⁵⁵ Co-counsel Thomas Sergeant added that “[i]n inventions, it is admitted, there was no common law property. The use of the word ‘secure’ cannot, therefore, presuppose an existing right. It would have the same effect, and be equally applicable to both.”¹⁵⁶

Justice McLean delivered the majority opinion, which dealt a decisive blow to the notion of copyright as a perpetual common-law right:

[T]he law appears to be well settled in England, that, since the statute of 8 Anne, the literary property of an author in his works can only be asserted under the statute. And that, notwithstanding the opinion of a majority of the judges in the great case of *Millar v. Taylor* was in favour of the common law right before the statute, it is still considered, in England, as a question by no means free from doubt.

That an author, at common law, has a property in his manuscript, and may obtain redress against any one who deprives him of it, or by improperly obtaining a copy endeavours to realise a profit by its publication, cannot be doubted; but this is a very different right from that which asserts a perpetual and exclusive property in the future publication of the work, after the author shall have published it to the world....¹⁵⁷

In so holding, the Court expressly relied on the lack of a natural right in inventions.¹⁵⁸ It said:

[T]he word secure, as used in the constitution, could not mean the protection of an acknowledged legal right. It refers to inventors, as well as authors, and it has never been pretended, by any one, either in this country or in England, that an inventor has a perpetual right, at common law, to sell the thing invented.¹⁵⁹

The Court concluded that “Congress, then, by this act, instead of sanctioning an existing right, as contended for, created it.... From these considerations it would seem, that if the right of the complainants can be sustained, it must be sustained under the acts of congress.”¹⁶⁰

¹⁵⁵ *Id.* at 629.

¹⁵⁶ *Id.* at 641.

¹⁵⁷ *Id.* at 657.

¹⁵⁸ *Id.* at 657-58.

¹⁵⁹ *Id.* at 661. *See also* note 84, above.

¹⁶⁰ *Id.* at 661-62. The court added that “[i]t may be proper to remark that the court are unanimously of the opinion, that no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right.” *Id.* at 668.

In rejecting Wheaton's claim of perpetual common-law copyright, the U.S. Supreme Court confirmed the utilitarian view embodied in the Constitution that patents and copyrights are exclusive rights of limited duration, granted in order to serve the public interest in promoting the creation and dissemination of new works. By placing these limits in the Constitution, the Framers hoped to avoid the kinds of abuse of monopoly power that had existed in England prior to the Revolution. In the words of Madison, "[t]here can be no just objection to a temporary monopoly in these cases; but it ought to be temporary, because under that limitation a sufficient recompense and encouragement may be given."¹⁶¹

CONCLUSION

When the U.S. Constitution granted Congress the power to secure copyrights "for limited Times," it did so in the context of the British struggles to restrain the booksellers' monopoly claims. The circumstances which will come before the Supreme Court this fall in *Eldred v. Ashcroft*¹⁶² seem strikingly parallel to those of eighteenth-century Britain. Once again the underlying struggle is between the great holders of old copyrights (movie studios, music publishers, and others) and those who would reprint or otherwise reproduce classic works and circulate them more widely. The Framers were also wary about allowing perpetual monopolies, and there is every reason to believe that they would have been as skeptical as the British pamphleteer of 1735 who remarked that allowing an endless series of term extensions would establish a de facto perpetual monopoly, "a Thing deservedly odious in the Eye of the Law."¹⁶³ His warning seems as relevant today as it did then: If the CTEA is upheld, what is to prevent the great copyright holders from obtaining further extensions again and again as often as the old ones expire?¹⁶⁴ In the words of the pamphleteer, it will be "a great

¹⁶¹ JAMES MADISON, WRITINGS 756 (Jack N. Rakove ed. 1999).

¹⁶² *Eldred v. Reno*, 239 F.3d 372 (D.C. Cir. 2001), *petition for reh'g and reh'g en banc denied sub nom. Eldred v. Ashcroft*, 255 F.3d 849 (D.C. Cir. 2001), *cert. granted*, 122 S.Ct. 1062 (Feb. 19, 2002), *order amended*, 122 S.Ct. 1170 (Feb. 25, 2002) (No. 01-618).

¹⁶³ A LETTER TO A MEMBER OF PARLIAMENT, *supra* note 37. See Appendix at ____.

¹⁶⁴ See *Eldred v. Reno*, 239 F.3d at 382 (Sentelle, J., dissenting in part) ("The Congress that can extend the protection of an existing work from 100 years to 120 years, can extend that protection from 120 years to 140; and from 140 to 200; and from 200 to 300; and in effect can accomplish precisely what the majority admits it cannot do directly.").

Cramp to Trade, a Discouragement to Learning, no Benefit to the Authors, but a general Tax on the Publick; and all this only to increase the private Gain of the Booksellers.”¹⁶⁵

APPENDIX

A Letter to a Member of Parliament concerning the Bill now depending in the House of Commons, for making more effectual an Act in the 8th Year of the Reign of Queen Anne, 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 (London, 1735).¹⁶⁶

Sir,

The Bill now depending in your House for making more effectual, An Act for the Encouragement of Learning, etc. having the specious Shew of being calculated for the Furtherance of Learning, and the Securing of Property; two things for which you have always shewn a becoming Zeal; I wonder not, that you should at first be inclin'd to favour it, especially considering the many deceitful Arts, and false Insinuations which some have made use of, in order to make the World entertain that Opinion of it: But when, upon a serious Review, those Arts shall be exposed, and the Falsehoods detected, it will plainly appear to be so far from having any real Tendency to the promoting of Learning, that, on the contrary, it will greatly cramp it, and manifestly hinder its spreading in the World; so far from the securing of Property, that it will notoriously invade the natural Rights of Mankind, and subject the Publick to an exorbitant Tax, in order to increase the Profits of those, who have neither Colour of Title, nor Pretence of Merit; and when this shall appear to be the Case, I doubt not but the same laudable Motives which at first prompted you to encourage it, will prevail with you to oppose a Design so unjust in itself, and so detrimental to the Interest it is pretended to promote.

¹⁶⁵ A LETTER TO A MEMBER OF PARLIAMENT, *supra* note 37. See Appendix at ___.

¹⁶⁶ This is a transcript of a broadside publication, from the copy in the Bodleian Library, Oxford (Ms. Carte 207 f. 31). Copies may also be found at the Houghton Library, Harvard University (*pEB7.A100.7351), the University of London (Broadside Collection 354(1). Vol. IV), and the British Library (357.c.2(74)). The authors are indebted to Ronan Deazley of Durham University for his assistance in the transcription.

And whereas many have been artfully made to believe, that the aforesaid Act passed in the 8th Year of Queen Anne is now expired, and therefore have the more readily concurred in promoting a Bill which they look on only as the Continuance or Revival of an expiring Law, it will be proper to give you a true State of the Case in that Particular.

Before the Act of the 8th of Queen Anne, there was no Law which vested in any one the sole Copy-Right of any Books which were published to the World; but when once a Treatise was made publick, every one was at Liberty to make free with it. This, to be sure, was a great Discouragement to Authors, who were by this means in great measure deprived of the Profit of their Works; and this was the Grievance which gave Occasion to the making of that Act, in order to remedy which, by giving due Encouragement to Authors, and yet to prevent the contrary Extreme, by giving a Monopoly for too long a Time, that Act provides as follows.

1. As to such Books which were printed and published before the Date of the Act, viz. April 10. 1710, the Authors, or those who had purchased of the Authors, should have the sole Right and Liberty of Printing them for the Term of Twenty One Years from the Date of the Act.

2. As to such Books which should be afterwards printed and published, the Authors, or those who should purchase them of the Authors, should have the sole Right and Liberty of Printing them for the Term of Fourteen Years from the Time of their being first published; and if the Authors be living at the End of that Term, they should have another Term for Fourteen Years, in all Twenty eight Years; and all others are prohibited under certain Penalties from Re-printing or Importing the same.

As this was not a temporary Law, and stands unrepealed, it is as much in Force now as ever, only the Term of Twenty One Years, which was granted for Books printed and published before the Date of the Act is expired. But the Booksellers, it seems, do not think this Term sufficient, and are therefore desirous to have it renewed for another Twenty One Years. But what Reasons have they offer'd why such a Request should be granted? In all other Inventions, which yet are as much the natural Property of the Inventors, as Books are of the Authors, the Law deems Monopolies so destructive of the publick Good, that the Crown is restrained by 21 Jac. cap. 3. from granting a Patent for any Term exceeding Fourteen years. In this Instance therefore the Legislature has already been more than ordinary liberal; and tho' they very justly thought, that some certain Term should be secured to the Authors, yet, at the same time, they judg'd it reasonable that some

Limitation should be set to that Term, that one time or other the Publick might have the common Benefit of a Work, after they had for several Years contributed to the Author's Profit. This Limitation they have fix'd to Twenty One Years; and therefore the Act provides that the sole Liberty of Printing etc. shall continue no longer. And why is not this Encouragement sufficient? Or, what has since happen'd, which should occasion the Legislature to alter their Judgment in this Point? Is there any room to think, that any useful or valuable Work has been suppress, for want of a longer Term to the Authors? No, the Authors, for what appears, are very well satisfied with the Encouragement the Law allows them; for it is not they, but the Booksellers who make this Application; and what Pretence can the Booksellers have to a larger Term? Will Learning be encourag'd by giving them a longer Interest in Books already published, even to the Exclusion of the Authors themselves? But it is said they have purchased the Copies of the Authors; but what have they purchased? Only an Interest for Twenty One Years. The Author by Law had no more, and therefore could grant no greater Interest to the Booksellers than what they themselves had. So that, if it were reasonable to enlarge the Term, surely it ought to be enlarged to the Authors, and not the Booksellers, who cannot be supposed to have paid a Consideration greater than what was adequate to the Interest assigned to them. To what Purpose then is any Argument fetch'd from Family Settlements? Can private Settlements overturn the Law? Or, can any one gain a greater Interest in an Estate, by taking upon him to make a Disposition of that which he has no Right to dispose of?

But it is pretended, that if the Authors could assign a larger Interest, the Booksellers could afford them a better Price for their Copy. This then is a Concession, that they have hitherto allowed the Authors only in Proportion to the Interest which the Laws now in Being would permit them to convey; how unreasonable then is it, that the additional Term sought for should be vested in the Booksellers, who have paid no Consideration for the same, consequently have no natural nor equitable Right thereto. And as to any Books hereafter to be published, what additional Advantage can it be expected an Author can have by a longer Term, over and above what he may now have for his Fourteen Years, and a Covenant for Fourteen Years longer, if he lives? The Booksellers will always take care, to extort from the Author the whole Interest he is able to convey; I would gladly know therefore, what these generous Booksellers would be willing to advance to an Author for a Reversion after Twenty eight Years, and by that some Judgment may be made what additional Benefit a longer Term will be to the Author. I believe most

People will be ready to answer, little or nothing. Where then is the Advantage that will accrue thereby to the Author? On the contrary, if the Author should outlive the exclusive Property of the Bookseller, he may hope, by re-printing his own Work, to gain some new Profit, since an Edition published by the Author will always have the Preference to any other. Thus it is in respect to the Author; but, as to the Publick, should the Bill pass, it would be much worse; for many Tradesmen who can now employ themselves in their respective Callings, must then stand still for want of Work. Books will now be sold at much easier Rates, and consequently, by passing into more Hands, will render the Knowledge contained in them more diffusive; but should this Bill pass into a Law, by being the sole Property of one or a few, they will be sold at higher Prices, and consequently be confined to a small Number, in comparison of what they would otherwise be. Many Books that are now scarce will probably be re-printed, while they are left free and open to the Publick, which while they are private Property, may long continue out of Print; the particular Proprietors either thro' Indolence, or for some other Reason, being indisposed to venture a new Impression of them.

As to any Argument drawn from the Employment of Printers, Bookbinders, Women and Children, it is certain, while the Liberty of Printing and Selling Books is left at large, they will be sold cheaper, and in larger Numbers, and therefore will increase the Business of these Trades, and of the Women and Children employed therein, much more than if they are restrained to be the Property of a few, as Experience abundantly shews.

As to the Pretence of furnishing foreign Markets, there can be no doubt but that End will be best attained by such Methods as may enable us to afford our Books at so low a Price, that Foreigners may not be able to undersell us; which can be done no way so well, as by leaving it open to the whole Trade: For, as to the Method of settling the Price of Books by the Archbishop of Canterbury, etc. The Booksellers very well know, that the Nature of their Trade is such, as renders the same impracticable; for which Reason, it has scarce ever been exercised, altho' the Booksellers have not been wanting in furnishing just Cause of Complaint.

Here I cannot but observe one Artifice made use of by the Booksellers in Reprinting Mr. Addison's Tatler, No. 101. upon this Subject, at this Juncture, as if that Ingenious Author had thought the Term of Twenty-One Years not sufficient. But it is to be noted, that whatever is there said by him is said on behalf of Authors and not Booksellers, and was said before the Act of Q. Anne; so that whatever

Ground of Complaint there might then be, the same was wholly taken away by that Statute, and Mr. Addison must be understood to complain only of the Law as it then stood, and not as it has been since alter'd by that Statute to which his Arguments are no Way applicable. Upon the whole, I see no Reason for granting a further Term now, which will not hold as well for granting it again and again, as often as the Old ones Expire; so that should this Bill pass, it will in Effect be establishing a perpetual Monopoly, a Thing deservedly odious in the Eye of the Law; it will be a great Cramp to Trade, a Discouragement to Learning, no Benefit to the Authors, but a general Tax on the Publick; and all this only to increase the private Gain of the Booksellers, who as they can have no natural Title to the Copy, so they can have no legal or equitable Title thereto, beyond the Interest assigned them by the Author, which could be for no more than the Term allowed by Law. For these Reasons I doubt not your Zeal for the Publick Good, which you have used to exert on other Occasions, will be exerted on this, to prevent a Law, which is likely to be productive of such mischievous Consequences to the Publick.