

THE HISTORICAL LAW AND ECONOMICS OF THE FIRST COPYRIGHT ACT

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Abstract

In this paper, an economic analysis of the first copyright Act, the Statute of Anne of 1710, is described. Part I covers the emergence of common law copy-right and the enactment of the Statute of Anne. Part II examines the provisions of the Statute of Anne from a law and economic perspective, and shows that contrary to popular belief that the Statute of Anne strengthened publishers' monopoly power, the provisions had the effect, at least in theory, of reducing the market power of copyright owners. In all, this paper provides a historical law and economic perspective of one aspect of copyright law.

Keywords: Copyright, Historical law and economics.

JEL classification: K39, N43.

1. Introduction

This is the story of the first British Copyright Act,¹ passed by the British Parliament in 1710.² It is also the world's first Copyright Act—the French had theirs in 1793 and the Germans one year thereafter (Avis 1965, 23).

¹ I use the more unconventional term 'British' here instead of the usual 'English' because the Copyright Act of 1710 was equally applicable in England, Wales and Scotland. A copy of the Act is enclosed in the Appendix.

This paper arose from a desire to study the economics of copyright law from a historical point of view. In a sense, it is an attempt to fill the historical and institutional gap in the economic analysis of copyright law, and to add to the literature in the area of historical research in law and economics.³ Since the 1980s, copyright law has been subject to the investigation of law and economics scholars (e.g. Gordon 1982, Landes and Posner 1989), although studies on the efficiency of the copyright system date back half a century earlier to Arnold Plant (1932).

The underlying objective of this paper is to counter the popular belief that modern copyright law was crafted to grant a monopoly right to authors and their assigns. Patterson (1968) writing on the history of copyright law, for example, laments that the 1710 Act was the point copyright law went astray. He argues that the Act was simply a perpetuation in statutory form of publishers' interest. Hence, it is the intention of this paper to show that that was not the case. On the contrary, we find that the Parliament when passing the Copyright Act in 1710 was mindful of the ill-effects of the copyright they were creating, and thus introduced a range of features to counter the monopolistic effects of a copyright. More in particular, apart from solving the public goods problem of literary works, the Parliament had two purposes in mind. The first is to break the London booksellers' cartel,⁴ and the second to end the 'perpetual monopolies' in classical and popular titles owned by the London booksellers.

In the first part of this paper, we recount the events leading to the making of the Copyright Act. In the second part, we examine the various features of this Act in the light of contemporary law and economic knowledge to show how they had the combined effect of limiting the monopolistic effect of a copyright.

² The bill was first presented to the Parliament on 12 December 1709, and received the royal assent on 5 April 1710 (Rose 1993, 42–47). Although many authors referred to it as the 1709 Act, John Feather rightly recommended that it be referred to as the 1710 Act (Saunders 1992, 51).

³ For a good discussion on the uses of history in law and economics, see Harris (2003).

⁴ Note that the early booksellers performed the dual roles of retailers and publishers.

The English Copyright Story

2. Copy-right and The Stationers' Company

The history of Anglo-Saxon copyright can be traced to the Stationers' Company of London. In 1403, a guild of writers of text-letters, lymners, bookbinders, booksellers, and possibly parchminers, was formed in London (Blagden 1960, 22–23). After printing technology was brought to England by Caxton in 1477 (Blagden 1960, 23), the composition of the guild tended to consist mainly of printers and booksellers. Naturally, with the advent of the printing press, printed books were cheaper than hand-copied ones. Unfortunately, it also meant that pirating another's book would be comparatively easier. When piracy was easy, a prisoners' dilemma existed among the few printers, for each could free-ride on the other's investment and payment for manuscripts (Gordon 1992a).

How then, did the guild of printers and booksellers solve this prisoners' dilemma absent a copyright law as we understand it today? Presumably, they would have to appoint an arbiter among themselves, having power to enforce punishment against any free-riders. Secondly, the group of printers and booksellers would have to be small enough to monitor and for enforcement to be effective. In other words, the guild of printers and booksellers would have to be organised much like a cartel with the necessary barrier to entry (Blagden 1960, 22–23). Ideally, non-members had to be prevented from exercising the trade.

The minimum requirement for self-regulation in a trade group is a rule and an arbiter. The arbiter came in the form of two wardens appointed by the Mayor of London to oversee the behaviour and work of the craftsmen when the guild was established in 1403. They were empowered to present bad and disloyal men for punishment, and were answerable to the Mayor who was appointed by the crown. This was the source of the wardens' enforcement power. Evidence of the rule came in the form of an early ordinance, of an unknown date between 1403 and 1557, which made it an offence to print a book before showing it to the wardens for approval, registering it in a register, and paying a fee (Blagden 1960, 32–33). In this way, the wardens would ensure that the book to be printed had not been owned by another printer or bookseller.

There remains, however, another problem. Non-members, especially those operating outside of London, were not subjected to the powers of the wardens. To expand the powers of the wardens, royal sanction was necessary. This too came

eighty years after Caxton established a printer in London, with the grant of a royal charter.

With the proliferation of printed matters, the literate population and the reading public group expanded. Some writings were more critical of the crown, while others deemed scandalous against the church. Thus, a series of press regulations was instituted.⁵

The wardens too had to play their parts in controlling the press, by ensuring that they only approved books which were not illegal.⁶ However, it could be easily conceived that the interest of the Stationers' Company, as the guild came to be known, was not in self-regulation, but in tackling piracy, minimising free-ridership, and establishing market power. The zeal of the crown in press regulation was the perfect opportunity for the Company to request for more control over printing in the whole of England. In 1542, the Stationers' Company requested a royal charter to give it greater power to control printing under the pretext of assisting the crown in regulating the press. Unfortunately, this attempt went unheeded.

However, as the years went by, it was clear that the crown was unable to keep the tide of seditious material at bay, and in 1557, Queen Mary Tudor acceded to the Stationers' Company request for a royal charter. Under the charter, the freemen of the company were given the usual privileges of being in a chartered company: the right forever to be a corporate body with perpetual succession, the power to take legal action and to make rules for their own governance, the right to meet together and to elect a Master and two Wardens, and the right to own property in the City or suburbs.

More importantly, the Stationers' Charter had terms which were unique to it. The preamble of the charter declares that the King and Queen, wishing to provide a suitable remedy against the seditious and heretical books which were daily printed and published, gave certain privileges to their beloved and faithful lieges, the ninety-

⁵ For example, in June 1530 a proclamation ordered that new theological books in English were not to be sent to the press before they had been examined by the bishop of the diocese, and by a proclamation of 1538 no English book was to be printed in England without the approval of a royal licenser (Blagden 1960, 30).

⁶ Blagden (1960, 43) observes that "theoretically, [the Company's] approval was quite independent of any ecclesiastical or civil authorization which a royal injunction or an Act of Parliament might require; except that, in order to protect themselves, the Wardens often insisted that the entry could be allowed only if such outside authority were obtained."

seven Stationers, in addition to the normal rights of a company.⁷ It was laid down, firstly that no one in the realm should exercise the art of printing, either himself or through an agent, unless he was a freemen of the Stationers' Company of London, or unless he had royal permission to do so; and secondly that the Master and Wardens of the Company were to have the right to search the houses and business premises of all printers, bookbinders and booksellers in the kingdom for any printed matter, to seize (and treat as they thought fit) anything printed contrary to any statute or proclamation, and to imprison anyone who printed without the proper qualification or resisted their search; such offenders were to remain in gaol for three months without trial and be fined five pounds, half of which was to go to the Crown and half to the Company (Blagden 1960, 21). At last, the powers of the wardens to search were expanded, and the Stationers' Company had an almost exclusive right to printing in the whole of England.

Under the royal charter, it could be conceived that the wardens were playing two roles at the same time: one for the crown and another for members of the Company. For the first, they had to ensure, when approving a book, that it was not seditious, heretical, obscene or blasphemous (Sherman and Bently 1999, 11), for their necks depended on it.⁸ This, they performed rather well by requiring that an approval will only be given after the approval of the royal licenser had been sought. It was never recorded that a warden lost his head because of approving a book.

The second role was more difficult to play. They had to ensure that a book had not been registered earlier in another printer's or bookseller's name. To do this, a register was kept. Approval for printing would not be given if a book had been registered in another printer's or bookseller's name. And to maintain the cartel-like organisation, registration would only be given to a member of the Company. Further, the expanded power to search for illegal books throughout the kingdom meant that the Master and wardens of the Stationers' Company could use their enforcement

⁷ The preamble of the Stationers' Company charter reads: "Know ye that we, considering and manifestly perceiving that certain seditious and heretical books rhymes and treatises are daily published and printed by divers scandalous malicious schismatical and heretical persons, not only moving our subjects and leiges to sedition and disobedience against us, our crown and dignity, but also to renew and move very great and detestable heresies against the faith and sound catholic doctrine of Holy Mother Church, and wishing to provide a suitable remedy in this behalf" (Arber 1950, vol. 1, xxviii).

⁸ Blagden (1960, 43) suggests that under the terms of the Charter and the Injunction of 1559, "the officials of the Stationers might be held responsible for the publication of books which smacked of sedition or heresy."

powers against any printers who printed and booksellers who kept illegal or pirated copies of books (Blagden 1960, 120).

With the combination of approval-registration and the search and seizure power granted to the Master and wardens, we now have a rudimentary form of property right in books for printers and booksellers who were members of the Stationers' Company. The existence of this privately arranged copy-right⁹ was criticised by a royal commission in 1583,¹⁰ although by no means the Stationers' copy-right arose spontaneously. Paterson observes from the Company's old registers, an evolution in the understanding of this copy-right. It started as "a licence to print" in the earliest entries; by the seventeenth century, a book or copy came to be understood as "belonging" to a particular member (Rose 1993, 14).

It has to be noted that up until this point, authors played no part in this early copy-right system. The author had no right apart from the ownership of his manuscript (Rose 1993, 17–18). A printer or bookseller would approach an author to buy his manuscript and proceed to register it at the Company. The author was merely bound by contract not to assist or sell the same manuscript to another printer or bookseller.¹¹

Fortunately or unfortunately, this was not the end of the story. In the name of press regulation, further powers were granted to the wardens under subsequent royal decrees. For example, under a 1566 decree, any books which offended against the laws of the land or against the grant or injunction issued by Her Majesty, whether they were printed in England or abroad, were to be seized and brought to Stationers' Hall; half of such books were at the royal disposal and half to be delivered to the seizer or informer. More specific power of search was granted to the Wardens or their deputies than the Charter gave them, particularly the right to enter warehouses at

⁹ I use 'copy-right' with a hyphen to denote the practice of the Stationers' Company claiming an exclusive right to print the manuscripts or copies they owned; while reserving the word 'copyright' to the legislative right.

¹⁰ "We find proued and confessed that the nature of bokes and printing is such, as it is not meete, nor can be without their vndoeinges of all sides, that sondrie men shold print one boke. And, therefore, where her Matie graunteth not priuilege, they [the Stationers] are enforced to haue a kinde of preuileges among them selues by ordinances of the companie whereby euerie first printer of any lawefull booke, presenting it in the hall, hath the same as seuerall to him self as any man hath any boke by her Matie preuilege.": State Papers Domestic Elizabeth, vol. 161, no. 1 (C); probably July 18th, 1583. Quoted from Blagden (1960, 42).

¹¹ An example of such contract terms was quoted by Rose (1993, 27–28).

ports and to examine any mounds or bales suspected of containing books (Blagden 1960, 70).

In 1586, a new decree was made with more explicit control and powers to the Stationers' Company. Recalling the Injunctions of 1559, no books were to be printed without licence by the proper civil or ecclesiastical authority; no books were to be printed contrary to any ordinance of the Company, i.e. the ordinance about the entering of copies and the respecting of the copies of others being the one particularly referred to. A printer's punishment was the destruction of his press and type, disablement from ever printing again and six months' imprisonment without bail; that for the booksellers and bookbinders was three months' imprisonment. Further, wardens or their deputies have the rights to search the premises of any member of the book trade, to seize books which offended against the decree and to carry away offending printing materials; the defacement of letters and destruction of presses were to be done to the order of the Assistants (Blagden 1960, 71–72).

In 1662, after the Courts of Star Chamber was abolished in 1641, Parliament enacted a Printing Licensing Act, known as such, for it required every licence to be printed verbatim at the beginning of each book (Blagden 1960, 154). This Licensing Act first lapsed in 1679, but was reinstated by the Parliament after King James II's accession, of which it lasted seven years when it finally lapsed in April 1695 (Blagden 1960, 174–175).

The ending of the Licensing Act in 1695 was an important event in the history of copyright. No longer did the Stationers' Company have the advantage of an enforcement power, meant for searching unlicensed and illegal books, to protect its copy-rights. The Glorious Revolution of 1688 proved that "the Tudor methods of government, under the shadow of which the Company had begun to play a real part of the world, were no longer workable" (Blagden 1960, 177). Thereafter between 1695 and 1707, ten unsuccessful attempts were made by the Stationers' Company at legislation to restore the Licensing Act or for registration of copyright (Saunders 1992, 51).

In December 1709, a group of major London booksellers and printers managed to petition for leave to bring in a bill "for securing to them the Property of Books, bought and obtained by them" (Rose 1993, 42–43). Unfortunately, the Act that the Stationers received for their efforts was not as what they had anticipated. When Edward Wortley's bill returned from the committees of the House of Commons and House of Lords, many key features which were drafted for the advantage of the Stationers had disappeared, replaced by those favoured by the Houses to restrict the

monopoly enjoyed by the printers and booksellers. This bill became law on April 5 and came into force on April 10, 1710.

3. The Existence (or Non-Existence) of a Scottish Copy-right Law

By 1282, Wales was under the political control of England, but the union between Scotland and England did not take place until the Scottish King James VI became the James I of England. The old Scottish Parliament was abolished in 1707, whereupon laws were made in London, although the administration of justice remained independent from that of England. Therefore the possible existence of a Scottish copy-right law similar to England's is a valid question.

Prescott (1989, 455) suggests that "the real motive behind the first Copyright Act ... seems to have been an attempt to *export* copyright control to a region of Great Britain where the Stationers' Company's writ did not run [, i.e. Scotland]". However, this does not seem to be the case, at least not at the time the Act was made. First, the Act is the result of repeated attempts since the end of the Licensing Act in 1695 to have a law passed. At that time, Scotland and England were not in a Union yet. At most we can say that the prospect of extending the London booksellers' control to Scotland was one of the motivations.

Secondly, there does not seem to be a healthy printing industry up north at the time of the Act as compared to the situation down south. This is important because the old system of copy-right came as a result of a printing industry. The first printing press was set up by Walter Chepman and Andrew Myllar in 1507 after James IV of Scotland gave leave to import a printing-press and type to print law books, breviaries and other works associated with the office of a king's printer (Plant 1974, 26). A record of books printed before 1700 shows that between 1505 and 1700, about four thousand titles were printed in Scotland, and there were about 65 printers in Edinburgh between 1557 and 1700, while Glasgow had only a handful in that same period (Aldis 1970).

Finally, decision of the Scottish Court of Session in *Hinton v. Donaldson* (Boswell 1774) lends evidence to the view that there was no recognisable common law copy-right prior to the first Copyright Act. One of the reasons for this position is that Scottish law, which is based on Roman law, does not admit intangible property.

In conclusion, it must be said that a common law conception of copy-right must be wholly an English experience, commensurate with the need for some kind of self-

organised form of protection against piracy in the growing printing industry in the seventeenth century.

The Copyright Act and Its Anti-Monopoly Features

4. The Copyright Act of 1710

The Act of 1710, introduced during the reign of Queen Anne, is commonly known as the Statute of Anne in the intellectual property circle.¹² The word ‘copyright’ was not used, although the concept embodied therein is clearly copyright. Titled “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,” the Act contains eleven sections, the whole of which is reproduced in the appendix herein.

The Act first establishes an exclusive right in his work to the author or his assign. Thereafter, a range of interesting features were introduced to counter this exclusive right, perhaps rightly for fear of creating a monopoly. These anti-monopoly features are summarised under seven headings: authorship, limited term, non-discriminatory registration, price control, legal deposit, importation of foreign works, and what I call provisions relating to uncertain property rights in copyright. Rather than doing a section-by-section analysis of the Act, we shall examine these headings in turn. Before that, we shall look at the exclusive right created by the Statute of Anne.

5. Exclusive Right

Section one of the Statute of Anne vests upon authors and their assigns the “sole liberty of printing and reprinting their books,” for a limited term. We can discuss this right in three parts: the creation, the registration, and the enforcement.

5.1 Creation

From an economic point of view, it is irrelevant whether a common law copy-right existed before the Statute of Anne, such that the Act merely codified what was there; or whether copyright is a sole creation of the Statute. However, on a historical footing, two occasions arose when this question was examined. When the bill was

¹² 8 Anne, c. 19 (1710).

first drafted by Wortley in 1709, the title of the bill reads “A Bill for the Encouragement of Learning and for *Securing* the Property of Copies of Books to the Rightful Owners thereof.” After the amendments by the committee of the whole House of Commons at its second reading, the word ‘vesting’ appeared for the first time in the bill. According to Rose (1993, 46), “whereas ‘securing’ implied that an extant right was confirmed, ‘vesting’ implied that a new right was conferred.” Furthermore section 9 of the Statute of Anne, which makes it a non-offence to print a registered book prior to the coming into force of the Act, seems to indicate that Parliament did not recognise the pre-existence of a copy-right prior to the Statute of Anne.

The main occasion where the question of this supposedly common law copyright was discussed was the case of *Donaldson v. Becket* some eighty years later. It was raised in relation to the existence and survival of the common law right which would have given it a perpetual protection. Although the eight common law judges sitting in the House of Lords favoured such a right,¹³ the peers at the House, who had the ultimate say over the matter, voted overwhelmingly in favour of the term-limited statutory right. Thus, any perpetual common law right was effectively overridden. It should also be noted that a few years earlier, the Scottish judges at the Court of Session decided against the idea of a common law copyright.¹⁴

It is not difficult to understand the House of Lords’ reluctance. As our above historical discussion of the Stationers’ Company showed, the so-claimed common law copyright was no common law. Indeed the Lord Chancellor, Lord Camden, asserted in the Parliament that the supposedly common law rights were “founded on Patents, Privileges, Star-chamber Decrees, and the Bye Laws of the Stationers Company; all of them the Effects of the grossest Tyranny and Usurpation; the very last Places in which [he would] have dreamt of finding the least Trace of the Common Law of this Kingdom” (*Cases of the Appellants* 1774, 48).

Since it was likely that common law did not anticipate a copy-right, or at least not in the form as suggested by the Stationers, why then did the Parliament create it? Standard neoclassical microeconomics texts have a ready answer. A writing, or any intellectual property for that matter, is a public good (Arrow 1962). Without state or legal intervention, there will be a market failure in supplying an optimal quantity of a

¹³ According to the *Journal of House of Lords*, seven judges voted for and four against a common law copyright after publication.

¹⁴ *Hinton v. Donaldson* (1773), reported in Boswell (1774).

public good. The three standard solutions for a market failure in provision of a public good are grants, prizes and propertisation. Grants can be public grants or private grants. A public grant or a subsidy would entail expenditure from the public coffers, which generally means taxation. Provision of private grants in the form of patronage was popular for literary works until the middle of the eighteenth century. Unfortunately, as Viala (1985) observes, the system of literary patronage has the effect of forcing an author to change his style to suit the particular patronal imperative. A prize has more or less the same characteristics of a grant, except that many participants vie for the prize, and that the prize would have to be sufficiently large enough so that the expected benefit of the prize equals to the cost of creation. The winner takes the prize and the rest loses everything, including their investment in creation. All works that have been created belong to the public domain.

Propertisation, on the other hand, is not without its drawback. The main one being its contradiction with the very nature of a public good: non-excludability and non-rivalry in consumption (Samuelson 1954). By its nature, propertisation of a work of information, such as a literary work, entails conferring the author or owner an exclusive right to control the use and dissemination of his work. In other words, he gets a monopoly of a sort in that particular work that he owns. But once we recognise that the marginal cost of using information is zero, there will be a welfare loss, known as deadweight loss, resulting from under-utilisation when the property owner does not price discriminate perfectly and charges a monopoly price, while a potential consumer is willing to pay a price higher than the marginal cost but lower than the monopoly price. In Arrow's words:

[A]ny information obtained should, ... from the welfare point of view, be available free of charge (apart from the costs of transmitting information). This insures optimal utilization of the information but of course provides no incentive for investment in research. In a free enterprise economy, inventive activity is supported by using the invention to create property rights; precisely to the extent that it is successful, there is an underutilization of the information. (1962, 616–617)

The “sole right and liberty” in this property as created by the Statute of Anne is an alienable property right, although no procedure is specified. It is likely that the Stationers Company's existing contractual procedure is retained and recognised. From an efficiency point of view, the alienability of this copyright can be understood as follows. It is the authors' comparative advantage to do what they do best, i.e. write. With an alienable right, the author would be able to concentrate on writing, sell his work for a lump sum, and leave the business of publishing and selling to the printer

and bookseller, without needing to bother a bit over how his work is sold and distributed.

However, when the author's reputation and the quality of his work are unknown, publishers might not want to risk supporting a wholly unknown author. Hence, it might be necessary to enter into a risk-sharing arrangement such as a royalty contract. In such a situation, an absolutely alienable right might not be necessary. But once authorial reputation is established, an assignment of the copyright by the author to a publisher has the advantage of dispensing with the agency and monitoring cost of the author. Interestingly, the *droit moral* or authors' right developed in continental European countries has an inalienable component, known in the Anglo-American tradition as moral rights. This inalienable right has been subject to economic analysis with opposite conclusions by Cotter (1997) and Netanel (1993).

5.2 Registration

Section 2 makes registration of ownership at the Stationers' Hall a prerequisite for a suit under the Statute of Anne, although non-registration does not affect the claim to a copyright. In other words, registration does not make the right, but merely completes it.¹⁵ Non-registration was not fatal. Instances of obtaining an injunction from the Court of Chancery were not infrequent, earlier, on the ground of the so-called common law copyright,¹⁶ but certainly later, for the protection of unpublished writings.¹⁷

The adoption of the Stationers' Company's register instead of creating a new one was indeed ingenious for two reasons. First, it pacified the Stationers' claim and gave them a piece of the new copyright action. More importantly, it prevented a possible rush to register all manners of existing work, whether the registrants were legitimate owners or not.¹⁸ In this sense, there was no sudden regime change by the introduction

¹⁵ However in 1748 the Scottish Court of Session decided in *Midwinter v. Hamilton* that only if a work met the registration requirements of the Act of 1710 was it protected (Saunders 1992, 61).

¹⁶ The existence, or at least the survival, of any common law copyright was finally rejected by a vote of majority of the peers in the House of Lords in *Donaldson v. Becket* (1774).

¹⁷ E.g. *Pope v. Curl* (1741) 2 Atk 342; 26 ER 608, for unpublished correspondences.

¹⁸ The American homesteading laws (Allen 1991) and the Internet domain names are two examples of a rush to establish property rights by early registration.

of copyright. Rather, the Act allowed for a smooth transition from a Stationers' copyright to a statutory copyright.

According to the Statute of Anne, the purpose of registration is evidentiary, i.e. so that people may not "through ignorance offend against" the Act. Further, the copyright register kept at the Stationers' hall may be inspected free or charge, even though anecdotal records show that the clerks at the registry had solicited payment for inspection.¹⁹ That aside, under the Act, anyone may request a certificate indicating registration of a title upon the payment of a fee not exceeding six pence.

From an economic point of view, registration upon payment of a fee has two advantages. First, it reduces tracing cost, which is the cost involved in tracing the current owner of a copyrighted work (Landes and Posner 1989, 361). It is obvious that use of a register of title reduces this cost as the ownership information can be obtained easily from the register.²⁰ There is, however, a shortcoming of the registration system introduced in the Statute of Anne. It is possible that the information in the register is not current because the right is not conferred by registration. An heir, for example, may not update his details in the register, by paying the fee of six pence, if he feels that the copyright has no value to him. Thus, a copier may still not be able to exploit freely a copyrighted work if the information he finds in the register could not help him in tracing the rightful owner. This arises because of the risk of a 'submarine' claim, i.e. a hidden copyright owner suddenly appears to claim damages for infringement. Although the shortcoming of the provision is to an extent mitigated by the registration prerequisite before any enforcement of right under the Act, the ideal situation is to make enforcement contingent to a registration of ownership prior to the unconsented exploitation, and the exploiter lodges a written declaration with the copyright registrar that he has failed to trace the copyright owner by this day.

The second use of a registration has its roots in welfare economics. According to the Pigouvian tradition (Pigou 1951), a tax equivalent to the social cost may be

¹⁹ An anonymous author in a piece titled "Entered at Stationers' Hall" complained that he was asked one shilling per entry when he requested to examine the register in order to avoid using another author's title for his book (Blagden 1960, 273). In December 1870, C. H. Purday who wrote *Copyright: A Sketch of Its Rise and Progress* (1877) complained to the Board of Trade that he had been prevented from freely searching the copyright entries in the registry at Stationers' Hall (Blagden 1960, 267).

²⁰ It is unfortunate that due to the requirement of no formalities in the Berne Convention for the Protection of Literary and Artistic Works 1886, registration as a basis of copyright was lost.

imposed against an economic actor to induce him to internalise the negative externality of his action. Taking the point that deadweight loss is a form of social cost, an appropriate registration fee may be collected to offset the social cost of proptertising copyright. It is suspected that no country has ever imposed a Pigouvian tax on copyright, especially not the Statute of Anne, judging by its relatively modest fee. Also, the ability to price discriminate (Liebowitz 1986) and negotiate (Coase 1960) licensing is likely to be a more efficient approach to minimising deadweight loss.²¹

We mention that the primary function of registration in the Statute of Anne is evidential. The registry at the Stationers' Hall, however, does not keep a copy of the actual work being copyrighted, for the Act merely requires registration of details as previously practiced at the Stationers' Hall. Therefore, a system of legal deposit is used to solve the evidential problem. Copies of the registered books are deposited at prescribed libraries in England and Scotland. A further discussion on legal deposit follows below.

5.3 Enforcement

The Statute of Anne is clear that the "sole right and liberty of printing" is confined to books, although the preamble in section 1 mentions "other writings" once. This does not necessarily mean that writings not in the form of a book get no protection. In *Pope v. Curl* (1741), Lord Hardwicke sitting in the Court of Chancery was of the opinion that letters and sermons not originally intended for publication may also be protected under copyright when they are collected later as part of a book.

The second part of section 1 makes it an infringement for a person who is not the proprietor, to "print, reprint, or import, or cause to be printed, reprinted, or imported" any copyrighted book within its term of protection, without the consent of the proprietor. This consent has to be obtained in writing and signed in the presence of two or more credible witnesses. It is not clear from the language of this section, whether printing a derivative work such as a translation is an infringement. In *Burnet v. Chetwood* (1720) 2 Mer. 441; 35 E.R. 1008, the first case to come before an English court after the Statute of Anne, Lord Chancellor Macclesfield thought that "on account that the translator has bestowed his care and pains upon [his translation],

²¹ In the patent system, a hint of this philosophy may be gleaned from the increasing renewal fee to maintain a patent within its allowable term of protection (Cornelli and Schankerman 1999).

and so [is] not within the prohibition of the act". However, on the facts of the case, an injunction was granted on moral grounds, i.e for censorship purpose.

Burnet v. Chetwood is not a definitive statement of law on derivative works then for two reasons. First, the court which heard this case was the Court of Chancery, which was not a common law court. The Court of Chancery makes its decisions based on moral conscience, equity and fairness, and not principles of law. Secondly, the statement about a translation as not prohibited by the Act was made as an *obiter dictum*, as a decision contrary to the statement was in fact made. Many years later, we would find Parliament to have included control of certain types of derivative works as part of the exclusive rights of the copyright owner.

Some research works on the economic analysis of derivative works in copyright have been published in recent years, notably from the perspective of the American-inspired fair use exceptions. I must honestly admit that the line between making a derivative work and use of a copyright is a fine one, and hence many fair use explanations by Gordon (1982) may apply. An economic analysis of derivatives is inconclusive whether they should be subject to the same protection as a reproduction (Landes and Posner 1989; Gordon 1992b). Ultimately, it depends on various factors. Firstly, if the author could recoup his creation cost without resorting to charging for derivatives, the law should allow derivatives, for it minimises deadweight loss; conversely, if the author has factored in the value of any derivative works at the time of creation, it might be necessary to allow control over derivative works to solve the provision of public goods problem.

Secondly, if the derivatives are sufficient substitutes to the originals, it might cause a market failure if derivatives are not prevented. On the other hand, if the derivatives do not compete with the original, but the copyright owner may strategically prevent its distribution, for it might be used as a negative quality signal of the original, social welfare calls for allowing these derivatives, for quality signals enhance market efficiency and are public goods. This is the logic behind the English fair dealing exceptions for criticism or review. Also, there might be situations where a derivative work may be embarrassing to the author but yields a social benefit, such as when a parody is made. In the United States, the fair use doctrine allows for such derivatives (Merges 1993; Gordon 2000). Finally, recent research on anticommons show that if a derivative work depends on a few copyrights separately owned, the fair use exception may be a way to minimise deadweight losses resulting from different copyright owners trying to extract monopoly prices (Depoorter and Parisi 2002). An example of such a derivative work is a database containing archive of old news articles as in *New York Times v. Tasini* (Parisi and Sevcenko 2002).

Although the economic justification of derivative works is inconclusive, the protection of copyrighted works against 'printing' and 'importation' in the Statute of Anne is historical. The Stationers' copy-right only came about after the advent of the printing press in England. Indeed the need for copyright arose as a consequence of the printing press. Prior to the printing press, books were copied by hand. The bookseller's job was to take orders, commission scribes to a copy of the book, and thereafter send the sheets for binding. Thus producing a copy of a book was a time-consuming and expensive venture. Books were expensive and few except for the very rich could afford one. To get books written, wealthy patrons provided for the writers in the time of literary patronage. This age of literary patronage came to an end with the printed press. With the press, the marginal cost of a book was substantially lowered. This opened up a market for the printed books, and consequently the number of readers and the literate went up. This in turn inspired more writers. As time went on, the number of writers grew and it was becoming increasingly difficult for potential patrons to identify deserving patronees. When literary patronage ended, it was replaced by the system of copy-right. As we have seen, the concern of copy-right was that of the printers and booksellers. In order to capture the value of their trade, it was only reasonable for them to ask for protection against competing printers and imports printed elsewhere. The exclusive right only came to be expanded when other groups of artisans came to petition for similar rights in the goods of their trade.

The Statute of Anne provides two kinds of remedy for a breach of copyright: forfeiture and fines. Upon finding an infringement, the copyright owner may forfeit all infringing books and sheets, and have the liberty to "damask and make waste paper of them". Further, the copyright owner may also sue to claim half of the fine of one penny for each sheet collected. Apart from these two statutory remedies, a copyright owner could also seek equitable remedies from the Court of Chancery which include injunctions and accounts for profits.

It is optimal, for most of the time, to protect copyright by a property rule, à la Calabresi and Melamed (1972), in the form of injunctions or punitive damages, and possibly criminal punishments. However, there are occasions which call for the use of a liability rule where restitution or compulsory license may be in order. A special case of a liability rule is when payment is zero. This is the case for the fair use or fair dealing exceptions, where a technical infringement is allowed. However, it is unfortunate that as far as property is concerned, English common law has developed mainly along the line of property rules. Except in the area of accident laws, common

law judges are almost powerless to grant a liability rule remedy in property cases, and intellectual property is not an exception.²²

Arguably, the statutory fine of one penny per sheet as prescribed in the Statute of Anne is a hefty sum in 1710, in comparison to the cost of registering a book at six pence. If the rationale behind the fine is to protect copyright by a property rule, this amount may be reasonable. Gary Becker's (1968) model on crime and punishment is useful here in understanding the effect of the statutory fine on the incentive to pirate. Assuming a copyright pirate is a rational actor, he will weigh his expected cost and expected benefit of pirating and will only pirate a book when the expected cost is lower than the expected benefit. The expected benefit is consisted of the marginal benefit per sheet multiplied by the probability of a successful sale; and the expected cost of the cost per sheet, plus the statutory fine and loss of the pirated material multiplied by the probability of being caught. Therefore, to increase the expected cost of piracy, the relevant authorities such as the Stationers' Company and the copyright owners will have to increase enforcement and detection of piracy.

The design of the enforcement mechanism in the Statute of Anne has some limitations. If enforcement is solely a private affair, there might be less than an optimal level of enforcement, as private individuals might not have the resources and skills in effectively enforcing their property rights. Collective enforcement of copyright has the advantage of scale economies because detection of copyright violation is a quasi-public good.²³ Obviously, the Stationers' Company would be in a good position to play the role of a collective agency representing booksellers and printers who owned copyrights.

6. Copyright as Market Failure

If by a market failure we mean the allocation achieved by the market is inefficient, it is easy to see how copyright may lead to a market failure. The usual argument that copyright is a source of market failure goes like this. Copyright creates a monopoly, with some limited exceptions, for the copyright owner for that particular work. Thus, in the absence of price discrimination, a copyright owner who is a price setter, will charge a profit maximising price, which is the monopoly price. When the monopoly

²² The United States Supreme Court decision in *New York Times Co. v. Tasini*, 533 U.S. 483 (2001) is a fine example of a case which might do well with a liability rule as a solution.

²³ Prosecution in enforcement is semi-excludable where violation of non-member's copyright is simply ignored.

price is higher than the marginal cost, there will be a deadweight loss. This deadweight loss arises when some of the potential users have a willingness to pay which are higher than the marginal cost, but lower than the monopoly price.

The perception of the deadweight loss, which is not natural but arising as a result of the legal institution, is aggravated when potential users could obtain pirated copies of the copyrighted work, or make a copy themselves, at a cheaper price. Normally, for a non-protected good such as works in the public domain, users are legally allowed to copy whatever things they want if the total cost of making them is cheaper. Similarly, if a manufacturer could produce a non-protected good at a cheaper cost than the market price, they may enter the market. Therefore, deadweight loss is a reflection of the lost opportunity to improve social welfare because of monopoly pricing.

The usual reason given for granting such an exclusive right to a copyright owner is that absent such a right, the creator will have insufficient incentive to create works of “mental labour” (Sherman and Bentley 1999). This is because works of mental labour have the characteristics of a public good, which is nonexcludability and inexhaustibility (Gordon and Bone 2000, 191). Without an exclusive right, the creator or his assign will have to compete with free-riders who do not share the fixed cost of creation.

The need to recoup fixed cost leads us back to monopoly pricing. Arguably, where the fixed cost is low, it is possible to recoup it from the normal profit even when the market price is at marginal cost, assuming an increasing marginal cost. But we have to recognise that monopoly pricing is a natural consequence of having a monopoly power. Where the number of players is small, such as in a natural monopoly industry, we usually find government price regulation as a way of countering the effects of a monopoly. The market price will then be fixed by the regulators at, or at slightly higher than, the marginal cost. But price regulation is bound to be unworkable in copyright, because of the large number of copyrighted works and the problem of asymmetric information. It is costly, difficult, and in fact impossible for the regulators to know accurately the fixed cost of creation. Even if accounting cost can be determined, creators of works of mental labour will have the incentive to be X-inefficient. Thus, copyright law basically takes a hands-off approach and leaves the determination of market prices to the copyright owner.

The welfare losses of a monopoly power in copyright can be reduced through two major ways. One is to allow substitutes, albeit not necessarily perfect ones. Anyone is allowed to independently create a substitute without referring to the copyrighted work, and this rule applies even when the substitute is identical or

perfect. On the other hand, borrowing to create an imperfect substitute is not allowed without the consent of the first copyright owner, unless it falls within some form of legal exceptions. Legal doctrines such as fair use and fair dealing allow borrowing to create substitutes where the transaction cost of licensing is high (Gordon 1982). In all other cases, borrowing to create a perfect substitute is almost impossible.

By allowing competing substitutes in the copyright market, the monopoly power from a copyright is tremendously reduced. Instead of having markets of pure monopoly, we generally find monopolistic competition. Although not as efficient as the idealised situation of perfect competition, a market of monopolistic competition substantially reduces the welfare losses from a monopoly. This is especially so when the cross elasticity of demand of a copyrighted work is high.

The second way of reducing monopoly power in copyright is more controversial and less equitable. It is to grant the copyright owner the privilege of price discrimination, i.e. to charge different prices to different users either based on an observable difference in willingness to pay, class of users, or subtle product differentiation. Simply, price discrimination allows a copyright owner to sell at different prices and thus translate the deadweight loss to mainly producer's surplus. This is the argument that price discrimination increases allocative efficiency (Demsetz 1970). More recently, Meurer (2001) observes that many features of copyright law facilitate or impede the practice of price discrimination; and price discrimination has significant negative as well as positive effects on social welfare.

As for the Copyright Act of 1710, we can observe that it focuses more on restricting the copyright owners' monopoly power as a means to cure the market failure of a copyright, than to facilitate price discrimination, although it is not wholly impossible for it to achieve the latter.

6.1 Authorship

It is said that the introduction in copyright of authorship was the principal motivation for the British Parliament to accept a petition to enact a copyright legislation after ten unsuccessful lobby attempts by the Stationers' Company. If we recall earlier, an author gets no place in the Stationers' scheme of copy-right. What authors had was just a right to sell to one of the Stationers his copy, who would then proceed to register the copy in the Stationers' Company register. Also, the author who prints his

book on his own initiative faces the risk of piracy for the Stationers' Company rarely opens its register to non-members or protects their rights.²⁴

Defoe's (1704, 27–28) call for a law to protect authorial rights is probably the earliest recorded instance in English history (Rose 1993, 35). This followed an earlier Parliamentary edict of 1642 requiring the author's name and his consent to be printed on the title page of a book, as an initial response to the flood of anonymous publications at the fall of the Star Chamber in 1641 (Rose 1993, 22). The edict, although short-lived, granted a property right to authors to grant consent or to veto the publication of a book. Presumably, it created an economic right and allowed an author to press for a higher payment for his work.

The Stationers first introduced authorship in a petition to Parliament for a bill in 1707. John Feather (1980, 42, n. 59) speculates that the bill failed because the advocates of censorship managed to get licensing clauses tacked on to it. A subsequent petition in 1709 reintroduced the plea of the authorship, and this was successfully carried to the 1710 Act.

Under the 1710 Act, any author, his assign, or any person for that matter may seek copyright registration. The effect is to break the booksellers' cartel in two ways.²⁵ First, an author may choose to register the copyright to himself and market his work without the help of a bookseller. Secondly, there will be potentially more buyers for an author's work, for anyone may now own a copyright. As a result, we could presume that an author would get a higher remuneration for his work as the number of potential buyers or publishers increase. Consequently, the number and variety of works too will increase. This increase in the number of titles in the market has a positive effect on social welfare. As more books are published, there will be more diversity to satisfy different consumers' preferences. Further, more titles would

²⁴ Blagden (1960, 41) notes that on occasions, a non-member tradesman such as a Draper was given access to the copy-right register. C.f., an order of the Court of Assistants of the Stationers' Company in December 1607 preventing its wardens from entering in the register any book except for a member of the Company resident in or near London; and that no member was to act as a cover for a non-member (Blagden 1960, 110).

²⁵ By the eighteenth century, printers had long been subsidiary and had ceased to be the dominant factor in publishing; they were now merely agents hired by the booksellers and shut out from any participation in the higher walks of the trade (Collins 1927, 16). My theory is that booksellers have better information about the market and thus are in a better position to extract monopoly rent. Further, competition among printers drove down the price of printing. Also in this picture is an entry barrier to become a bookseller, where the London booksellers prevent others from owning the copy-right to profitable titles.

mean higher substitutability, which would theoretically increase the price elasticity of demand, and therefore drive down the monopoly prices.

The positive effect of this legislative innovation was not realised until more than half a century later. Collins (1927, 15) characterises the eighteenth century as the age of cooperation among the London booksellers, but by the nineteenth century competition was the norm. At least three major factors contributed to this shift in trend. First, literacy rate has gone up by the second half of the eighteenth century, thus increasing the demand for printed words. Secondly, the House of Lords' 1774 decision in *Donaldson v. Becket* rejected the booksellers' claim of a perpetual common law copyright surviving the statutory limitation. This sounded the death knell to the booksellers' monopoly on classical and popular titles, with the effect that any printer could sell it at marginal cost. And finally, since the end of the Licensing Act about a century earlier, the number of printers and booksellers from Scotland and the English provinces has multiplied, thus increasing competition in the market place to a certain extent.

6.2 Limited Term

The second innovation introduced by the Parliament in the Statute of Anne was a limitation of term. For books which have been printed or acquired for printing before 10 April 1710, the commencement date of the Act, copyright term was twenty one years. For books which have not been printed or published, and for that matter uncomposed, the term of copyright was fourteen years from the day of first publication. This was an important departure from the Stationers' ancient practice of a perpetual copy-right. It was, in effect, an abrogation of the Stationers' monopolies at the stroke of a pen.

The idea of limiting the copyright term was inspired by two sources: John Locke and the Statute of Monopolies. Observing the monopolistic practices of the London booksellers, John Locke was offended by the "ignorant and lazy" stationers' ability to restrict the printing and importation of new editions of ancient writers. He therefore suggested, in a memorandum, to limit the literary property of a copyright owner to a certain number of years after the death of the author, or, fifty or seventy years from the first printing of the book (Locke 1694). Understandably, Wortley's bill did not have a limitation of term, for the Stationers were adamant on maintaining their perpetual copy-rights. Instead the House of Commons introduced this most important change. To fix the term, the Commons looked at the old Statute of Monopolies which governed patents for mechanical inventions (Rose 1993, 44–45). Accordingly, new

inventions could be patented for fourteen years, while existing patents were reduced to a twenty-one-year protection.

The term of protection in copyright and patents is one of the most studied topics by economists in the area of intellect property law (see Nordhaus 1969; Liebowitz 1986). Landes and Posner (2003, pp. 475–485) identify six reasons commonly held by economists for limiting the term of copyright: (1) tracing costs increase with the length of copyright protection; (2) transaction costs may be prohibitive if creators of new intellectual property must obtain licenses to use all the previous intellectual property they seek to incorporate; (3) because intellectual property is a public good, any positive price for its use will induce both consumers and creators of subsequent intellectual property to substitute inputs that cost society more to produce or are of lower quality, assuming (realistically however) that copyright holders cannot perfectly price discriminate; (4) because of discounting to present value, incentives to create intellectual property are not materially affected by cutting off intellectual property rights after many years, allowing lucrative new markets for the copyright work, unforeseen when the work was created, to emerge; (5) in any event, retroactive extensions of copyright should not be granted, because such extensions do not affect the incentive to create works already in existence; but (6) the possibility of such extensions invites rent-seeking. In view of continual updates and exploitation of copyrighted cartoon characters by their owners beyond the statutory term of protection,²⁶ Landes and Posner suggest an alternative system of copyright term based on an indefinitely renewable registration, much like the one for trade marks.

Speaking in a Parliamentary debate, Lord Macaulay cautioned against extending the copyright term. The famous statesman, sounding like an economist, casts a monopoly as an evil, and that the evil is proportionate to its length of duration. On the other hand, he notes that “an advantage that is to be enjoyed more than half a century after we are dead, by somebody, we know not by whom, perhaps by somebody unborn, by somebody utterly unconnected with us, is really no motive at all to action” (Macaulay 1841, 199). In a more formal way, Liebowitz (1986) describes the same as the marginal benefit of a copyright decreasing, and the marginal cost increasing, over time. This justifies, in theory, a limited copyright term, at the point when the marginal benefit equals to marginal cost. In practice, each piece of copyrighted work would have a different marginal rate, and the legislature would be hard pressed to get any accurate information or to set an optimal term.

²⁶ See the U.S. Copyright Term Extension Act 1998, and recently, Supreme Court decision *Eldred v. Ashcroft*, 537 U.S. (2003).

It is interesting to note that the House of Lords added a section 11 to the bill as amended by the House of Commons. At the expiry of the fourteen-year term, if the author is still living, the copyright reverts back to him for another term of fourteen years. The idea is that the author could have a second term of benefit of his work if he was living. The rationale for this is difficult to understand from an economic point of view. Extending copyright term post creation has no bearing on the incentive to create. Making it contingent on being living could only be explained as creating an incentive for the author to live longer, although that might sound preposterous since one's death is an uncertain event. However, Tor and Oliar (2002) in a recent article tried to show, using behavioural economics, that copyright term contingent on life could be a more effective incentive than a mere fixed term.

6.3 Non-Discriminatory Registration

Having in theory lost their perpetual monopolies through the limited term clause, the London Stationers were given back a role in the administration of the new copyright. The register that they have diligently kept for 150 years now becomes the copyright register under the Act. This was important, for the ownership of the twenty-one year copyright for published books was to be determined from this register. Also, it was foreseeable that the Stationers would be the principal registrants of copyright in the immediate future, and hence it was sensible for them to carry on the practice of using their register.

A major difference in the adoption the Stationers' register under the new copyright regime is that registration is open to anyone, and not merely to members of the Stationers' Company as previously practised. As an added measure to prevent the clerk of the Stationers' Hall from refusing a registration of copyright, section 3 allows a registrant to advertise a notice in the Gazette of such refusal, with the usual witness requirement, and thereafter claim twenty pounds from the clerk. In such cases, the public notice is equivalent to a record of registration. Clearly, this is another measure by the Parliament to break the booksellers' cartel.

6.4 Price Control

Another legislative innovation by the Parliament in limiting the negative effect of market power by the copyright owners is price control. Although we mentioned previously that price regulation is a function of modern day regulators on natural monopoly, and that information cost would make it unfeasible to implement price control on copyrights, the Statute of Anne is unique in the sense that it tries to

implement an *ex-post* price control as compared to an *ex-ante* price control found in natural monopoly industries nowadays.

What is meant by *ex-post* price control is that a consumer, after observing the market price of a book, may make a complain to a regulator that the price set for a book is too “high and unreasonable”. The interesting thing about this approach is that section 4 provides a list of forums to complain to. This list includes non-judicial personnel such as the Lord Archbishop of Canterbury, the Lord Keeper of the Great Seal of Great Britain, the Lord Bishop of London, the Vice Chancellors of the University of Oxford and University of Cambridge, and the Rector of the College of Edinburgh. Upon enquiring and examining the complaint, the official or the judge acting as a regulator may “limit and settle the price” and seek to advertise the new price in the Gazette. Failure to adhered to the set price may attract a penalty of five pound per offending book sold or offered for sale. Further, the complainant may also claim cost from the bookseller.

It is not clear how effective this scheme of judicial price control was, and how often it was evoked. Without further historical evidence, it is impossible to say whether this section was effective in curtailing the booksellers’ monopoly. Rational apathy would probably deter most people from complaining to the regulators, unless he is a public-spirited one. On the other hand, not having complete and accurate information over the cost of production may prevent a successful complaint. Therefore, it is speculated here that this price control section was not very successful. In any event, this scheme was abandoned in later Acts.

6.5 Legal Deposit

Section 5 formalised a tradition which can be traced to an agreement in 1610 between the Stationers’ Company and Sir Thomas Bodley for the former to deliver a free copy of every book printed in England to the latter’s library in Oxford. However compliance with this was not successful, so in 1637 the Chancellor of Oxford University used his influence in the Star Chamber to obtain a decree with a penalty of imprisonment and a heavy fine for non-compliance (Bell 1977).

In the Statute of Anne version, the number of copies for this legal deposit has been increased to nine. Copies are to be deposited with the warehouse-keeper of the Stationers’ Company before publication. Four libraries in England and five in Scotland were to be entitled to one each. Penalty for non-compliance is five pound plus the value of the non-delivered copy. Naturally the London booksellers were not happy with this arrangement. It could be perceived that an effective library collection

based on free legal deposits would affect the revenue from sales. Hence, it is not difficult to imagine the booksellers orchestrating a rebellion against this 'library tax' (Feather 1988).

This concept of legal deposit was started by King Francis I of France. In 1537, he ordered every printer and publisher in France to forward to the Royal Library at Blois a copy of every newly published book (Bell 1977). Failure to do so entailed a punishment of forfeiture of the whole edition and an arbitrary fine. It proved successful in establishing a sizable library collection with little cost, and became a permanent and tangible record of the country's literary history.

Legal deposit could rightly be considered as a tax. As a tax, it transfers wealth from the booksellers in the form of the cost of a book, to the recipient library, while at the same time yielding an expected improvement in social welfare. From an economic point of view, legal deposit plays an important role in the system of copyright. First, it allows access to a published work, normally, below the market price. And when the work is out of print even though still within its copyright term, it lowers the transaction cost of access, even when the user has a willingness to pay higher than the previous market price. More importantly, it acts as a repository for the public domain when the copyright of a work expires. This has some equivalence to the filing and disclosure rule in patent law. A deposited work can be used as evidence of the work so copyrighted. Finally, legal deposit facilitates the creation of a national bibliography indicating the literary stock of a nation. A complete bibliography prevents duplication of sunk research costs.

6.6 Importation of Foreign Works

The Statute of Anne is only concerned with works registered in the Stationers' Company register, and more importantly books written in the English language. Section 7 allows "the importation, vending, or selling of any books in Greek, Latin, or any other foreign language printed beyond the seas." This obviously has the effect of encouraging local authors to write in English instead of Greek or Latin. Another is to prevent local booksellers from holding effective copyright in foreign books. Thus it might be imagined that in the short run, foreign books will be imported following the rejection of a monopoly on foreign books, but in the long run, local booksellers may be slow in bringing and promoting foreign works in the face of possible competition and free-ridership on promotion cost.

6.7 Uncertain Property Rights

Sections 8 and 10 deal with what I call uncertain property rights. Section 8 allows a defendant claim to cost if the suit against him is unsuccessful. Although quite a usual procedure in courts nowadays, it was important for it creates a disincentive against frivolous threat of infringement. In a way, increasing the expected cost of litigation encourages the copyright owner to ascertain his rights before making a claim. It also lightens other printers and booksellers' fear of being sued based on uncertain rights. This is because copyright does not have physicality as proof of ownership. Instead, it might be necessary to prove ownership through a paper trail.

Section 10 can be seen as further strengthening the argument of uncertain property rights in copyright. It requires the copyright owner to bring a suit against an infringer within three months of the infringing action. Failure to do so will cause the suit to be avoided and cease to have an effect. Again, it reduces the uncertainty in the long term of whether a book is actually protected by copyright. In some sense, it lowers the incentive of 'suspect' copyright owners to use a protracted threat to sue to gain a first-mover's advantage. The combined effects of these two provisions can be seen as to reduce the abusive power and threats of the London booksellers against competing printers and booksellers who purported to print non-copyrighted books.

7. Conclusion

In this paper, we have looked at the historical events leading to the first British Copyright Act. We show that it was the opportunity to break the London's booksellers monopolies that prompted the British Parliament to enact the Act. Although the preamble of the Act, as advanced by the Stationers, gave market failure as the justification, the content and structure clearly took an anti-monopoly stance. To further break the London booksellers cartel in the printed words, the British Parliament, in enacting the Copyright Act of 1710, introduced authorship and non-discriminatory registration. Having understood the social costs of perpetual monopoly in books, the concept of limited term was implemented. Other innovations such as price control allowed the occasional regulation of monopoly pricing. Legal deposits and importation of foreign books increased substitution and lowered the market power of booksellers. Finally, provisions against uncertain property rights reduced the practical threat value of booksellers over printing of uncopyrighted works. History has shown that this was not successful immediately after the enactment of the Act, but in the long run, it did change the whole face of the book trade.

One aspect that the Act was silent about was the boundary of protection for a work. The Act is clearly written to tackle the problem of wholesale piracy, but it is vague as to the extent imperfect substitutes are allowed. The solution to this question only came about in the later years through a series of court decisions introducing innovative doctrines to fine-tune the boundary of copyright protection.

By and large, the impact and contribution of the Copyright Act of 1710 to modern copyright law should be acknowledged. Although many new developments have thereafter surfaced in copyright law, copyright as we understand today was embryonic in the 1710 Act. This aspect of history should not be ignored in the study of law and economics of copyright.

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Appendix

Anno Octavo Annæ Reginae.

(Statute of Anne, available from <http://www.copyrighthistory.com/anne.html>)

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.

[1] 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 Queens 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, 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 Queens 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 Majesties Courts of Record at *Westminster*, by Action of Debt, Bill, Plaint, or Information, in which no Wager of Law, Essoign, Privilege, or Protection, or more than one Imparlance, shall be allowed.

[2] 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 therein 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 Entred, 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 Entred, as aforesaid, for every of which several Entries, Six Pence shall be Paid, and no more; which said Register-Book may, at all Seasonable [sic; should be: Reasonable] and Convenient times, 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] Provided nevertheless, That if the Clerk of the said Company of *Stationers*, for the time being shall Refuse or Neglect to Register, or make such Entry or Entries, or to give such Certificate, being thereunto Required by the Author or Proprietor of such Copy or Copies, in the Presence of Two or more Credible Witnesses, That then such Person and Persons so refusing, Notice being first duly given of such Refusal, by an Advertisement in the *Gazette*, shall have the like Benefit, as if such Entry or Entries, Certificate or Certificates had been duly made and given; and that the Clerks so

refusing, shall, for any such Offence, Forfeit to the Proprietor of such Copy or Copies the Sum of Twenty Pounds, to be Recovered in any of Her Majesties Courts of Record at *Westminster*, by Action of Debt, Bill, Plaint, or Information, in which no Wager of Law, Essoign, Privilege or Protection, or more than one Imparlanse shall be allowed.

[4] Provided nevertheless, and it is hereby further Enacted by the Authority aforesaid, That if any Bookseller or Booksellers, Printer or Printers, shall, after the said Five and twentieth Day of *March*, One thousand seven hundred and ten, set a Price upon, or Sell or Expose to Sale, any Book or Books at such a Price or Rate as shall be Conceived by any Person or Persons to be High and Unreasonable; It shall and may be Lawful for any Person or Persons to make Complaint thereof to the Lord Archbishop of *Canterbury* for the time being; the Lord Chancellor, or Lord Keeper of the Great Seal of *Great Britain* for the time being; the Lord Bishop of *London* for the time being; the Lord Chief Justice of the Court of Queens Bench, the Lord Chief Justice of the Court of Common Pleas, the Lord Chief Baron of the Court of Exchequer, for the time being; the Vice-Chancellors of the Two Universities for the time being, in that part of *Great Britain* called *England*; the Lord President of the Sessions for the time being; the Lord Justice General for the time being; the Lord Chief Baron of the Exchequer for the time being; the Rector of the College of *Edinburgh* for the time being, in that part of *Great Britain* called *Scotland*; who, or any one of them, shall and have hereby full Power and Authority from time to time, to Send for, Summon, or Call before him or them such Bookseller or Booksellers, Printer or Printers, and to Examine and Enquire of the reason of the Dearness and Inhauncement of the Price or Value of such Book or Books by him or them so Sold or Exposed to Sale; and if upon such Enquiry and Examination it shall be found, that the Price of such Book or Books is Inhaunced, or any wise too High or Unreasonable, Then and in such case, the said Archbishop of *Canterbury*, Lord Chancellor or Lord Keeper, Bishop of *London*, two Chief Justices, Chief Baron, Vice-Chancellors of the Universities, in that part of *Great Britain* called *England*, and the said Lord President of the Sessions, Lord Justice General, Lord Chief Baron, and Rector of the College of *Edinburgh*, in that part of *Great Britain* called *Scotland*, or any one or more of them, so Enquiring and Examining, have hereby full Power and Authority to Reform and Redress the same, and to Limit and Settle the Price of every such Printed Book and Books, from time to time, according to the best of their Judgements, and as to them shall seem Just and Reasonable; and in case of Alteration of the Rate or Price from what was Set or Demanded by such Bookseller or Booksellers, Printer or Printers, to Award and Order such Bookseller and Booksellers, Printer and Printers, to Pay all the Costs and Charges that the Person or Persons so Complaining shall be put unto, by

reason of such Complaint, and of the causing such Rate or Price to be so Limited and Settled; all which shall be done by the said Archbishop of *Canterbury*, Lord Chancellor, or Lord Keeper, Bishop of *London*, two Chief Justices, Chief Baron, Vice Chancellors of the Two Universities, in that part of *Great Britain* called *England*, and the said Lord President of the Sessions, Lord Justice General, Lord Chief Baron, and Rector of the College of *Edinburgh*, in that part of *Great Britain* called *Scotland*, or any one of them, by Writing under their Hands and Seals, and thereof Publick Notice shall be forthwith given by the said Bookseller or Booksellers, Printer or Printers, by an Advertisement in the *Gazette*; and if any Bookseller or Booksellers, Printer or Printers, shall, after such Settlement made of the said Rate and Price, Sell, or expose to Sale any Book or Books, at a higher or greater Price than what shall have been so Limited and Settled, as aforesaid, then and in every such case such Bookseller and Booksellers, Printer and Printers, shall Forfeit the Sum of Five Pounds for every such Book so by him, her, or them Sold or Exposed to Sale; One Moiety thereof to the Queens most Excellent Majesty, Her Heirs and Successors, and the other Moiety to any Person or Persons that shall Sue for the same, to be Recovered, with Costs of Suit, in any of Her Majesties Courts of Record at *Westminster*, by Action of Debt, Bill, Plaint or Information, in which no Wager of Law, Essoign, Privilege or Protection, or more than one Impar lance, shall be allowed.

[5] Provided always, and it is hereby Enacted, That Nine Copies of each Book or Books, upon the best Paper, that from and after the said Tenth Day of *April*, One thousand seven hundred and ten, shall be Printed and Published, as aforesaid, or Reprinted and Published with Additions, shall, by the Printer and Printers thereof, be Delivered to the Warehouse-Keeper of the said Company of *Stationers* for the time being, at the Hall of the said Company, before such Publication made, for the Use of the Royal Library, the Libraries of the Universities of *Oxford* and *Cambridge*, the Libraries of the Four Universities in *Scotland*, the Library of *Sion College* in *London*, and the Library commonly called the Library belonging to the Faculty of Advocates at *Edinburgh* respectively; which said Warehouse-Keeper, is hereby required, within Ten Days after Demand by the Keepers of the respective Libraries, or any Person or Persons by them or any of them Authorised to Demand the said Copy, to Deliver the same, for the Use of the aforesaid Libraries; and if any Proprietor, Bookseller or Printer, or the said Warehouse-Keeper of the said Company of *Stationers*, shall not observe the Direction of this Act therein, That then he and they, so making Default in not Delivering the said Printed Copies, as aforesaid, shall Forfeit, besides the value of the said Printed Copies, the sum of Five Pounds for every Copy not so Delivered, as also the value of the said Printed Copy not so Delivered, the same to be Recovered by the Queens Majesty, Her Heirs and Successors, and by the Chancellor, Masters, and

Scholars of any of the said Universities, and by the President and Fellows of *Sion College*, and the said Faculty of Advocates at *Edinburgh*, with their full Costs respectively.

[6] Provided always, and be it further Enacted, That if any Person or Persons incur the Penalties contained in this Act, in that part of *Great Britain* called *Scotland*, they shall be recoverable by any Action before the Court of Session there.

[7] Provided, That nothing in this Act contained do extend, or shall be construed to extend, to Prohibit the Importation, Vending, or Selling of any Books in Greek, Latin, or any other Foreign Language Printed beyond the Seas; Any thing in this Act contained to the contrary notwithstanding.

[8] And be it further Enacted by the Authority aforesaid, That if any Action or Suit shall be Commenced or Brought against any Person or Persons whatsoever, for doing or causing to be done any thing in pursuance of this Act, the Defendants in such Action may Plead the General Issue, and give the Special Matter in Evidence; and if upon such Action a Verdict be given for the Defendant, or the Plaintiff become Nonsuited, or Discontinue his Action, then the Defendant shall have and recover his full Costs, for which he shall have the same Remedy as a Defendant in any case by Law hath.

[9] Provided, That nothing in this Act contained shall extend, or be construed to extend, either to Prejudice or Confirm any Right that the said Universities, or any of them, or any Person or Persons have, or claim to have, to the Printing or Reprinting any Book or Copy already Printed, or hereafter to be Printed.

[10] Provided nevertheless, That all Actions, Suits, Bills, Indictments, or Informations for any Offence that shall be Committed against this Act, shall be Brought, Sued, and Commenced within Three Months next after such Offence Committed, or else the same shall be Void and of none Effect.

[11] 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.