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A historical perspective exists for copyright law

Looking at the past sometimes helps us have a better understanding of the present. Americans are criticized for having a weak grasp of history. A recent poll (Marist Poll, July 2011) asked Americans in which year the U.S. declared its independence. Only 58 percent knew the correct answer (yes, it is 1776). The results were worse for younger respondents. Only 31 percent of adults younger than 30 got it right.

So I thought it would be useful to take a look at the historical underpinnings of U.S. copyright law. U.S. copyright law has its roots in English law, specifically the Statute of Anne, enacted in 1710. The Statute of Anne was the first statute to specifically recognize the rights of authors. Prior to that time, the right to print and publish books was subject to a monopoly granted in 1557 by the crown to the Stationers' Co., a group of London printers and booksellers. This monopoly was used by the crown not only to provide economic benefit to the publishers, but also as a tool of censorship.

The Statute of Anne was significant because for the first time it recognized and protected the rights of the authors themselves rather than vesting power solely in the hands of the printing companies. The need for the law is seen in the preamble, which states:

"Printers, Booksellers and other Persons have of late frequently taken the Liberty of Printing, Reprinting, and Publishing ... Books and other Writings without the Consent of the Authors ... to their very great Detriment, and too often to the Ruin of them and their Families."

The stated purpose of the statute was "for Preventing such Practices for the future, and for the Encouragement of Learned Men to Compose and write useful Books."

The American Colonies were strongly influenced by the Statute of Anne.

Twelve of the 13 colonies enacted copyright laws, as a result, in part, of the lobbying efforts of Noah Webster. However, it was clear that nationwide protection of copyrights was necessary, not just protection limited by the boundaries of the individual colonies.



Inside IP Law

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The framers of the Constitution understood the need to protect authors' rights. In the Federalist Papers (No. 43), James Madison wrote of copyright protection:

"The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law. ... The public good fully coincides (in the case of copyright) with the claims of individuals."

The recognition of authors' rights was embodied in Article I, Section 8, Clause 8 of the Constitution:

"Congress shall have the power ... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

It is interesting to note that this clause contains the only use of the word "right" in the entire main body of the Constitution. As such, it preceded all of the now well-known rights in what would soon become our Bill of Rights.

Having been granted the power to legislate in the area of copyrights, Congress wasted no time in exercising that power. The very next year, in 1790, the first Congress enacted the first U.S. copyright law. The original act was narrow, granting protection only to "maps, charts and books." The author's exclusive rights consisted only of the rights to "print, reprint, publish

and vend" these works for a period of 14 years, renewable for a second term of 14 years (the same duration as existed in England under the Statute of Anne).

Over the years, both the subject matter of copyright and the scope of copyright protection have broadened substantially. Prints were added to the list of protected works in 1802, followed by, among others, musical compositions (1831); photographs (1865); paintings, drawings and sculpture (1870); motion pictures (1912); sound recordings (1972); and architectural works (1990). The exclusive rights of the author now include not only the right to reproduce and distribute a work, but also the right to perform, display and make derivative works. In 1995, Congress added the exclusive right to perform sound recordings "by means of a digital audio transmission." The Copyright Act has constantly (though sometimes a bit too slowly) responded to the advent of new technology to address current needs. While books, maps and charts of the sea were of utmost importance in 1790, digital technology now is the center of much copyright legislation. In 1998 Congress passed the Digital Millennium Copyright Act which, among other things, provides Internet service providers with certain safe harbors against claims of infringement.

Some of the early cases in our copyright jurisprudence have much to teach us as well. For example, a Supreme Court case from 1884 involving one of the nation's first celebrity photographers has played a key role in the history of copyright law and the recognition of the rights of creative artists. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884).

Napoleon Sarony was a photographer of note in New York City. He created a photograph of the author Oscar Wilde, splendidly outfitted, with a pensive look on his face and volume in hand. The defendant, Burrow-Giles, without authorization, sold 85,000 copies of the photo. Burrow-Giles defended the claim of copyright infringement by arguing that photographs could not be protected by copyright because a photograph is not "the production of an author," as required by the Constitution, but rather a "mere

mechanical reproduction of the physical features or outlines of some object animate or inanimate.” The court rejected the view that the photographer was nothing more than an automaton and found that the photo in the case was an original work of authorship. The court’s description of the creativity of a photographer’s work is still germane today:

“The photograph is a useful, new, harmonious, characteristic and graceful picture and Sarony made it entirely from his own original mental conception, to which he gave visible form by posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression and from such

disposition, arrangement or representation, made entirely by Sarony, he produced the picture in suit.”

Accordingly, Sarony’s claim of copyright infringement was upheld. If you’re curious, you can find the famous photo of Oscar Wilde at the Wikipedia page for Napoleon Sarony, where you’ll also find an impressive self-portrait photo of Sarony himself, with fez and handlebar mustache.

Another important early case is *Folsom v. Marsh*, 9 F. Cas. 342 (D. Mass. 1841), authored by Justice Joseph Story of the U.S. Supreme Court. The case involved the unauthorized republication of certain letters of George Washington. The defendant argued against infringement because he republished only some and not all of the letters from the original work. Story answered:

“It is certainly not necessary, to constitute an invasion of copyright, that the whole

of the work should be copied, or even a large portion of it, in form or substance. If so much is taken, that the value of the original is sensibly diminished or the labors of the original author are substantially to an injurious extent appropriated by another, that is sufficient, in point of law, to constitute a piracy pro tanto. The entirety of the copyright is the property of the author and it is no defense that another person has appropriated a part, and not the whole, of any property.”

In the 170 years since that opinion, one is hard pressed to find a better articulation of the test for substantial similarity in an infringement case.

Historical perspective is important. Let it not be said when the next historical poll is taken that the readers of this column do not know the date of the Statute of Anne and its influence on U.S. copyright law.