No. 01-618

In The
Supreme Court of the United States

ERIC ELDRED, et al.,

Petitioners,

v.

JOHN D. ASHCROFT,
in his official capacity as Attorney General,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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

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INTERESTS OF *AMICI CURIAE*

This brief *amici curiae* is submitted pursuant to Rule 37 of the Rules of this Court.[1]

Tyler T. Ochoa is a Professor and Co-Director of the Center for Intellectual Property Law at Whittier Law School. Mark Rose is a Professor of English at the University of California at Santa Barbara. Edward C. Walterscheid is a historian who has published two books and numerous articles on the history of patent and copyright law. The Organization of American Historians is the nation's largest professional association dedicated to the study of teaching American history. It is comprised of approximately 11,000 individual and institutional members and promotes preservation and access to historical sources and scholarship. H-Net: Humanities and Social Sciences OnLine is a scholarly society with over 100,000 members in more than 90 countries. H-Net currently sponsors 140 free, electronic, interactive discussion forums for scholars, teachers, advanced students and related professionals.

Amici Ochoa, Rose and Walterscheid are scholars who have studied the history and development of copyright and patent law in England and the United States. All *amici* are interested in assuring that Congressional enactments, including the Copyright Term Extension Act of 1998 (CTEA), are consistent with, rather than in conflict with, that history and development. To that end, *amici* present a summary of their understanding of that history and development to aid the Court in its deliberations.

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[1] Counsel for both parties have consented to the filing of this brief, and those consents have been filed with the Clerk of this Court. No counsel for either party authored this brief in whole or in part, and no person other than *amici* and its counsel made a monetary contribution to the preparation and submission of this brief.

SUMMARY OF ARGUMENT

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 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.

ARGUMENT

The Constitutional provision granting Congress the power "To promote the Progress of Science and useful Arts" by securing copyrights and patents "for limited Times,"[2] 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.[3] Indeed, the 1790 Copyright Act is directly modeled on the British Statute of Anne,[4] both in its title ("An Act for the Encouragement of Learning") and in many of its provisions, notably its specification of the basic term of copyright as 14 years.[5] 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 to grant monopoly privileges by means of "letters patent," in order

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[2] U.S. Const., Art. I, §8, cl. 8.

[3] *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.").

[4] 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.).

[5] 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).

to encourage foreign tradesmen and manufacturers to introduce their trades into England, and to train apprentices in their craft.[6] 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.[7] Her 1598 grant of a monopoly over the manufacture of playing cards led to the landmark case of *Darcy v. Allen*,[8] in which the judges of the King's Bench held that a patent granting a monopoly over an existing trade, as opposed to a new trade or invention, was invalid. Similar conditions were imposed on the Crown's use of monopoly patents in *The Clothworkers of Ipswich*,[9] in which it was held:

> [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.[10]

Despite these rulings, King James I continued to abuse the royal privilege of granting monopolies.[11] This led to the

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

[7] *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).

[8] 74 Eng. Rep. 1131 (K.B. 1603).

[9] 78 Eng. Rep. 147 (K.B. 1615).

[10] *Id.* at 148.

[11] Pollack, *supra* note 7, at 65-70.

enactment in 1624 of the Statute of Monopolies,[12] which declared broadly that all monopoly grants were invalid. The Statute had a number of exceptions, however, including one for new inventions "for the Term of fourteen Years or under."[13] 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."[14] 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.

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. Once secured by registration, the right to print a book continued forever, and might be bequeathed or sold to other stationers.[15] 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 1662 and

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[12] 21 Jac. I, ch. 3 (1624) (Eng.).

[13] *Id*. §6.

[14] *Id*. §5.

[15] *See* LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 47-49 (1968).

its predecessors, no book could be printed in England unless it had first been registered with the Stationers.[16]

In 1695, the Licensing Act of 1662 expired, throwing the book trade into disarray. The Stationers at first sought the revival of licensing,[17] but when that attempt failed,[18] they petitioned Parliament for an act that would re-institute their traditional guild system by confirming the Stationers' Company copyrights.[19] As introduced, the proposed legislation did not limit the duration of the Stationers' copyrights.[20]

Parliament was sympathetic to the booksellers' claims about disorders in the trade, 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 of copyrights. Thus, for the first time, one no longer had to be a member of the Stationers' Company to own copyrights.[21] Second, the proposed legislation was amended to impose term

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[16] 14 Car. 2, ch. 33 (1662) (Eng.). This requirement was used by the Crown as an instrument of censorship. *See* PATTERSON, *supra* note 15, at 114-142.

[17] *See* PATTERSON, *supra* note 15, 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.

[18] 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).

[19] *See* MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT 42-43 (1993).

[20] *Id.* at 43.

[21] PATTERSON, *supra* note 15, at 147; ROSE, *supra* note 19, at 47-48.

limits modeled on those in the Statute of Monopolies.[22] The term of copyright in new works was limited to 14 years, with the possibility of renewal for a second 14-year term if the author were still living at the end of the first.[23] 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.[24] Like the parallel provision in the Statute of Monopolies, this was a transitional provision. 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.

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 the political climate favored their cause, the booksellers asked Parliament to change the term of copyright for all books, old and new, to 21 years.[25] 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 effect would have been to extend the statutory copyright on

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[22] PATTERSON, *supra* note 15, at 144, 147-150; ROSE, *supra* note 19, at 43-45.

[23] 8 Anne ch. 19 (1710) (Eng.).

[24] *Id*.

[25] ROSE, *supra* note 19, at 52-53. This bill actually reduced the copyright on new books from two fourteen-year terms, or a total of twenty-eight years, to a single twenty-one-year term. In effect, it traded a shorter term on new books for extended protection of valuable old books.

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 . . . [26]

Not surprisingly, the booksellers' bill failed in the House of Lords, which was particularly hostile to anything that smacked of monopoly.[27] Two years later in 1737, when the booksellers again sought a term extension, a second bill was also defeated by the House of Lords.[28]

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 Statute of Anne, the great London booksellers regarded these reprints as piracies. They argued that copyright was fundamentally a matter of common law, not statutory law. Labor, they maintained, gave authors a

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[26] 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 Appendix A.

[27] ROSE, *supra* note 19, at 56. The bill died when the second reading was postponed. 24 H.L. Jour. 550 (1735).

[28] ROSE, *supra* note 19, 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).

natural 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.[29] 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 was reached, however, until 1769, when in *Millar v. Taylor*[30] the court of King's Bench ruled by a three-to-one vote that there was 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*,[31] 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*,[32] 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

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[29] ROSE, *supra* note 19, at 4-8 & 67-91.

[30] 4 Burr. 2303, 98 Eng. Rep. 201 (K.B. 1769).

[31] *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).

[32] 4 Burr. 2408, 98 Eng. Rep. 257 (H.L. 1774).

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 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 divested by the Statute of Anne.[33] 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.[34]

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.[35] 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

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[33] *Id.* 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 19, 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 claim that the peers had simply followed the vote of the judges, which was not the case. *Id.* at 1169-70; ROSE, *supra* note 19, at 107-10.

[34] *See* ROSE, *supra* note 19, 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 33, at 1159-64.

[35] *See* ROSE, *supra* note 19, at 97.

decision had positive effects. 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.[36] 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.

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. State Copyright and Patent Laws under the Articles of Confederation

In March 1783, in response to several authors' petitions, the Continental Congress appointed a committee

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[36] 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).

"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."[37] 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 the general extension of arts and commerce."[38] Under the Articles of Confederation, the Continental Congress had no authority to issue copyrights; so on May 2, 1783, it 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.[39]

Three states had already enacted copyright statutes earlier that year; and within three years all of the remaining states except Delaware had followed suit.[40] As had the Continental Congress' resolution, the preambles of several

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[37] NATIONAL ARCHIVES, PAPERS OF THE CONTINENTAL CONGRESS, No. 36, II, folios 113-114, *reprinted in* BRUCE W. BUGBEE, THE GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW 112 (1967). 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).

[38] 24 JOURNALS OF THE CONTINENTAL CONGRESS 326 (May 2, 1783). In so stating, this report set forth both natural right and utilitarian justifications for copyright.

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

[40] *See* COPYRIGHT ENACTMENTS, *supra* note 39, at 11-31.

of these statutes set forth both natural right and utilitarian justifications for copyright. 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 14-year terms.[41] The five remaining States granted copyrights for single terms of 14,[42] 20,[43] and 21[44] years' duration, with no right of renewal.

South Carolina's copyright statute also included the only general 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."[45] Throughout this time period, however, the states continued to enact individual patents.[46] The terms of these patents were sometimes as short as five years; but the English fourteen-year term became "almost universal among state patents issued in 1786 and thereafter."[47]

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[41] *See* Act of Jan. 29, 1783 (Conn.); Act of Apr. 21, 1783 (Md.); Act of May 27, 1783 (N.J.); Act of Mar. 15, 1784 (Pa.); Act of Mar. 26, 1784 (S.C.); Act of Feb. 3, 1786 (Ga.); Act of Apr. 29, 1786 (N.Y.), *in* COPYRIGHT ENACTMENTS at 11-13, 15-17, 20-24, 27-31.

[42] Act of Nov. 18, 1785 (N.C.), *in* COPYRIGHT ENACTMENTS at 25-27.

[43] Act of Nov. 7, 1783 (N.H.), *in* COPYRIGHT ENACTMENTS at 18.

[44] *See* Act of Mar. 17, 1783 (Mass.); Act of Dec. 1783 (R.I.); Act of Oct. 1785 (Va.), *in* COPYRIGHT ENACTMENTS at 14-15, 19, 24-25.

[45] Act of Mar. 26, 1784 (S.C.), *in* COPYRIGHT ENACTMENTS, at 23.

[46] *See generally* BUGBEE, *supra* note 37, at 84-103.

[47] *Id.* at 101.

B. 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. Madison's proposal read: "To secure to literary authors their copy rights for a limited time."[48] Pinckney's proposal read: "To secure to Authors exclusive rights for a certain time."[49] Pinckney also proposed that Congress be given the power "to grant patents for useful inventions."[50] These proposals were referred to the Committee on Detail. Later, provisions which had not been acted upon were referred to the Committee of Eleven (of which Madison was a member),[51] which drafted the Patent and Copyright Clause as it exists today, and recommended its adoption.[52] The clause was unanimously approved by the delegates with no debate.[53]

The language of the Clause is ambiguous when it speaks of "securing" exclusive rights. For the next 47 years, the 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." In *Wheaton v. Peters*,[54] this Court held the utilitarian view

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[48] JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 (Ohio Univ. Press 1966) at 477 (Aug. 18, 1787).

[49] *Id*. at 478.

[50] *Id*.

[51] *Id*. at 569 (Aug. 31, 1787).

[52] *Id*. at 580 (Sept. 5, 1787).

[53] *Id*. at 581 (Sept. 5, 1787).

[54] 33 U.S. (8 Pet.) 591 (1834). *See* Section III.D., below.

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 in their inventions.[55]

In the 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.[56]

In light of the decision in *Donaldson v. Beckett*,[57] Madison's statement that copyright had been adjudged to be a common-law right is problematic. It has been suggested 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

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[55] *Id*. at 661. *See also* CHRISTINE P. MACLEOD, INVENTING THE INDUSTRIAL REVOLUTION: THE ENGLISH PATENT SYSTEM 1660-1800 198 (1988) (in *Donaldson*, "the *lack* of a natural right in mechanical inventions provided a fixed pole of the debate.") (emphasis in original). In a 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).

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

[57] *See* Section I.C., above.

Donaldson.[58] 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.[59] 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.[60] 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.[61] This seems to preclude any argument that Madison believed the Clause was "securing" a pre-existing right.[62]

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,[63] and future Justice

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[58] *See* 2 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 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 common-law copyright, and that he argued the booksellers' cause in both *Tonson v. Collins* (1760) and *Millar v. Taylor*.

[59] *See* 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).

[60] *See* Abrams, *supra* note 33, at 1177-78.

[61] *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).

[62] For a more extensive analysis, *see* EDWARD C. WALTERSCHEID, THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE 201-238 (2002).

[63] *See* 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 415 (Merrill Jensen, ed. 1976).

James Iredell of North Carolina.[64] Iredell also set forth the utilitarian justification for copyright, saying, "such encouragement may give birth to many excellent writings which would otherwise have never appeared."[65]

The stipulation that patent and copyright protection be granted only "for limited Times," only to "authors" and "inventors," and only "To 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."[66] 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.[67]

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[64] *See* 16 DOCUMENTARY HISTORY, *supra* note 63, at 386 note (c).

[65] *Id*. at 382.

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

[67] Letter from Jefferson to Madison (July 31, 1788), *in* 13 THE PAPERS OF THOMAS JEFFERSON 442-43 (Princeton 1956).

Madison replied in a letter dated October 17, 1788:

> 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?[68]

Madison's explanation is revealing in several respects. First, it endorses the utilitarian justification for copyrights and patents. Second, in using the words "privilege" and "grant," it 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.[69]

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

[69] Letter from Jefferson to Madison (Aug. 28, 1789), *in* 15 THE PAPERS OF THOMAS JEFFERSON 367-68 (Princeton 1958).

Jefferson's concerns were widely shared by others at the time. George 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."[70] Elbridge Gerry of Massachusetts refused to sign for similar reasons.[71] 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."[72] In addition, the ratifying conventions of four states requested an amendment expressly restricting Congress' power to grant "exclusive advantages of commerce."[73]

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

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[70] 8 DOCUMENTARY HISTORY, *supra* note 63, at 45.

[71] 4 DOCUMENTARY HISTORY, *supra* note 63, at 14.

[72] 13 DOCUMENTARY HISTORY, *supra* note 63, at 482. *See also* 4 DOCUMENTARY HISTORY, *supra* note 63, at 428 ("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. . . . [In England,] Individuals have been enriched, but the country at large has been hurt.") ("Agrippa").

[73] 2 THE DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 1786-1870 (State Dept. 1894) at 95 (Massachusetts), 142 (New Hampshire), 198 (New York) 274 (North Carolina).

them by the Clause.[74] Expressions of anti-monopoly sentiment were sometimes qualified in this regard.[75]

Many years later, in a manuscript 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. . . .[76]

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

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[74] *See* 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 62, at 10.

[75] 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 and an exception to the rule." 14 DOCUMENTARY HISTORY, *supra* note 63, at 76. And in Pennsylvania, "Centinel" wrote "that monopolies in trade or arts, other than to authors of books or inventors of useful arts, ought not to be suffered." 13 DOCUMENTARY HISTORY, *supra* note 63, at 466.

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

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 14 years, with a right of renewal for another 14-year term if the author survived to the end of the first term.[77] The Act covered "any map, 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."[78] 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 term 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,[79] 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;[80] but the availability of a renewal term ensured that no author would be deprived of the term that

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

[78] *Id*.

[79] *See* Section I.B., above.

[80] *See* Section II.A., above.

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."[81] No provision was made for the extension or renewal of a patent.[82] 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.[83]

B. Private Patent and Copyright Laws

In 1808, Congress extended by private act the term of a patent owned by inventor Oliver Evans.[84] Evans' patent had been held invalid because the face of the document did not recite the allegations made in the patent application.[85] 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

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

[82] Because of this omission, many inventors petitioned Congress for 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. This 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. *See* Tyler T. Ochoa, *Patent and Copyright Term Extension and the Constitution: A Historical Perspective*, 49 J. Copyr. Soc'y USA 19, 52-54 (2002).

[83] Patent Act of 1793, §7, ch. 11, 1 Stat. 322.

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

[85] Evans v. Chambers, 8 F. Cas. 837 (C.C.D. Pa. 1807) (No. 4,555).

decision] would admit the invalidity of all the patents issued in the same form since the commencement of the Government."[86] 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,[87] 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.[88] Similar equitable adjustments of individual patent terms have been granted in recent years for reasons beyond the inventor's control, such as war, judicial corruption, and delay in FDA approval.[89]

In 1828, Congress extended by private act the copyright in a book of tables of discount and interest compiled by James Rowlett.[90] 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

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[86] *See* AMERICAN STATE PAPERS, No. 231, 1 Misc. 646 (1807).

[87] 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). 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.

[88] 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 82, at 58-72, 97-109.

[89] *See* Ochoa, *supra* note 82, at 72-82.

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

money he had lost on the first edition.[91] At that time, the investment of time and money was at least arguably an acceptable basis for copyright protection; but now that this Court has firmly rejected the "sweat of the brow" doctrine as inconsistent with the Patent and Copyright Clause, the basis of Rowlett's claim to an extension has been eroded.[92] Since then, Congress has extended a copyright by private act only once, and that extension was held invalid.[93]

C. The Copyright Act of 1831

In 1826, Noah Webster wrote to Daniel Webster, seeking his assistance in securing a perpetual copyright, saying "an author has, by common law, or natural justice, the sole and *permanent* right to make profit by his own labor."[94] Daniel Webster replied that he would forward the letter to the House 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."[95]

Noah Webster's son-in-law, William W. Ellsworth, was elected to Congress in 1828 and was appointed to the Judiciary Committee. Webster "applied to him to make efforts to procure the enactment of a new copy-right law."[96]

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[91] *See* Ochoa, *supra* note 82, at 46-48.

[92] Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340 (1991); *see* Ochoa, *supra* note 82, at 50-51.

[93] Priv. L. No. 92-60, 85 Stat. 857 (1971); United Christian Scientists v. Christian Science Board of Directors, 829 F.2d 1152 (D.C. Cir. 1987).

[94] 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) (emphasis in original).

[95] *Id.* at 176-77.

[96] *Id.* at 177.

The Report prepared by Ellsworth for the Judiciary 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."[97] 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 a limited time, as was obviously intended."[98]

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,[99] the term of which was extended to all subsisting copyrights.[100]

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."[101] He noted that patents were limited 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;

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[97] 7 GALES & SETON'S REGISTER OF DEBATES IN CONGRESS cxx (Dec. 17, 1830).

[98] *Id.* at cxix.

[99] Copyright Act of 1831, §§1-2, ch. 16, 4 Stat. 436.

[100] *Id.* §16, 4 Stat. 439.

[101] 7 GALES & SETON'S REGISTER OF DEBATES at 423 (Jan. 6, 1831).

> and the latter . . . had the right to avail themselves of the work, when the copyright expired.[102]

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."[103] 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."[104]

This record reveals that the 1831 term extension was based on the view that copyright was a natural right of the author.[105] Three years later, this view was rejected by the U.S. Supreme Court in *Wheaton v. Peters*.

D. Wheaton v. Peters

In 1827, Richard Peters succeeded Henry Wheaton as the reporter of decisions for the U.S. Supreme Court.[106] In 1829, Peters began to publish "Condensed Reports" of the cases that had been decided prior to his appointment.[107]

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[102] *Id.*

[103] *Id.*

[104] *Id.* at 424. 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." *Id.*

[105] It should be noted that by 1831, not a single member of the Constitutional Convention or the First Congress remained in Congress.

[106] *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).

[107] *Id.* at 1362-70.

Wheaton and his publisher sued, alleging that Peters had copied Wheaton's Reports. Peters answered that Wheaton had not complied with the requirements for obtaining a statutory copyright, and that no right to common-law copyright existed. Circuit Judge Joseph Hopkinson agreed, dismissing the complaint and dissolving the preliminary injunction on January 9, 1833.[108]

On appeal, 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."[109] Representing Peters, Joseph Reed Ingersoll argued that Wheaton's view was inconsistent with the Patent and Copyright Clause, saying "[t]here would be no occasion to secure for a limited time, if the exclusive right already existed in perpetuity."[110]

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

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[108] 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 Supreme Court opinion made it clear that Wheaton could not claim a common-law copyright.

[109] 33 U.S. at 595-96, *citing* Millar v. Taylor, 4 Burr. 2303 (K.B. 1769).

[110] 33 U.S. at 629.

> still considered, in England, as a question by no means free from doubt.
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> 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. . . . [111]

In so holding, the Court expressly relied on the lack of a natural right in inventions.[112] 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.[113]

The Court concluded that "Congress, then, by this act, instead of sanctioning an existing right, as contended for, created it. . . . [I]f the right of the complainants can be sustained, it must be sustained under the acts of congress."[114]

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

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[111] *Id.* at 657.

[112] *Id.* at 657-58.

[113] *Id.* at 661. *See also* note 55, above.

[114] *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.

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. 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."[115]

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 of the present case seem strikingly parallel to those of 18th-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 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." His warning seems as relevant today as they 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? In the words of the pamphleteer, it will be "a great

[115] JAMES MADISON, WRITINGS 756 (Jack N. Rakove ed. 1999).

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."

Respectfully submitted,

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APPENDIX A

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)[1]

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

[1] This is a transcript of a broadside publication, from the copy in the Bodleian Library, Oxford (Ms. Carte 207 f. 31).

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.

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.