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The DMCA: A Modern Version of the Licensing Act of 1662

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THE DMCA: A MODERN VERSION OF THE LICENSING ACT OF 1662*

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I. INTRODUCTION

The thesis of this Article is that the Digital Millennium Copyright Act of 1998 (DMCA)[1] in the United States is a modern version of the Licensing Act of 1662[2] in England. The English censorship statute is sufficiently obscure to merit an explanation of why the similarity and why it makes a difference. The reasons can be simply stated. The statutes are similar because they represent the same goals: the control of access to ideas. The similarities make a difference because a legal construct to control public access to ideas undermines—and will eventually destroy—the right of free speech, the foundation of a free society. The Licensing Act and the DMCA are such constructs with one major difference. Under the Licensing Act, the persons given the power to determine what materials could be made accessible to the populace were public officials acting for the government; under the DMCA, they are private copyright holders acting for themselves as the beneficiaries of the copyright monopoly.

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* Editor's Note: Two proposals to amend the DMCA were introduced in the House of Representatives on October 2d and 3d, 2002. Both "The Digital Choice and Freedom Act" (H.R. 5522) and "The Digital Media Consumers' Rights Act" (H.R. 5544) were drafted in part to amend the anticircumvention provisions at section 1201 of Title 17.

One of the stated goals of the Digital Choice and Freedom Act of 2002 [hereinafter DCFA] is to "restore the traditional balance between copyright holders and society, as intended by the 105th Congress, [which enacted the DMCA]." The DCFA notes in part that section "1201 has been interpreted to prohibit all users— even lawful ones— from circumventing technical restrictions for any reason .... [and that a]s a result, the lawful consumer cannot legally circumvent technological restrictions, even if he or she is simply trying to exercise a fair use or to utilize the work on a different digital media device." H.R. 5522, 107th Cong. (2002) (citing *Universal City Studios, Inc. v Reimerdes*, 111 F. Supp. 2d 294, 321-24 (S.D.N.Y. 2000)).

Similarly, in introducing the Digital Media Consumer's Rights Act [hereinafter DMCRA], Representative Boucher stated that the enactment of the DMCA "dramatically tilted the balance in the Copyright Act toward content protection and away from information availability." 148 CONG. REC. E1761 (extensions of remarks ed. October 4, 2002) (statement of Rep. Boucher).

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[1] 17 U.S.C. § 1201 *et seq.* (2000).

[2] 13 & 14 Car. II, c. 33 (Eng.).

This difference would seem to give the advantage to the Licensing Act for effectiveness, but the perception is misleading. The political purpose that led to the Licensing Act was narrower than the profit purpose that led to the DMCA. The goal of the English statute was to deny public access only to "heretical, schismatical, blasphemous, seditious and treasonable" works.[3] The goal of the DMCA is to substitute for the public's right of free access to published material the duty to pay a license fee whenever the material containing ideas is digitized. The motive behind the earlier statute was political, while the motive behind the contemporary statute is economic, which explains why the former was concerned with substance, and the latter with form. The significance: The concern for substance limited the material to be censored to a particular subject (e.g., religion), but the concern for form extends to all material in the protected format whatever its subject (e.g., a popular song or a Shakespeare play).

The political motive also tends to result in less efficient control than the profit motive since money is a more attractive goal than political oppression. More importantly, the money goal serves as a camouflage for the use of copyright as a tool of censorship because private censorship is considered to be a means of protecting one's property. The preliminary question is whether private censorship to protect private property is as objectionable as public censorship to protect a state religion. The answer must be yes, because censorship makes intellectual property a commodity for the marketplace. Intellectual property is a lawyer's euphemism. Ideas, and control of access to ideas that copyright represents is censorship whatever the mechanism or motivation; and since censorship is forbidden by the First Amendment,[4] the ultimate question is whether copyright used as a tool to protect ideas as private property is excused as an exception to the constitutional right of free speech.

The argument here is that it is not, and the reason is two fundamental, but seldom noted, propositions. One is that the Free Press Clause and the Copyright Clause are complementary, not contradictory. Therefore, to use copyright as an excuse for censorship by anyone, public official or private citizen, is contrary to both clauses. And the excuse that one's own speech is private property immune from strictures of the First Amendment is a fallacy. One's speech ceases to be private property when it is published, for the essence of a free press is the right of the public to read, which is the reason to protect the right of the press to print. The other proposition is that the complementary nature of the two clauses depends upon the proprietary reach of copyright. A copyright limited to the marketplace promotes access, while a copyright extended to the classroom, office or home inhibits access. The history of copyright demonstrates the point.

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[3] 13 & 14 Car. II, c. 33 (Eng.).

[4] U.S. CONST. amend. I.

During the time when copyright was a plenary property right in the nature of fee simple property, it was a tool of censorship. When copyright became a limited property right in the nature of an easement, it became a tool of learning. The purpose of this Article is to explain these developments.

In Part II, I present the background of the problem; in Part III, I show the similarity of the Licensing Act and the DMCA; in Part IV, I discuss the proprietary base of copyright in the Licensing Act; in Part V, I discuss the proprietary base of the statutory copyright created by the first English copyright statute, the Statute of Anne in 1710; in Part VI, I discuss the proprietary base of copyright that the Copyright Clause of the U.S. Constitution authorizes Congress to grant; and in Part VII, I explain how Congress enlarged the proprietary base of copyright in the 1976 Copyright Act.

II. THE BACKGROUND

Most everyone would agree that from today's vantage point, the Licensing Act, having been contrary to the freedom of religion, would be deficient as a matter of public policy and constitutional law. That a seventeenth century English statute was characterized by unsound policy, however, does not mean that a similar twentieth century American statute suffers the same fate. Times change, and modern political, technological, and economic conditions may justify the kinship of the two statutes. The United States Constitution guarantees freedom of religion,[5] the personal computer has made the protection of copyrighted material more problematic, and the free market system prevails. And there is a difference between saying that government officials may protect a state religion by control of access and that a person may protect his or her property by control of access.

Those who would argue that the DMCA is a legitimate exercise of Congress' copyright power, however, face the problem of the copyright dilemma. If a copyright holder can control access to the copyrighted work, logically it is because he or she owns the work. But since the essence of a copyrighted work is ideas, it follows that to own the work is contrary to the principle that one cannot own ideas. The ostensible choice is between ownership of the work, which would inhibit learning, and free use of the work by everyone, which would also inhibit learning (for the lack of a market).

Historically, the copyright dilemma was manifested in a controversy as to the length of the copyright term. The publisher class wanted a perpetual copyright, while the user class wanted a limited-term copyright. The publishers had the

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[5] *Id.*

advantage of historical precedent, because for some 150 years, from its beginning in the sixteenth century to the end of the Licensing Act in 1694, copyright was treated as a perpetual right.[6] But this was a matter of self-interest, not logic. Copyright was created by publishers, and the government was not concerned that the publishers claimed copyright as a perpetual property, but that copyright be an effective tool of censorship; a perpetual copyright was a much more effective tool for this purpose than a term copyright.[7] Consequently, the government was not concerned with the proprietary nature of copyright so long as it was consistent with the scheme of copyright as a tool of censorship. It was after the government ceased to be interested in using copyright for purposes of censorship that Parliament, in 1710, enacted a copyright statute providing for a limited copyright term. The reason for the change from a perpetual to a temporary copyright was almost surely Parliament's concern about copyright as a monopoly. But the booksellers, as the publishers were then called, sought to obscure this point by arguing that copyright had a source superior to Parliament. Copyright, they said, was a natural law right of the author by reason of creation and was in fact a perpetual common law right that superseded the temporary statutory copyright.[8]

The unarticulated premise of the booksellers was that the source of a right determines the scope of that right. Since the common law courts customarily created, but did not limit rights, at least as to time, the common law copyright was without temporal limitation, which meant that it was perpetual. The premise was more a reflection of the custom of the common law of defining the rights of the parties before them than reason. Despite the booksellers' natural law argument, there was nothing natural about the exclusive right of a mortal author to publish his or her writings in perpetuity. But that, of course, was not the point. The corporate bookseller would be entitled to the perpetual copyright as the assignee of mortal authors, and the advantage of the perpetual copyright was that it

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[6] *See* LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE (1968) for a detailed treatment of the history of copyright.

[7] *See generally id.* The partnership between the publishers and the monarchy lasted until the Glorious Revolution of 1688, which ensured the Protestant succession to the English throne and thereby eliminated the need for official control of the press. In the meantime, the publishers had created a copyright that was a primitive form of the natural law copyright. It was a perpetual right, but it was derived from the registration of a title in the company register book by a member of the company, not from a creative act. The author was not eligible for the stationers' copyright. *Id.*

[8] *See generally* A TRANSCRIPT OF THE REGISTERS OF THE COMPANY OF STATIONERS OF LONDON: 1554-1640 A.D. (Edward Arber ed., 1875) [hereinafter ARBER]. Arber noted the continual petitions of the booksellers for greater power and control of their copyrights. During the Interregnum, for example, the booksellers petitioned Parliament for legislation to replace the Star Chamber Decree of 1637 that expired with the abolition of the Star Chamber in 1640. The booksellers argued that without press control legislation, "Many Pieces [sic] of great worth and excellence will be strangled in the womb, or never conceived at all for the future." *Id.* at 587.

increased the value of the property. Thus, the booksellers were seeking to use the author's natural law copyright argument to gain a personal benefit, at the public's expense. Had the campaign for a perpetual copyright succeeded, William Shakespeare's works today would be subject to the copyright monopoly.

Reflection demonstrates that one of the oddities of copyright jurisprudence is the persistence of the idea that copyright is a natural law right of the author because he or she created the copyrighted work. The seed for this idea was planted, watered and fertilized by the booksellers in their efforts to revive the perpetual copyright as a common law copyright to defeat the limitations that the Statute of Anne had placed on their monopoly. The oddity is that copyright as a natural law right of the author is contrary to the public interest purposes of copyright that the statutory copyright protects. Thus, the copyright of the Statute of Anne promoted learning, protected the public domain, and provided for public access. An author's natural law copyright would have been anti-learning, would have destroyed the public domain, and would have been anti-public access.

The weakness of the natural law theory of copyright is that it is a disguise for self-interest in the guise of public interest. Certainly this was true when the booksellers in the eighteenth century argued that the courts should create a perpetual common law copyright based on natural law.[9] The surprising thing is not that the booksellers ultimately failed, but that they almost succeeded. They achieved their goal of a judicially created perpetual copyright in a 1769 King's Bench decision, *Millar v. Taylor*,[10] but their victory was short-lived. A 1774 House of Lords decision, *Donaldson v. Beckett*,[11] overruled *Millar* and limited the copyright holder's rights after publication to those granted by the copyright statute.

The statutory theory of copyright prevailed in this country for some two hundred years, partly because it was embodied in the Copyright Clause of the U.S. Constitution, and partly because during this period there was relatively little development of communications technology prior to the advent of television and, later, the personal computer. Moreover, the technology that developed was seen as being related primarily to entertainment—motion pictures, recordings of musical compositions, and radio—which was not deemed to be very high on the scale of intellectual values. The fiction was that the expansion of the copyright monopoly to afford protection to works in these media would do little harm to the learning purpose of copyright. Entertainment entrepreneurs encouraged this

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[9] When the grandfather clause of the Statute of Anne ended after twenty-one years, the booksellers applied to Parliament in 1735, 1738, and 1739 for a longer term of years or for life. "The truth is, the idea of a common-law right in perpetuity was not taken up till after that failure in procuring a new statute for an enlargement of the term." Donaldson v. Beckett, 1 Eng. Rep. 837 (H.L. 1774) (Lord Chief Justice DeGrey). *See* cases cited *infra* notes 10 and 11.

[10] 98 Eng. Rep. 201 (K.B. 1769).

[11] 1 Eng. Rep. 837 (H.L. 1774).

attitude, which was obviously to their advantage, by lobbying Congress and litigating their rights. The point the entrepreneurs obscured, of course, was that entertainment, viewed as being an intellectually lightweight enterprise, formed a large part of American culture, the nature of which gives it an importance to rival the importance of learning to be gained from books, the paradigm of copyright protection.

The piecemeal progress of communication technology resulted in a stealth campaign to enhance the copyright monopoly that, by and large, has succeeded. The 1909 Act[12] created the recording right, and in 1912 Congress added motion pictures to the compendium of copyrightable works,[13] but by and large radio broadcasts were unprotected as such. The revolutionary change came with the enactment of the 1976 Copyright Act.[14] In order to protect the interests of television and computer entrepreneurs, Congress disregarded the Copyright Clause and its first cousin, the Free Press Clause of the First Amendment.

Properly interpreted, the Copyright Clause limits Congress' copyright power to the grant of copyright as a market monopoly for published works for a limited time. In the 1976 Act, Congress extended copyright to the moment of fixation, which eliminated the publication requirement; it divided the publication right into two rights, the right to copy and the right to distribute copies publicly, and it codified the right of fair use in such a way as to give copyright holders a weapon to enhance the copyright monopoly further. They have been successful because the proprietary base of copyright determines the scope of the copyright monopoly. A copyright that is a plenary property right is a more comprehensive monopoly than a copyright that is a limited property right, and because property is a monopolistic concept, the fact that an increase in the property right enlarges the monopoly goes unnoticed.

My theory as to why Congress failed to act within its constitutional restraints is that the members knew not what they were doing. They were implementing the natural law copyright under the guise of copyright as a plenary property right. There are three parts to the theory: First, in England the natural law copyright was a plenary property right that both Parliament and the House of Lords in its judicial capacity rejected in favor of the statutory copyright; second, the English statutory copyright was adopted by the Founders, embodied in the U.S. Constitution, and prevailed until the 1976 Copyright Act; third, the natural law theory of copyright has been revived in the guise of a plenary property right, of which the DMCA is the exemplar.

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[12] Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075 (amended and codified in 17 U.S.C. § 101 *et seq.*).
[13] Townsend Amendment, Act of Aug. 24, 1912, ch. 356, 37 Stat. 488.
[14] Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified in 17 U.S.C. § 101 *et seq.* (2000)).

The enactment of the DMCA, because of its similarity to the Licensing Act, provides an occasion to examine the impact of the English statute on American law. The most useful insight this examination reveals is that two provisions of the U.S. Constitution can be attributed to the English policy of press control as manifested in the Licensing Act; one directly, the other indirectly. The two provisions are the First Amendment and the Copyright Clause.

III. THE SIMILARITY OF THE LICENSING ACT AND THE DMCA

The similarity of the Licensing Act and the DMCA is seen in those provisions intended to control the manufacture of, and trade in, materials that would enable one to do the forbidden act, that is print unlawful material or gain unlawful access to digitized material.

The English statute provided:

> [t]hat no joyner, carpenter, or other person shall make any printing press, no smith shall forge any iron-work for a printing press, no founder shall craft any letters which may be used for printing for any person or persons whatsoever; [nor import or buy materials] belonging unto printing, unless he or they respectively shall first acquaint the . . . master and wardens of the . . . company of stationers . . . for whom the same presses, iron work or letters are to be made, forged, cast, brought or imported . . .[15]

The DMCA provides that "[n]o person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component or part thereof, that is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title."[16]

There is even some evidence that the legislators in both London and Washington were dubious about the desirability of the statutes they enacted. The Licensing Act contained a proviso "[t]hat this act shall continue and be in force for two years, to commence from the tenth of *June*, one thousand six hundred sixty and two, and no longer."[17] The DMCA provides that the "[v]iolations [r]egarding [c]ircumvention of [t]echnological [m]easures" shall not take effect

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[15] Licensing Act of 1662, 13 & 14 Car. II, c. 33, § X (Eng.).

[16] Digital Millennium Copyright Act, 17 U.S.C. § 1201(a)(2)(A) (2000).

[17] 13 & 14 Car. II, c. 33, § XXV (Eng.). The statute was renewed. 16 Car. II, c. 8 (Eng.), 1 Jac. II, c. 17, § XV (Eng.).

until two years after the enactment of the statute.[18] Moreover, the American statute mandates triennial studies to determine whether users of a copyrighted work are, or are likely to be, adversely affected by "the prohibition under subparagraph (A) in their ability to make noninfringing uses under this title of a particular class of copyrighted works."[19]

The common concern for controlling the manufacture of, and trade in, materials of communication technology is striking evidence of the similarity of the goals: to control access to learning materials. The most subtle similarity between the two statutes, however, is that copyright is a secondary consideration in both. The Licensing Act made the infringement of copyright as much of an offense as publishing a book without an imprimatur, but copyright was not available for unlicensed material. Although the DMCA is codified as part of the copyright statute, it does not specifically limit the materials available for encryption to copyrighted works. The primary concern in both statutes, in short, was and is what is communicated, although the criteria and motives differed. The Licensing Act was concerned with substance, that is with "heretical, schismatical, blasphemous, seditious and treasonable" material;[20] the DMCA was concerned with form, that is encrypted material.

The remarkable similarity of statutes separated by three hundred years in different countries, one governed by an autocratic monarchy, the other by elected officials, is best explained, perhaps, by the law of motivation, which is that motivation for the same goal tends to produce similar actions. The motivation for the Licensing Act and for the DMCA was the same: to control public access to publicly disseminated material. Although for different reasons–politics in England, profit in the U.S.—the motives produced ideas that resulted in the same means, control of dissemination in order to control public access to what was disseminated. The emphasis on control of access is highlighted by the title of the Licensing Act, "An act for preventing abuses in *printing* seditious, treasonable, and unlicensed books and pamphlets, and *for regulating of printing and printing-presses.*"[21] While the statute made it illegal to print and sell "heretical, schismatical, blasphemous, seditious and treasonable books, pamphlets and papers,"[22] it contained no provision relating to the writing or composing or reading of such material. The target was the publisher, the link that provided access of writer to reader and vice versa. Similarly, the DMCA has no provision relating to the basic

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[18] 17 U.S.C. § 1201(a) (2000).
[19] 17 U.S.C. § 1201(a)(1)(c) (2000).
[20] 13 & 14 Car. II, c. 33, § I (Eng.).
[21] *Id.* (emphasis added).
[22] *Id.*

condition for copyright, originality, and no recognition that materials in the public domain can be encrypted along with copyrighted material.

One difference between the two statutes is that the Licensing Act precluded any access to forbidden materials because without publication, the material was not accessible. Under the DMCA, digitized material presumably is available for a fee, which ostensibly makes it less threatening than the Licensing Act. Persons with this view, however, overlook two points. The first is that not all people will have the coins to make the turnstiles turn. The second is that the real issue here is power, and Lord Acton's dictum remains valid: "[p]ower tends to corrupt, and absolute power corrupts absolutely."[23]

IV. THE PROPRIETARY BASE OF THE LICENSING ACT COPYRIGHT

The Licensing Act codified the extant copyright and thus was a copyright as well as a censorship statute. Section III of the Licensing Act provided "[t]hat no private person or persons whatsoever shall at any time hereafter print, or cause to be printed any book or pamphlet whatsoever, unless the same . . . be first entered in the book of the register of the company of stationers of *London* . . ."[24] This condition for printing was consistent with censorship because it provided authorities with a record of who printed what. The Act, however, also provided the right of exclusive publication (the essence of copyright) in Section VI, which read:

> And be it further enacted . . . That no person or persons shall . . . imprint or cause to be imprinted . . . any copy or copies, book or books, or part of any book or books, . . . which any person or persons . . . by force or virtue of any entry or entries thereof duly made or to be made in the register-book of the said company of stationers . . . have or shall have the right . . . solely to print, without the consent of the owner or owners of such book or books, copy or copies, ...[25]

The copyright that was codified in the Licensing Act was a private law copyright of the Stationers' Company, the London Company of the booktrade.

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[23] ROBERT ANDREWS, THE COLUMBIA DICTIONARY OF QUOTATIONS 511 (1993) (quoting Lord Acton in Letter, 3 Apr. 1887, to Bishop Mandell Creighton).

[24] 13 & 14 Car. II, c. 33, § III (Eng.).

[25] 13 & 14 Car. II, c. 33, § VI (Eng.). The provision also provided protection for the printing patent, a copyright that was granted by the sovereign for a fee that existed in addition to the stationers' copyright. The Printing Patent was not significant in the development of copyright jurisprudence.

The early copyright was a stationers' copyright in both function and name since it was limited to members of the Company.[26] It had existed for over a century when the Licensing Act was enacted, and one of the many ironies of copyright is that despite its current status as a concept to protect authors, it was created by tradesmen as a means of maintaining order among themselves in the conduct of their business. The business was the booktrade (from which authors were excluded) and the tradesmen were printers and publishers (called booksellers). An odd set of circumstances gave workmen the power to create copyright, one of the most far reaching legal concepts in history and, arguably, one that is essential for a free society because of its impact learning. The two most influential circumstances were the introduction of the printing press into England by William Caxton in 1471, and the religious schism created by Henry VIII's break with the Roman Catholic Church in the 1530's in order to divorce Queen Katherine, the mother of the future Queen Mary, and marry Anne Boleyn, the mother of Mary's half-sister, the future Queen Elizabeth I.

The first event resulted in a new type of business–the booktrade–and the second was the reason the tradesmen were given a monopoly power to regulate their business. In 1556, Philip and Mary granted a royal charter to the tradesmen called stationers to create the Stationers' Company, a London Company with unprecedented power to control the publication of books. As a Catholic intent on returning her subjects to the fold of the Holy Mother Church, Mary recognized that an unregulated press was an obstacle to her goal. She also recognized that making the printers and publishers beholden to her by vesting them with the power to control their trade was the most efficient means to keep "heretical, schismatical, blasphemous, seditious and treasonable" books out of the hands of her subjects.[27] To this end, the stationers were given the power to search out and destroy illegal presses and burn illegal books.

This historical note is important because it explains the proprietary basis of the original copyright. It was in the nature of a fee simple property because it was created by tradesmen. But while the stationers presumably were sophisticated businessmen in a sophisticated society–this was after Chaucer and includes the time of Shakespeare and Milton–the proprietary basis of copyright was almost surely a practical, not a theoretical, concept. There was no need for them to be concerned with theory because copyright law was the ordinances of the Company and there were no competing rules. The Star Chamber decrees that preceded the

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[26] "That the custom of endowing a stationer with the copyright of any work he could get hold of, get licensed, and get entered in the Company's Register might work hardship to the author is evident enough." W.W. GREG, SOME ASPECTS AND PROBLEMS OF LONDON PUBLISHING BETWEEN 1550 AND 1650 72 (1956).

[27] 13 & 14 Car. II, c. 33, § I (Eng.).

Licensing Act had merely confirmed the stationers' rules in the same way the statute did. They were public law that supported the private copyright law of the company, the only reason the censorship regulations were important to the stationers.

The failure to articulate the proprietary basis of the stationers' copyright is explained in part by the fact that the common law courts had no role in developing the concept. Consequently, there were no judicial opinions providing direct evidence of the nature of copyright as property. In the absence of direct evidence, circumstances serve the cause of proof.[28] There is substantial circumstantial evidence that the stationers viewed their copyright as having the characteristics of land ownership applied to the ownership of copies; for example, ownership in perpetuity that could be assigned or devised.

Evidence of the proprietary base of the stationers' copyright begins with the stationers' charter, which was granted to provide "a suitable remedy" against the publication of "seditious and heretical books . . . daily published and printed by divers scandalous malicious schismatical and heretical subjects . . . ."[29] To this end, it limited printing to members of the Stationers' Company or holders of printing patents granted by the sovereign,[30] and gave the stationers the power to "make and ordain and establish . . . ordinances, provisions, and statutes . . . ." so long as they were "not in any way repugnant or contrary to the laws or statutes of this our kingdom of England . . . ."[31] And the Master and Wardens were authorized "to imprison or commit to jail" anyone who "shall disturb, refuse, or hinder" the Master and Wardens "in . . . seizing, taking, or burning" unlawful books.[32]

The charter thus created the foundation for a culture of censorship that lasted for 150 years[33] based on copyright as a fee simple property that, by definition, existed in perptuity. A lesser property would have been less monopolistic and thus less effective for tradesmen as policemen of the press for both censorship and competitive purposes.[34] This fact alone justifies the inference that the

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[28] The difference between circumstantial and direct evidence is only that the former requires more inferences than the latter (which is proof of itself).

[29] I ARBER, *supra* note 8.

[30] *Id.* at xxxi.

[31] *Id.* at xxx.

[32] *Id.* at xxxi.

[33] The continuation of the culture was assured when the Protestant Elizabeth I, who succeeded her half-sister Mary in 1558, renewed the charter and continued the policies of press control, albeit in support of a different faith.

[34] The stationers' role as policemen of the press proved to be a substantial benefit to them. To facilitate that role, the sovereigns from time to time promulgated decrees of press control, beginning with Elizabeth I's Injunctions of 1559. The most notable of these decrees were the Star Chamber Decrees of 1566, 1586, and 1637, each of which produced increasingly restrictive control of the

proprietary base of the stationers' copyright was in the nature of a fee simple property, an inference supported by its two most important characteristics: it existed in perpetuity, and it was freely alienable.[35] There were two good reasons for these characteristics. First, the sovereign was interested in copyright as a tool of censorship, and its proprietary base determined the efficacy (and efficiency) of copyright for this purpose. Obviously, a term copyright would end the license at the end of the term while a perpetual copyright would continue the license. Second, copyright as a fee simple property was a reward that encouraged the stationers in their role as policemen of the press.

The ultimate test of the proprietary nature of the stationers' copyright is the form it took and the services it provided. In form it was the ownership of a copy (or manuscript) that entailed the right of exclusive publication in perpetuity. This meant that there would be *an* owner for all time with the right of exclusive publication, which, of course, entailed the right to prevent others from publishing the work even if the copyright owner did not wish to do so.[36] These characteristics meant that the stationers' copyright was a tool that could be used to deny access, to prevent the development of the public domain, and to control learning. More succinctly, the stationers' copyright was anti-access, anti-public domain, and anti-learning. The use of copyright as a tool of official censorship makes this obvious, but these truisms were lost when the statutory copyright replaced the stationers' copyright as codified in the Licensing Act.

V. THE PROPRIETARY BASE OF THE STATUTORY COPYRIGHT

The statutory copyright created by the first English copyright statute, the Statute of Anne,[37] made a seismic change in the proprietary base of copyright. The perpetual copyright of publishers, the only condition of which was registration in the Stationers' Register book, became a copyright with three conditions: the creation of a work, the publication of that work, and an exclusive

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press. The decree of 1637 was the last of the decrees because the Star Chamber was abolished in 1640, but it had a greater influence than its short existence would indicate, for it was revived in the form of the Licensing Act of 1662, after Charles II returned to the throne. In the meantime, during the Interregnum, Parliament had continued the policy of press control with the Ordinances of 1643, 1647 and 1649, despite John Milton's plea for a free press, *Areopagitica* in 1644.

[35] Copyright "was like an estate, . . . it was assignable, . . . [and] after publication, an author, or his assigns, had an exclusive right in perpetuity of multiplying copies." Donaldson v. Beckett, 1 Eng. Rep. 837 (H.L. 1774) (Mr. Justice Willes).

[36] There is, however, evidence that if a stationer did not publish a work he registered, the Company would allow another stationer to print it. *See* GREG, *supra* note 26, at 71 (discussing the company's rule that if a copy were out of print, and the owner did not, after warning, reprint it within six months, the journeymen of the Company should have leave to print it).

[37] 8 Ann., c. 19, § I (1710) (Eng.).

right of publication for a limited term. The proprietary basis of copyright changed from a fee simple property to a limited property in the nature of a marketing easement for designated periods of time.

In summary, Section I of the Statute of Anne provided copyright for limited property in the nature of an easement. There were three kinds of books: books already printed and copyrighted (a grandfather clause), books composed but not printed, and books "that shall hereafter be composed."[38] The term of protection for books already printed was twenty-one years, for the other two classes of books, the term was fourteen years. The section also stated the rights of copyright and defined infringement. The rights granted were "the sole liberty of printing and reprinting" books; infringement was the printing, reprinting, importing, selling, publishing or exposing to sale books without the consent of the proprietor.[39] The penalty for infringement was forfeiture of the offending works to the proprietor "who shall forthwith damask, and make waste paper of them."[40] The offender also forfeited one penny for each offending sheet in his possession. The monetary penalty was subject to a *qui tam* action, which meant that anyone had standing to sue for copyright infringement and be entitled to one-half of the recovery, the other half going to the sovereign.[41]

The statute also involved two shrewd political tactics: extension of the extant stationer's copyrights for twenty-one years, and vesting of copyright in the author.[42] The first tactic mollified the booksellers, who would otherwise have been chagrined to lose their perpetual copyright.[43] The second placated authors without objection from the booksellers because the new copyright was not available until a book was published, which meant that the booksellers could continue to be copyright owners as assignees of the author and therefore could continue their control of the booktrade.

From today's perspective, however, the interesting point is that the Statute of Anne is derivative of the Licensing Act of 1662. From the perspective of the 1710, this was natural, for the censorship statute was a source of ideas to provide a framework for the statutory copyright. It was the only precedent available. Even so, that a censorship statute was the source of a statute to promote learning comes as a surprise and suggests the ease with which the latter can be corrupted

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[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] When the extended term expired in 1731, the booksellers went back to Parliament for another extended term and failed; they then turned to the courts in an effort to get a judicially created perpetual copyright.

to return to its original function. The following analysis demonstrates the relationship of the two statutes.

The Statute of Anne had eleven sections of which three were procedural,[44] one was remedial,[45] and one was original.[46] The remaining six sections, including section I, are evidence of the use of the Licensing Act. The *qui tam* action for copyright infringement in section I had a counterpart in the Licensing Act.[47] The Statute of Anne provided for registration of the title of a work "in the register book of the company of stationers, in such manner as hath been usual,"[48] which was the same procedure as in the Licensing Act.[49] The Statute of Anne required copies of books for nine libraries;[50] the Licensing Act required copies for three libraries, the library of the King and of Oxford and Cambridge universities.[51]

The Statute of Anne provided a scheme for controlling the prices of books[52] that was obviously patterned after the scheme for licensing books in the Licensing Act.[53] Many of the same officials authorized to license books, for example, the Archbishop of Canterbury, the Bishop of London, the Chief Justices of the Common law courts and the Chief Baron of the Exchequer, were the officials to whom complaint could be made if the price of a book was too high. The Statute of Anne also provided that it should not be construed to extend to prohibit the importation of books in foreign languages printed beyond the seas.[54] This provision can be viewed as protection against any recidivistic conduct by reason of the Licensing Act provisions that subjected the importation of books to the control of the licensors[55] and provided that no English books could be printed or imported from beyond the seas.[56]

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[44] 8 Ann., c. 19 (Eng.). Sections VI (granting jurisdiction of the Court of Session in Scotland); VIII (providing for the plea of the general issue and special matter in evidence); and X (setting three month statute of limitation).

[45] *Id.* Section III (providing for alternative method for entry–by advertisement in the *Legal Gazette*–if the Clerk of the Stationers' Company refused to register).

[46] *Id.* Section XI (giving the author the right to a renewal term if living at the end of the first term).

[47] Licensing Act of 1662, 13 & 14 Car. II, c. 33, § III (Eng.). A *qui tam* action for a criminal statute, which is what the Licensing Act was in effect, is understandable; but there seems to be no reason other than copying that it should be available for a tort such as copyright infringement.

[48] 8 Ann, c. 19, § II (1710) (Eng.).

[49] 13 & 14 Car. II, c. 33, § III (Eng.).

[50] 8 Ann., c. 19, § V (1710) (Eng.).

[51] 13 & 14 Car. II, c. 33, § XIII (Eng.).

[52] 8 Ann., c. 19, § IV (1710) (Eng.).

[53] 13 & 14 Car. II, c. 33, § III (Eng.).

[54] 8 Ann. c. 19, § VII (1710) (Eng.).

[55] 13 & 14 Car. II, c. 33, § V (Eng.).

[56] *Id.* at § IX.

The most arcane section of the Statute of Anne, however, provides the most persuasive evidence of the use of the Licensing Act for drafting the copyright statute. Section IX of the copyright statute read:

> Provided, That nothing in this act contained shall extend, or be construed to extend, either to prejudice or confirm any right that the said universities, or any of them, or any person or persons have, or claim to have, to the printing or reprinting any book or copy already printed, or hereafter to be printed.[57]

Read literally, the provision makes no sense, because it negates the other provisions of the statute. Properly interpreted, however, the section meant that the statute was not "to prejudice or confirm" any printing patent, which was a privilege of the exclusive right to print a particular book or books granted by the sovereign.[58] Proper interpretation, however, was available only when the section was read in light of two provisions of the Licensing Act, sections XVIII and XXII. The former protected the printing patents of Oxford and Cambridge Universities, the latter the printing patents of all patentees.[59] By 1710, apparently the sovereign had ceased to grant printing patents, and there was no reason to create a controversy over a moribund issue. And it should be noted that the printing patent had no significant role in the development of copyright jurisprudence.

There is one further point about the Statute of Anne. The commonly expressed idea that the new statutory copyright was an author's right (because it vested initial ownership in the author) is misleading, because the beneficiaries of

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[57] 8 Ann., c. 19, § IX (1710) (Eng.).

[58] "[T]he saving clause could not refer to any common-law right, because . . . there existed no common law right. It was merely a salvo to the Universities and all who held under letters patent, which alone could in books or copies give a perpetuity." Donaldson v. Beckett, 1 Eng. Rep. 837 (H.L. 1774) (Mr. Justice Gould).

[59] 13 & 14 Car. II, c. 33, § XVIII read:

> Provided always, That nothing in this act contained, shal be construed to extend to the prejudice or infringing of any of the just rights and priviledges of either of the two universities of this realm touching and concerning the licensing or printing of book in either of the said universities.

Section XXII read:

> Provided also, That neither this act, nor any thing there in contained, shall extend to prejudice the just rights and priviledges granted by his Majesty, or any of his royal predecessors, to any person or persons, under his Majesties great seal, or otherwise, but that such person or persons may exercise and use such rights and priviledges as aforesaid, according to their respective grants; any thing in this act to the contrary notwithstanding.

the statute included the purchasers of copies. This meant that the benefits for the author (except the renewal right) accrued to the author's assignee, that is the publisher.[60] Even so, there was a little recognized value in vesting the initial copyright in the author. The change protected works in the public domain from being captured by copyright, because it made the condition for the statutory copyright a new (original) work. The limited term, of course, meant that the public domain would be enriched as copyrights expired.

Acceptance of the idea that the Statute of Anne created an author's copyright is attributable mainly to the arguments of the booksellers–the most powerful group in the booktrade and the 18th century counterpart to today's copyrightists—in "The Battle of the Booksellers." This was the epithet applied to a forty-year effort to get the courts to override the limitations of the Statute of Anne by creating a perpetual common law copyright for the author based on natural law. Using natural law as a premise, the lawyers for the booksellers argued that the author, as creator, is entitle to ownership of his creation in perpetuity as a matter of equity and justice.[61] But the lawyers did not note that few authors live in perpetuity, that corporate booksellers would continue as beneficiaries of the author's natural law copyright as assignee long after the author's demise, or that the natural law copyright would substantially limit, if not destroy, the public domain.

The limited proprietary base of the statutory copyright can best be understood by comparing ownership and term. A perpetual copyright for publishers was changed into a temporary copyright for authors. The most important difference, however, may be the new conditions for copyright: the creation and publication of a work. These differences represent a change from a permanent to a temporary property right, and when one analyzes the Statute of Anne, two points become apparent. The statute was a regulatory statute that created the property it regulated. In proprietary terms, the statutory copyright was a temporary easement granted for a particular purpose—learning—upon specified conditions–a new work, a limited term, and publication–that created and protected the public domain.

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[60] *See* Millar v. Taylor, 98 Eng. Rep. 201, 205 (Justice Willes).

[61] *See id.* at 252 (opinion of Justice Mansfield) stating:

> [I]t is just, that an author should reap the pecuniary profits of his own ingenuity and labour. It is just, that another should not use his name, without his consent. It is fit that he should judge when to publish, or whether he ever will publish. It is fit he should not only choose the time, but the manner of publication; how many; what volume; what print. It is fit, he should choose to whose care he will trust the accuracy and correctness of the impression; in whose honesty he will confide, not to foist in additions: with reasoning of other the same effect.

While an analysis of the language of the Statute of Anne makes this clear, subsequent events created a new dimension that distorted the language. These events were the efforts of the booksellers to revive the stationers' copyright in the form of an author's common law copyright based on natural law. The efforts were ultimately rejected, but they are very important in understanding the proprietary base of the copyright that the Constitution in article I, section 8, clause 8 empowers Congress to grant.

The booksellers actually achieved their goal in the King's Bench case of *Millar v. Taylor*, but their victory was likely more attributable to Chief Justice Mansfield, who had been counsel for the booksellers, ruled in their favor and[62] than to the merits of their claim. Indeed, the infirm logic of the booksellers' argument about justice for the author explains the ultimate failure of their quest for a revival of the stationers' copyright in the form of a perpetual common law copyright. The House of Lords in *Donaldson v. Beckett*[63] ruled that while the author does own the work he or she creates, that ownership lasts only until publication, after which the author must rely on the copyright statute for his or her rights. The House of Lords thus created the common law copyright, which was merely the right of first publication, not a true copyright, which was the right of continued publication.

The failure of the booksellers' campaign, however, should not be allowed to obscure the impact of their arguments on copyright jurisprudence. That impact, the popularization of the idea that copyright is an author's property, obscured the fact that the Statute of Anne was a regulatory, not a proprietary, statute, and that the statutory copyright was basically a regulatory, not a proprietary, concept. The regulatory nature of the early statutory copyright is clearly shown by the ruling in *Donaldson v. Beckett* that, except for the copyright statute, publication of a book would put it into the public domain for anyone to publish. Logically, then, the rights granted by the copyright statute had to be a matter of regulation, not property.[64] Or to put the point another way, the regulatory aspects of copyright were superior to the proprietary aspects.[65] This is because the rights were conditional.

Indeed, the genius of the Statute of Anne was that it changed copyright from a proprietary concept for the exclusive benefit of the booksellers to a regulatory concept for the benefit of the public. It did so by imposing four conditions: 1)

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[62] It should be noted that the dissenter in *Millar*, Justice Yates, had been counsel against the booksellers.

[63] 1 Eng. Rep. 837 (H.L. 1774).

[64] The argument as to the regulatory nature of copyright law in the Statute of Anne is clinched by the price control provision of the statute. There is no clearer form of regulation than control of the prices for books.

[65] The U.S. Supreme Court makes this point each time it rules, as it often has, that copyright is primarily to benefit the public interest, the author's interest only secondarily.

the condition of originality; 2) the condition of publication; 3) the condition of registration of the title; and 4) the condition of a limited term. The Statute of Anne thus rejected the anti-learning, anti-public domain and anti-access features of the stationers' copyright and transformed copyright into a pro-learning, pro-public domain and pro-access concept. The jurisprudential confusion generated by the argument for the author's natural law copyright, however, obscured the nature of these provisions. The confusion was created by the question of whether they were conditions or requirements. The answer was legally significant because conditions cannot be waived, whereas requirements can. The difference is crucial in determining the scope of Congress' copyright power, for the classification determines whether the Copyright Clause is a limitation on, as well as a grant of, congressional power.[66]

VI. THE PROPRIETARY BASE OF THE CONSTITUTIONAL COPYRIGHT

The words of the Copyright Clause are less than a model of clarity. "The Congress shall have Power . . . To promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings . . ."[67] The clarity is not improved by the fact that the words are in the Intellectual Property Clause that includes Patent Clause. (Does "Times" refer to both copyrights and patents so that each is entitled only to a limited time?) Fortunately, the job of interpretation is facilitated by examining the source of the language, the title of the Statute of Anne: "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."[68]

An analysis of the Statute of Anne reveals three policies: the promotion of learning because the language so stated; the protection of the public domain because copyright required an original writing and existed only for a limited time (the first condition meant that copyright could not be used to capture public domain works and the second meant that all copyrighted works would go into the public domain); and public access, because the exclusive right was only the right to publish (the statute made publication a condition for copyright).

The fact that the Licensing Act of 1662 was a source of the Statute of Anne explains why the three policies shared two characteristics: they were anti-

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[66] The U.S. Supreme Court in *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834), determined in effect that the provisions are conditions.

[67] U.S. CONST. art. I, § 8, cl. 8.

[68] The Statute of Anne used the plural "times" because the statute contained provisions for three copyrights: the extant copyrights were extended for twenty-one years; copyright for books written and not published and to be written in the future were given a term of fourteen years; and the author was given a renewal term of fourteen years if living at the end of the first term.

censorship and anti-monopolistic. A rational inference is that this was because the Stationers/Licensing Act copyright had been a monopoly used as a device of censorship. The most effective way to reject this dual role was to redefine copyright's purpose as the promotion of learning and to impose three conditions for copyright protection: a new work, a limited term, and publication. The most interesting point about these policies, perhaps, is how well they are integrated as a matter of logic. A condition for learning is access, and between these two policies are the policies necessary for the public domain, the conditions of a new work, and the limited term.

While history makes apparent the utility of the policies and their presence in the Copyright Clause, copyright scholars have by and large ignored them. Two reasons may explain this oversight. First, the promotion of learning literally interpreted would require that a copyrighted work promote learning in fact. But this would result in a content-based copyright and arguably make the copyright statute a law regulating the press. (The requirement of a new (original) work was consistent with this position.) History, however, provides the answer to this conundrum. The promotion of learning was an anti-censorship policy and the requirement for a new work was an anti-monopoly policy to protect the public domain; the Licensing Act made both policies desirable, if not necessary.

The second reason for oversight of the policies is that copyright is so closely identified as the property of the author that a larger purpose—protection of the public domain—has been overlooked. Yet, it is clear that the requirement of an original work and the limited term were protection for the public domain, and arguably the public domain is more important for the promotion of learning than the protection of original works.

The oversight of the copyright policies has been expensive in intellectual terms, for the cost has been the failure to recognize that the policies are in fact free press components of the Copyright Clause. The promotion of learning is a free-press goal; the protection of the public domain is a predicate for a free press; and public access requires a free press. These are lessons from the Licensing Act, the most important of which is that the Copyright Clause complements, and does not contradict, the Free Press Clause. This follows from the fact that, as the Licensing Act demonstrates, the essence of a free press is the right of public access. This is why the Statute of Anne made publication a condition for copyright protection, for the Licensing Act was in fact a printing act to regulate the booktrade in the service of religion and politics. Licensing was merely a predicate for books to which access could be granted.

The DMCA, of course, provides the copyright holder control of access without the need for an individual governmental license, except that copyright is in fact a governmental license. Thus, the copyright statute, as did the Statute of

Anne, "serves for an universal patent, and supercedes the necessity for an author's applying for particular ones."[69]

The function of the copyright statute is thus etymologically consistent with the term license as "formal permission from a constituted authority to do something,"[70] the exclusive right to multiply a work in copies. Lending credence to copyright as a license is that in passing a copyright statute, Congress creates a right, as the U.S. Supreme Court held in *Wheaton v. Peters*.[71] Thus, without a copyright statute, the publication of a book puts it into the public domain, which places the copyright statute in the category of a general licensing statute, that is, it "serves as a universal patent." The authority that grants a license, of course, can alter the terms of the license within the bounds of its authority to grant the license, and Congress has consistently altered the terms of the copyright statute. In 1790, Congress granted a single right, the right to publish a work; in the 1976 Act, Congress granted five (now six) rights[72] If copyright is the grant of license, it follows that copyright holders are governmental licensees. This fact raises an important question: is a statute that vests the power of censorship in copyright holders as governmental licensees is a law regulating the press, or can Congress do indirectly what the Constitution forbids it to do directly?[73]

VII. THE DMCA AND COPYRIGHT

The constitutional deficiency of the DMCA should now be apparent. Like the Licensing Act in England, it is anti-learning, anti-public domain, and anti-access. The DMCA thus represents a remarkable change from the pro-learning, pro-public domain, and pro-access copyright the Founders empowered Congress to provide. The important question is not whether the charge is correct (it is axiomatic), but why. The answer is surprisingly simple. It is the proprietary base of copyright. A plenary proprietary base for copyright has one set of consequences, while a limited proprietary base has another. Thus, the characteristic

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[69] "[B]efore the institution of the Stationers Company [authors] had recourse to the legislature for a license, grant, patent, or privilege; . . ." *Donaldson v. Beckett*, 1 Eng. Rep. 837 (H.L. 1774). Congress has, on occasion, granted an application for an individual copyright.

[70] THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 826 (1966).

[71] 33 U.S. (8 Pet.) 591, 660-69 (1834).

[72] 17 U.S.C. § 106 (2000).

[73] The fact that gives force to importance of the licensing argument is the subject of copyright, which is speech, albeit in printed form. Presumably, when the Founders denied Congress the power to regulate the press or speech, they did not intend that Congress delegate the power to copyrightists in the interest of private profit. This is why the Founders understood publication to be a condition for copyright protection. To treat copyright holders as governmental licensees is merely a way of saying that they have responsibilities as well as rights.

that made the Stationers/Licensing Act copyright effective for both monopolistic and censorship purposes was that its proprietary base was treated as being in the nature of fee simple property.

But we do not have to resort to history to know this. Common sense tells us that copyright as a fee simple property is anti-learning, anti-public domain, and anti-access because the copyright holder has plenary control over another's use of the work. The Second Circuit made the point crystal clear in *Universal City Studios, Inc. v. Corley*, upholding the constitutionality of the DMCA. Said the Court:

> [W]e must recognize that the essential purpose of encryption code is to prevent unauthorized access. Owners of all property rights are entitled to prohibit access to their property by unauthorized persons. Homeowners can install locks on the doors of their houses. Custodians of valuables can place them in safes. Stores can attach to products security devices that will activate alarms if the products are taken away without purchase.
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> * * *
>
> In its basic function, CSS is like a lock on a homeowner's door, a combination of a safe, or a security device attached to a store's products.[74]

Surely the court did not recognize the import of its language. The DMCA uses copyright law to give effect to the encryption code, and the court says in effect that "the essential purpose of *copyright* is to prevent unauthorized access" for "[i]n its basic function, *copyright* is like a lock on a homeowner's door, a combination of a safe, or a security device attached to a store's products."[75] In this language, we see the ghost of the stationer's copyright brought back to haunt the public domain and to thwart the constitutional purpose of copyright, the promotion of learning. The error of the court was fundamental. It started with an illogical premise and proceeded logically to an illogical conclusion. The faulty premise was that copyright is property the same as a house, jewels to be put into a safe, and items sold in a department store. The court's reasoning, of course, was a product of the proprietary culture of the common law legal system.

A major value of copyright history is that it shows the shallow intellectual treatment of copyright as property, primarily because of the law of self-interest,

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[74] 273 F.3d 429, 452-53 (2d Cir. 2001).

[75] *See id.* (emphasis added).

the basis of the booksellers' greed in the eighteenth century and of the copyrightists' greed in the twentieth. In the beginning, the idea that copyright is a plenary right in the nature of fee simple property is understandable. Those who create a new proprietary concept give it as broad a reach as possible, especially if the creators are tradesmen whose livelihood depends upon the concept they create, as in the case of copyright. The fortuitous circumstance that printed books became the basis of a trade in a time when unfettered learning was a threat to the welfare of the state gave the members of the trade unusual power in the development of copyright as a plenary property that existed in perpetuity. When freedom of learning ceased to be a threat to the government, it became apparent that copyright as a plenary property primarily served the publisher's interest and disserved the public interest. The statutory copyright created by the Statute of Anne was the legislative response: a copyright with a limited proprietary base. The ruling in *Donaldson v. Beckett* that confirmed the limited proprietary base of the statutory copyright was rendered in 1774,[76] only thirteen years before the Framers used the English statute to write the Copyright Clause of the U.S. Constitution. It is logical to assume, then, that the limited proprietary base of copyright in the U.S. is constitutionally mandated.

The importance of recognizing that copyright is in fact a license is that it is a special type license in the form of an easement. This follows from the fact that the copyright license has a proprietary basis. While the copyright is a license, the work that is the subject of the copyright license is subject to easements. Thus, an easement is "a right held by one person to make use of the land of another for a limited purpose, as the right of passage."[77] The fact that easement is defined in terms of the use of land is an impediment to analysis only if form is more important than substance. Thus, to recognize that copyright is an easement is to avoid the inconsistencies that result from treating copyright as normal property owned by the copyright holder. Normally, for example, property, whether real or personal, is not subject to term limits or a fair use by others. As intellectual property, copyright, of course, is not normal property, but the problem is that copyright holders, in a classic example of wanting to have their cake and eat it, too, insist on the right to protect their property to the exclusion of all other factors. They often succeed because they treat their copyright as giving them ownership of the work. Thus, they ignore the distinction between the copyright and the work in order to control the use of the work as well as the copyright,

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[76] 1 Eng. Rep. 837.

[77] THE RANDOM HOUSE DICTIONARY, *supra* note 70, at 449.

despite the statutory recognition of the distinction.[78] Thus, the easement theory comports with the statute as well as common sense.

An easement is a use and for books there are three uses—a creative use, a marketing use, and a learning or entertainment use—for which there are three users—authors, publishers, and individuals. Authors use ideas, which are in the public domain; publishers use the author's copyright (as assignees) to distribute the work; and users use the author's work for learning and entertainment. The subject of these uses, of course, is ideas: authors use ideas to write books, publishers market ideas when they sell books, and readers acquire ideas when they read books. This is why one of the basic principles of copyright law is that copyright does not protect ideas, which must remain in the public domain free for all to use without restraint. The public domain status of ideas is thus codified in the copyright statute.[79] Reason tells us that if one cannot own ideas, the proprietary base for a copyrighted work that encompasses ideas (as they all do) is not ownership but only a right of use, that is property in the form of an easement. The easement theory thus explains the first sale doctrine, that is, the author's marketing easement is exhausted with the sale of a copy of a book.[80]

The rule that copyright does not protect ideas is commonly attributed to the U.S. Supreme Court's decision in *Baker v. Selden*[81] in 1879, but in fact the idea that copyright is property in the form of an easement is not a modern innovation. It was the premise for the statutory copyright created by the Statute of Anne. The statutory grant of an otherwise non-existent right that was conditioned upon the writing and publication of a book and was limited in time could hardly be characterized as property other than easement.[82] Moreover, the regulatory nature of the statute would have been negated if the proprietary base of copyright had been in the nature of a fee simple property.[83]

The question is: why was the easement theory of copyright lost? There are two reasons: one historical and one contemporary. The historical reason is that the efforts of the booksellers in the eighteenth century undermined the easement theory with their arguments that copyright is a natural law right of the author. The arguments, although rejected, were used in the opinions of the dissenting justices in *Wheaton v. Peters*[84] and thus became a part of American copyright jurisprudence through the back door. The contemporary reason is the expansion

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[78] 17 U.S.C. § 202 (2000) (referring to ownership of copyright as "distinct from ownership of material object in which the work is embodied").

[79] 17 U.S.C. § 102(b) (2000).

[80] *See* 17 U.S.C. § 109 (2000).

[81] 101 U.S. 99, 101-03 (1879).

[82] *See* 8 Ann., c. 19 (1710) (Eng.).

[83] *See id.*

[84] 33 U.S. (8 Pet.) 591, 668 (1834).

of the proprietary base for copyright, which occurred in the 1976 Copyright Act. There were two subtle changes (in that their impact was not realized), both related to publication, that expanded the copyright monopoly. The first was to eliminate publication as a condition for copyright, which automatically extended copyright protection to the moment of fixation.[85] The second was the division of the right of publication into two rights–the right to reproduce in copies and the right to distribute copies publicly. The first change enlarged the proprietary base of copyright by eliminating a restrictive condition; the second multiplied the rights of copyright by division. Both changes were made in disregard of the constitutionally based easement theory of copyright.

Without the enlargement of the proprietary base of copyright, the DMCA could not have been enacted. And there is reason to believe that without the U.S. adherence to international copyright treaties, even the copyrightists, for all their pieces of silver, would not have been able to persuade Congress to enact legislation that overrides the U.S. Constitution. While the copyrightists may be greedy and cynical, no one has ever accused them of being stupid. Because the Copyright Clause was an impediment to their goal, they pursued a strategy to provide Congress with a substitute for the Copyright Clause. That something, of course, was the WIPO Treaty. As the court in *Universal City Studios, Inc. v. Corley* explained:

> The DMCA was enacted in 1998 to implement the World Intellectual Property Organization Copyright Treaty ("WIPO Treaty"), which requires contracting parties to 'provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.'[86]

Apart from issues of constitutional jurisprudence, the problem with using international treaties as the source of Congress' copyright power, of course, is that the treaties do not contain the protections for the public interest that are an integral part of the Copyright Clause. The reason for the cavalier disregard of the public interest is that the treaties are based on the natural law theory of copyright, which was rejected for Anglo-American copyright in 1774.[87] The vice of the

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[85] *See* 17 U.S.C. § 102 (2000).

[86] 273 F.3d 429, 440 (2d Cir. 2001).

[87] Donaldson v. Beckett, 1 Eng. Rep. 837 (H.L. 1774).

natural law copyright is that it is an author's plenary property right, which relieves the copyright holder of any obligations to the public. While the beneficiaries of the statutory copyright are the author, the publisher, and the user, the sole beneficiary of the natural law copyright is the author.

VIII. CONCLUSION

If the U.S. Constitution is to be implemented with integrity in accordance with the principle that the Copyright Clause is a limitation on, as well as a grant of, congressional power, the unconstitutionality of the DMCA is beyond doubt. The statute is a complete repudiation of the constitutional policies that copyright promote learning, protect the public domain, and provide public access. The DMCA thus returns to the anti-learning, anti-public domain, anti-access policies of the Licensing Act.

Congress did not, of course, set out to emulate the English statute. The route leading back to the policies of the Licensing Act was much more subtle. The journey began with the 1976 Copyright Act, which was a codification of the natural law copyright, a topic for another day. To accept the conclusion, however, one need only compare the benefits the statute denied to the public with those conferred on the relatively small class of copyright holders. Consider the pattern of the statute, a grant of exclusive rights to the copyright holder, subject to narrow limitations designed to protect the copyright holder while appearing to benefit the public. Notice, for example, the fourth fair use factor in section 107–"the effect of the use upon the *potential* market or value of the copyrighted work."[88] There are few works that cannot be said to have a potential market in addition to the actual market.

The change in the 1976 Act that paved the way for the DMCA, however, was the transmission copyright that protects the live transmission of television and radio broadcasts.[89] The DMCA represents the epitome of the transmission copyright. It protects the work only by protecting the transmission, which is directly contrary to the constitutionally mandated policy of public access by publication.

The ultimate irony is not that the DMCA violates the Copyright Clause, but that it violates the copyright statute. The copyright statute provides that "In no case does copyright protection . . . extend to any . . . procedure, process, system,

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[88] 17 U.S.C. § 107(a) (2000) (emphasis added).

[89] This result was achieved by several provisions of the statute. *See* 17 U.S.C. § 101 (definition of "fixed" and "to perform"); § 102 (extension of copyright to work fixed in tangible medium of expression); § 106 (performance right); § 411(b) (allowing subsequent registration for transmission works).

[or] method of operation . . ."[90] The only concerns of the DMCA are procedure, process, system, and method of operation. Recall the language from § 1201(a): "No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component or part thereof, that is primarily designed to produced for the purpose of circumventing a technological measure that controls access to a work protected under this title."[91]

Res ipsa loquitur.

[90] 17 U.S.C. § 1201(b) (2000).
[91] 17 U.S.C. § 1201(a) (2000).