2010

Statute of Anne: Today and Tomorrow

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Recommended Citation  
Leaffer, Marshall; Jaszi, Peter; Joyce, Craig; and Ochoa, Tyler, "Statute of Anne: Today and Tomorrow" (2010). *Articles by Maurer Faculty*. Paper 832.  
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EPILOGUE

THE STATUTE OF ANNE:
TODAY AND TOMORROW

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By the time you read these few concluding observations, the
time for celebrating the 300th Anniversary of the Statute of
Anne will have come—but not gone! While the official
commemoration of this momentous event in copyright history
was April 10, 2010, the importance of the Statute of Anne—as a
measure for where copyright has been, what it has become, and
what it may yet be—continues.

In 1710 (had anyone given the point any thought), the
likelihood that this newly-minted statutory scheme would
someday assume an important position in the corpus juris could
not have seemed very high. Essentially, the first copyright act
represented a modest regulatory response to a specialized social
problem of less than earth-shaking proportions: the growing
insecurity of capital investments in the burgeoning London-based
publishing business. Many means might have been chosen to
address this problem. In fact, Parliament elected to stabilize the
market in printed books by recognizing a portable legal right in

1. Adapted from CRAIG JOYCE, MARSHALL LEAFFER, PETER JASZI & TYLER OCHOA,
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texts which vested initially in their creators, while acknowledging the existence of a "public interest" in access to information. These elections, as we know, proved to be fateful. Unbeknownst to its members, the Parliament of 1710 managed to invent a formula which has been flexible enough to serve as the primary vehicle for nearly three centuries of legal responses to changes in the way information is made, stored, sold, and used.

Considered as a whole, the history of Anglo-American copyright law has been a remarkable one, driven, in significant part, by the waves of innovation in information technology that are a hallmark of the late modern period. But the relationship between ever-accelerating technological progress and the development of copyright doctrine has not been simple. Technology itself does not drive the development of copyright law. Rather, copyright is driven by the changes in social life, economic organization, and cultural outlook that technology inspires. To complicate the pattern further, copyright law has helped to shape these changes, even as it has been shaped by them.

In the United States at least, where the basic framework of law laid down by the Statute of Anne has persisted the longest, the story of copyright now has entered a new era—one in which this body of law is being remade more radically and more rapidly than at any other point in its history. In retrospect, at least, we can see the process of law revision which began in the early 1960s and culminated in the Copyright Act of 1976—a tectonic shifting of the plates—as the crucial episode in the modern transformation of copyright, paving the way for future efforts at harmonization and the development of international norms. But if the 1976 Act represented a critical reconsideration of historic theory and practice in this branch of the law, events since the Act took effect in 1978 have been even more dramatic—and those of the next decade may be even more so. Today, copyright law is subject to extraordinary new pressures. As never before, the globalization of information commerce has subjected U.S. copyright law to a variety of external forces, including international legal norms and the ideological influences of foreign laws of literary and artistic property. Meanwhile, copyright law is being pressed to adapt to the new realities of the digital condition—and to do so without the delay associated with its past accommodations to technological developments. What can be

guessed, then, about the vectors of change along which these pressures will direct the law of copyright in years to come?

To frame the speculations that follow, it may be worthwhile to point out that, although U.S. copyright always has had many features in common with the analogous laws of other countries, it also has maintained a somewhat distinct identity, not least where thinking about goals and purposes is concerned. Like all laws of literary and artistic property, ours has been affected by a deep-seated vision of inherent authorial entitlement. Unlike most other national laws, however, U.S. copyright has not developed primarily from a discourse dominated by that vision. Instead, the discussion of copyright policy in the United States has been characterized largely, at least for most of its history, by a shared rhetoric of public purpose. Like the laws of other countries which inherited the British legal tradition, U.S. copyright law is explicitly premised on a vision in which grants of information monopolies to individuals are rationalized as incentives to the creation and distribution of information for the benefit of all. Unlike some other national laws rooted in the Statute of Anne, U.S. copyright has remained overtly faithful to that vision. Put differently, U.S. copyright law has been conceived as an instrument of national cultural policy, rather than a mere scheme of private rights. From its inception, it has been the vehicle for the balancing of private proprietary claims and the public interest in access to information resources.

The concept of purpose just described has been of more than merely rhetorical significance. Where copyright doctrine is concerned, it has had an important generative influence. It explains the "limited Times" language of the constitutional Copyright Clause. It helps account for the historical commitment of U.S. copyright law to the various "formalities" that formed part of the public price that rights holders were expected to pay for their private privileges. And it informs many of the most characteristic and distinct features of U.S. law as it stands today, including its insistence on the exclusion of protection for factual and governmental information and its broad conception of a residual "fair use" exception to claims of copyright infringement.

Intimately related to U.S. copyright's special vision of purpose (and its cognate doctrinal peculiarities) is its unusual

3. For detailed discussion of the matters that follow, with citations to pertinent statutory provisions and case law, see generally JOYCE, supra note 1.
position of primacy in the field of information law. As we know, copyright shares the field of federal intellectual property with other bodies of rules. Where proprietary rights and use privileges in intangible expression are concerned, however, it stands more or less entirely alone. Until very recently indeed, Congress had not seen fit to enact any “neighboring rights” legislation of the sort that is common abroad, displaying instead a positive antipathy toward the notion of specialized protections of lesser scope and duration than those afforded by copyright. In the United States, policy choices regarding the recognition of federal proprietary rights for new forms of expression historically have been framed in quite singular fashion: protection under copyright or no protection at all. Similarly, the preemption doctrine has kept the underbrush of state laws relating to rights in information under fairly rigorous check. In the United States, then, copyright law consistently has represented more than a mere set of default rules for interest-balancing in the domain of cultural production. Instead, it has represented the definitive expression of a collective social judgment about what forms such balancing should take.

The preceding paragraphs represent an effort to articulate the basis for our persistent sense of the “special character” of U.S. copyright law. It is precisely those features of the law, however, which have been under pressure for most of the last half-century and are under ever-increasing pressure today. The next decade or so of developments will provide at least a tentative answer to this question, among others: As we enter the fourth century of statutory copyright law, what remains of the special copyright tradition, first engendered by the Statute of Anne, of which the United States is arguably the preeminent inheritor?

Imagine a Rip Van Winkle of intellectual property (or, indeed, Good Queen Anne herself!), who dozed off in 1710, only to awaken three centuries later, in 2010. How easily would he (or she) recognize copyright doctrine—or copyright discourse—in this tri-centennial year? And if the answer is “only with difficulty,” does it really matter?
Where copyright doctrine is concerned, U.S. law has been substantially remade by the Copyright Act of 1976, subsequent legislative revisions, and the explosive growth of copyright case law. That process of revision is likely to continue unabated in the decade to come. Of course, some of the most peculiar—even anomalous—features of U.S. copyright doctrine are unlikely to be displaced. The work-for-hire doctrine, for example, represents too great a convenience to corporate copyright owners to be lightly discarded (although U.S. efforts to persuade the rest of the world to adopt or at least defer to it have been less than wholly successful).

In other respects, however, our sleeper would be in for a rude awakening. Getting over his first shock at the sheer volume and density of our increasingly muscle-bound (and consequently inflexible) copyright statute, with all its new, exquisitely qualified specialized provisions, he might reflect on the end of the dream of a “unified field” theory of copyright. Almost certainly, he would marvel at the range of new subject matter categories
(including “works” resolutely unintelligible to the ordinary information consumer)—as well as the proliferation of “rights” and the reflexive growth in the complexity and sophistication of infringement analysis. Likewise, he might note the remarkable punitive turn reflected in the trend toward the criminalization of copyright remedies and the decoupling of civil remedies from ideas of actual harm and benefit. But of all the intervening developments, perhaps none would appear as so dramatic a break with the past as the unseating of “publication” as the triggering event for the attachment of copyright and the enthronement of “fixation” in its place—the “big bang” of 1978, by which the copyright universe expanded to embrace our private letters, laundry lists, and doodles, as well as our undying literary and artistic effusions.

Presumably, changes in the calculus of copyright term—including, in particular, the life-plus-70 regime—also would come as a surprise to our newly awakened sleeper. Even more surprising, one suspects, would be the breach of the once-axiomatic principle that a work once in the public domain should remain in the public domain—a principle set aside in 1994 where various works of foreign origin are concerned and perhaps to be challenged, in due course, with respect to domestic works as well.

The familiar © notice might seem to offer a comfortingly stable point of reference when the sleeper wakes. But when he inspected it more closely, that sense of comfort would be likely to fade with the realization that copyright formalities are not what they used to be. And while the fair use doctrine—that monument to the singularity of U.S. copyright law—still looms large over the much changed landscape of copyright in 2010, an attentive listener can hear rumblings emanating from the growing influence of the “three-part test” of TRIPS Article 13.

Extrapolation from today’s situation suggests that, whatever the changes in doctrine, copyright discourse in the teen years of the twenty-first century may be even more dramatically different than those produced by the decades just past. Hearing longer, stronger protection justified in microeconomic terms, as promoting the efficient allocation of information resources, and the public domain derided as a wasteland of abandoned interests, our sleeper might wonder what had become of the once-dominant notion of a “public–private bargain” at the heart of copyright. Likewise, he probably would be struck by the continuing viability of the rhetoric of “misappropriation”—once associated only with various obscure and suspect state-law doctrines—in mainstream discussions of copyright itself. He would be moved to wonder how limitations and exceptions to copyright, seen in his time as a fully
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integrated part of the distribution of rights and privileges in the overall copyright system, could now be widely characterized as burdens or impositions on the rights of owners. And he would be puzzled to hear so much said about the centrality of copyright to the U.S. foreign balance of payments and to the welfare of information-owning corporations—and so little about its importance in the working lives of individual creators.

It seems entirely possible, however, that the greatest surprise of all might be the gathering demise of copyright's historical—and sometimes splendid—isolation. In the not-too-distant future, for example, it is reasonable to expect renewed pressure for federal database protection legislation outside copyright law, extending protection under a Commerce Clause-based scheme of neighboring rights to precisely the subject matter that the decision in *Feist Publications, Inc. v. Rural Telephone Service Company, Inc.* 4 marked as out-of-bounds for copyright. Still other forms of *sui generis* protection may emerge, including comprehensive registration-based protection for designs excluded from copyright on account of their utility—following the path blazed by the introduction of rights for boat hulls in 1998. Even today, various state-law doctrines, such as the "right of publicity," are giving copyright a run for its money, while enjoying widespread immunity from preemption. Our waking sleeper could live to see a world in which "shrink-wrap" and "click-through" licenses, enforceable under state laws, have reduced the norms of copyright to an easily overridden "default setting" where the distribution of works in digital formats is concerned!

Already, under the Digital Millennium Copyright Act, information use is regulated by elaborate systems of "technological safeguards," themselves backed up by the new non-copyright provisions of Title 17 imposing various pains and penalties on those who circumvent them or enable their circumvention. Indeed, our sleeper would be waking to an unforeseen world in which information consumers are required to secure licenses for more and more uses of proprietary content, no matter how trivial in amount and no matter how fully justified in terms of traditional copyright categories such as fair use. It is something of a paradox that, in such a brave new world, the best hopes for safeguarding a vestige of a "public interest" in access to information may lie outside copyright itself, in the doctrines of competition law which today are beginning to impinge on intellectual property.

However the just-sketched scenario of copyright's possible "marginalization" plays out, it is clear today that—in yet another sense—the historic isolation of U.S. copyright law already is a thing of the past. Whether we locate the decisive shift in 1891 (passage of the Chace Act)\(^5\) or 1988 (U.S. adherence to the Berne Convention),\(^6\) the United States now is enmeshed irrevocably with the larger world where copyright is concerned—and copyright itself is no longer an independent category in the international legal order in this post-TRIPS era. In years to come, we will hear more calls to revise domestic copyright law in the cause of "harmonization" with the intellectual property norms of other nations, reinforced by reminders that only harmonization can protect us from being haled before the World Trade Organization to justify the peculiarities of our own regime.

The elegiac tone of the preceding passages is quite intentional—but it may or may not be justified. Even as we celebrate the adoption of the world's first-ever copyright statute three centuries ago this year, our duty to those joining in the celebration vicariously through these pages is to be accurate, informed, clear, insightful, and at least occasionally provocative. We need to acknowledge, too, the possibility that our own attachment to many of the old ways of U.S. copyright law, so many of them derived so directly from Anne's landmark legislation, may be a matter of mere sentimentality or antiquarian taste. Perhaps, after all, the changes that have been underway since the mid-1960s, and which seem likely to continue beyond the 2010 celebrations, will prove to have been all for the good—or, at least, inevitable in the great scheme of history. And yet . . .

We should not forget that the law of copyright, particularly as it has been developed in the United States from its English antecedents, has made a remarkable contribution to the development not only of the U.S. economy, but of American culture and freedoms as well. In particular, the profound alliance between the Copyright Clause and the First Amendment—stretching from the idea-expression dichotomy to our broadly formulated principle of fair use, with deference throughout to the concept of a vital public domain—affords to at least parts of traditional U.S. copyright law a deep and abiding appeal. In a world increasingly linked by a system of commerce of which the United States has

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been the principal proponent—a world in which America’s political and cultural ideas likewise have continued (despite occasional missteps) to gain adherents—it is perhaps not too much to hope that the modest republican virtues of our copyright law may yet survive.

As a reawakened Rip Van Winkle might remind us from his knowledge of U.S. history, copyright’s long record of carefully calibrated encouragement for learning requires no resort to jingoism to justify its continuance. American copyright law, whatever its failings, has played an indisputably central role in making the United States today the world’s preeminent creator and exporter of intangible information products. We would suggest that copyright has been able to play this role precisely because of, rather than in spite of, its doctrinal and theoretical peculiarities—and, specifically, because of its success over time in balancing proprietary rights and public access. Through the process of successive approximation which is the special genius of a common law system, the United States has managed to negotiate a course between overprotection and underprotection, and to strike at least a rough balance between the social interest in securing capital investment, on the one hand, and encouraging both innovation and free expression, on the other. Perhaps, in years to come, we will be able to recalibrate that balance without overcompensating. If not, perhaps the entailed consequences of our collective failure to do so will make us wish eventually that we had left well enough alone.

At the end of the day—and of this year of celebration—what should we make of the trends and tendencies according to which copyright law is being remade from its ancient antecedents? The truest answer is also the ultimate proverbial cop-out: Only time will tell. Whatever may lie beyond the horizon for this venerable body of law, the challenge for those of us vitally interested in its sound further development—whether as teachers, scholars, practitioners, or judges—is to help educate, with an eye to lessons learned, the new generation of copyright lawyers who will shape that law in the post-tricentennial period. Our plea is a simple one. In the pursuit of rationalization and harmonization with cognate laws of other lands, let us not be too ready to discard whatever may remain of the unique traditions of Anglo-American copyright law. After all, they may yet come in handy.