Copyright and the Evolution of Legal Systems: Assessing the Divergence of American Legal Culture from British Traditions

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This research paper will examine British and American scholarship prior to and contemporary to the development of the early legal systems in America, specifically those regarding copyright and intellectual property law. A significant feature that will be explored is the development of the English copyright system from the royal privilege system into the statutory law system established by the Statute of Anne, which stood as both as the first 'modern' copyright law and the prevailing copyright doctrine in England during the 18th and early 19th century. Establishing how and why this particular statute remained the standard for English copyright law will enable discussion of more fascinating and divergent treatments of intellectual property principles in developing legal systems. The early American legal systems, which will form the bulk of this essay's discussion, simultaneously attempted to emulate the British copyright mechanism and to become a discrete legal structure. The decision to focus upon the American copyright system stems from the immediate connections to the English copyright environment and the positionality of post-revolutionary American legislators to advance uniquely American interpretations of copyright. I argue that the development of a peculiarly American legal culture following independence eclipsed the motivation of many American law-makers to rely on the established and tested English copyright system. Paying particular attention to the treatment of American intellectual property law in the social environment defined by state borders as much as by the new democratic government will warrant significant insight into the sentiments of American law-makers at the time and also into the process for adapting copyright legislation to fit novel cultural contexts.

One would expect to find residual artifacts within the early American copyright system that have stemmed or have been taken wholesale from the English system, given that many American law-makers were intimately familiar with British jurisprudence as shown by the

prevalence of Blackstone's *Commentaries* in legal education.[1] It is also expected, however, that other aspects of the evolving American system diverge significantly from the established English common law and represent the creation of a uniquely American copyright identity. This would likely manifest in the compulsion of the American system to foster the quick accumulation cultural products accessible in the commons.

Through this course of inquiry, I intend to explore how the legal framework for copyright translates into legislation in unique social environments, and whether during this transition the legislation retains the principles that guided the original law. This is important for a contemporary audience because modern law-makers are encountering novel copyright environments in the digital era and a need to reassert copyright. Investigation into the nuances of translating English copyright to deal with the novel issues faced by American legislators may indeed merit insights into the difficulties confronted transferring existing intellectual property law into digital contexts. Such insights could prove invaluable to future protection of copyright and authors' rights in an age where global information transfer is nigh instantaneous and individual authorship degrees more difficult to ascertain.

Intellectual property, as a species of property, remains a very contentious subject among law-makers and legal scholars. While more tangible forms of property may admit simpler expressions of ownership and transmissibility, intellectual property is dependent first and foremost on abstract guiding principles. This is because intellectual property attempts to protect

[1] Blackstone's *Commentaries on the Laws of England* was published in four volumes between 1765-1769 and was the first methodical treatise on the British common law accessible to lay-readership since the Middle Ages. Blackstone's logic assisted American law-makers to untangle the precedent-heavy British common law and played a definitive role in the development of early American law. The *Commentaries* will be discussed in depth later in the paper.

the ownership of abstract objects, such as ideas or literary expression, in their original form. Whereas the ownership of a plot of land might be discerned through occupancy or contractual agreements between authorities, intellectual property is intentionally constructed and artificially terminated. There are four types of intellectual property: patents which attempt to protect inventions, trademarks which verify products from their commercial source, trade secrets which protect the processes of industry, and copyright which protects literary property.[2] Copyright is especially abstract and interesting to study, as the construction and protection of literary property stimulates discussion about the logical extension of both the author's and the consumer's rights. Legal protection of copyright soon encounters obstacles that include defining the role of the literary property in the society at large and the role of those protecting the said literary property, and so we see copyright law as a microcosm of a more extensive legal and social environment.

The modern debate surrounding the transplantation of the English system is especially contentious about deciding the extent to which the American system did in fact develop a unique legal culture amidst clashing cultural influences. Copyright law in many ways serves as a mechanism to explore this conceptual debate. The concept of legal culture will be considered using the definitions advanced by Friedman and will be applied as an overarching framework to explore the implications presented by authors more concerned with copyright institutions. Ross pays particular attention to the pluralistic intellectual development of early American legal culture to confront the view of a static American colonial law with the perspective that mainstream cultural developments in colonial America dynamically shaped its law. Del Duca and Levasseur further this concept, arguing that early US copyright law manifested more of the regional needs of the states than the generally British principles they were written from. Some,

[2] "Understanding Copyright and Related Rights." Informational Report, WIPO, 2016

such as Baldwin, contend that the two countries implement copyright law in ways that merit distinction from the continental European legal cultures.

As one of the most renowned legal historians of the modern era, Lawrence Friedman attempts to situate the fields of comparative law within the larger cultural history of legal development. The classification of legal systems into families, Friedman suggests, assumes that they are more than the sum of their components. Out of these classifications of legal systems into families, we see legal traits consistent with other members of a particular family of legal structures that permeate the legal institutions of the society. These traits give the legal system a demonstrable character that transcends the historical evolution conventionally assigned to the progression of legal systems. The concept Friedman proposes is that of legal cultures, which attempts to encapsulate the values and attitudes within society that are determining factors in what, why, and how legal structures are applied, and especially where approaches to legal control fall apart.[3] Explicit mention is made here to the immediate English influence on early American law, noting the divergent development of land use law despite the initial similarity of the two systems. Friedman highlights how early American attitudes tended to distrust centralization and thus split authority into countervailing parts while the British attitudes toward property aspired toward a more explicitly hierarchical power structure. He also mentions the impact of regional cultural influences on the development of state laws, looking at Louisiana legal culture as a particular transplantation of French jurisprudence into the broader pluralistic American legal environment. While Friedman does not explore copyright law explicitly, his

[3] Lawrence Friedman, "Legal Culture and Social Development", *Law & Society Review*, vol 4, no 1 (1969): 34.

concept of legal culture and his comparative study of the English and American legal attitudes will be valuable for this research.

Building from this notion of the pluralistic adaptions of English law into an American legal culture, Ross looks at the conflicting cultural attitudes in early America through the lens of legal culture as provided by Friedman. He presents a three-part interpretation of the legal system: institutions and their associated procedures; governing rules; and a legal culture which positions the legal system within the wider societal context.[4] Particular attention is paid here to the shortcomings of the use of legal culture as a catchall for the intersection of cultural, intellectual, and legal history. However, Ross argues the ambiguity of the concept and the numerous ways that legal culture can be approached offers legal historians the opportunity to make unexpected connections. Ross does not attempt to advance much the historical scholarship concerning legal history in America, but rather makes suggestions for the methodology of subsequent work integrating legal culture discussions into intellectual histories of early American law. Particularly, he proposes that analysis colonial and early American legal education may merit insight into the workaday legal assumptions of New England law-makers. This idea is developed throughout this research.

An article by Del Duca and Levasseur also considers the concept of legal culture and focuses upon the impact of the transplantation of English legal norms and legislation on the evolution of the US legal institutions. They acknowledge the immediate connections between the two legal cultures, noting that America was uniquely receptive to English legal influence during

[4] Richard Ross, "The Legal Past of Early New England: Notes for the Study of Law, Legal Culture, and Intellectual History," *The William and Mary Quarterly*, vol 50, no 1 (1993): 30.

colonial era despite substantial exposure to diverse cultures. Much of this English influence relies on the lingual and cultural consistency between the two entities. The authors point to the adoption of Blackstone's *Commentaries on the Laws of England* as the definitive textbook for early American legal education to illustrate the reliance of colonial law on the English legal institutions.[5] However, the American system soon diverged significantly from the British legal culture, as the American law-makers structured their legal systems to fit regional realities and functions. Anti-British sentiment in early America following the Revolution is quite important to this discussion. We see some states such as New Jersey and Rhode Island adopting statutes prohibiting use and transplantation of English common law decisions rendered after 1776. Curiously, this does not preclude the use of Blackstone's *Commentaries*, which were published between 1765-1769. Del Duca and Levasseur also briefly consider the legal cultures of Louisiana and Texas which express the empowerment of state legislators to develop legal institutions divergent from the broader American social context, based more on French and Spanish influence than British.[6] This article will thus assist this essay to explore the regionalism of the American legal culture and the copyright traditions we explore will incorporate the emphasis on the local intellectual property needs of American legislators.

The post-Revolutionary American legal culture derived in many ways from the historical memory of the former colonists, not only of their salient history but of the first English Revolution. Rock Brynner's essay, "Cromwell's Shadow over the Confederation", highlights the concerns of early American law-makers such as George Washington and James Madison that the

[5] Louis Del Duca & Alain Levasseur, "Impact of Legal Culture and Legal Transplants on the Evolution of the U.S. Legal System," *The American Journal of Comparative Law*, vol 58 (2010): 5.
[6] Ibid, 23.

revolution would be merely an interregnum. Brynner argues that the profound Enlightenment-era concept of cyclic historiography that permeated Anglo-American intellectualism influenced American legal decision-making in the early stages of nationhood.[7] As these ideologies persisted in the American consciousness, the uncertainties fostered by Washington/Cromwell comparisons continued. By exploring the attempts to create a nation based on popular sovereignty in the wake of the English Civil War and the tensions stemming from the historiography of the time, we can examine the growth of the legal culture in America as it evolved. Early 19th century copyright legislation in America especially connects to Brynner's broader argument that the American experiment expressed a transcendence of this inevitable historic recurrence. As American confidence in the federal structure soon matured in the years following the ratification of the Constitution, we see a strengthening in the copyright culture that involved more divergence from the British legal norms collected and expressed in America by Blackstone.

Peter Baldwin, in his book *The Copyright Wars: Three Centuries of Trans-Atlantic Battle*, contends that in the 18th century Britain and the United States had similar goals in the development of copyright law and indeed exhibited parallel development of statutory copyright based loosely on the natural rights of the author. Both nations wanted to encourage author productivity and to streamline the timely transfer of the copyrighted material into the public domain. He points to tensions in both countries regarding the adoption of either common law copyright, which assigned authors perpetual natural rights over their works, or statutory copyright, which saw literary property as an artificial social creation. By constructing the author-

[7] Rock Brynner, "Cromwell's Shadow over the Confederation: The Dread of Cyclical History in Revolutionary America," *Proceedings of the Massachusetts Historical Society,* Third Series, vol 106 (1994): 37.

work relationship as a plausible natural right and proceeding to then make such author rights fully assignable, statutory law in the Anglo-American recognized authorial claims to their own work but was primarily concerned with the economic ramifications of too strong copyright protections.[8] However, Baldwin's overarching goal is to contrast Anglo-American 'publishers' copyright against what he determines to be persistent Continental European authors' rights, on a scale of three centuries. This is concerning for the reader as the book attempts to cover an incredibly broad scope of four copyright traditions over hundreds of years. So as to not get bogged down by the wealth of information presented in the first few chapters, only the most relevant arguments regarding the development of British and American copyright in the 17th and 18th centuries. Baldwin implies that these English language copyright environments evolved similarly because of just that, the cultural and lingual connection between England and the USA.

Confronting the paradigm shift in American IP law concerning the constant need to redetermine rights to intellectual property, Hare's argument challenges the accepted ontology between the ideological principles underlying copyright law. He tends towards a discussion concerning the role of the United States in developing a historically based (meaning derivative of existing British common law) IP legal structure and describes the insufficiencies of such a system at adapting to new formulations of property. Protection of IP rights that are necessarily mental products derivative of an unprotectable 'idea' cannot be applied satisfactorily to novel social contexts. Hare contends that IP issues associated with determining natural law and expressing derivative status from that idea are highly contingent on cultural and technological

[8] Peter Baldwin, *The Copyright Wars: Three Centuries of Trans-Atlantic Battle.* Princeton University Press: Princeton, 2014: 19.

movements.[9] The erratic treatment of law based on inherent rights by new countries and the constant necessity to keep 'reinventing the wheel' so to speak invalidates the development of a general intellectual property system based on absolute principles. Due to this, Hare argues that ownership should be determined on the basis of de facto control, time, and intent. This explicitly places the American author in a relationship with ownership that invalidates many natural law arguments advanced by many 17th and 18th century British thinkers. Although Hare's focus isn't necessarily on the tensions between early American and British copyright and indeed is more valuable for a discussion of the modern and future development of copyright, his argument that new legal environments warrant newly constructed ontologies is relevant to the emergence of the American legal culture.

The 1710 Statute of Anne emerges into the legal realm as the first statute providing for copyright regulated by the state and its courts rather than by private interests such as guilds. English law before the Statute of Anne had a a long history of government censorship and monopoly of right to copy by the Stationers' Company, which was invested with a royal warrant for the perpetual copyright and distribution rights of all books in England. The Crown let the Stationers' Company hold this privilege from 1556 until 1695 in order to bind the political interests of the monarchs to the economic interests of the publishers, though the royal privilege the publishers were invested with took a couple forms. The courts which initially validated this warrant were abolished in the mid-17th century by the Long Parliament, which convened from 1640-1660, and the royal warrant was replaced with the Licensing Act of 1662.[10] The Licensing

[9] Clark Hare, "Towards an Ontology of Intellectual Property: A Suggested Reconstruction," *The American Journal of Economics and Sociology*, vol 58, no 2 (1999): 290.

[10] Ronan Deazley, "Commentary on the *Statute of Anne* 1710" in *Primary Sources on Copyright (1450-1900)*, eds. L. Bently & M. Kretschmer, (2008) www.copyrighthistory.org

Act attempted to set out a comprehensive set of provisions concerning licensing of the press and management of the book trade. The act reaffirmed the publishing power of the Stationers, imposed additional restrictions on printing allowing invasive searches for illegal presses, and also stipulated that the act be renewed every two years.[11] However, the privilege system that had been expressed in the common law of the English courts was intensely unpopular, as the Company's monopoly and censorship of the publishing market failed to protect authors and was often injurious to public knowledge. We do see the introduction of a clause requiring a library deposit, yet this was the last instance in English law in which censorship of the press was strategically linked the economic interests of the Stationers' Company.[12]

It is important to note, therefore, that the modern copyright legislation that was the Statute of Anne was not developed in an intellectual vacuum. Rather, it emerged following critiques of the privilege system of publishing rights by public intellectuals such as John Locke. Indeed, Locke wrote a formal memorandum the MP Edward Clarke, chair of the 1693 Licensing Act renewal committee in Parliament, stressing that the system restricted free exchange of ideas and education and provided unfair monopolies to Company members.[13] The direct involvement of Locke and numerous other authors and smaller stationers in the campaign to convince Clarke to let the 1662 Licensing Act lapse in 1895 in favor of a reformed licensing system favorable to

[11] Licensing Act, London (1662), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org
[12] Ronan Deazley (2008) 'Commentary on the Licensing Act 1662', in *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer, www.copyrighthistory.org
[13] Locke's Memorandum on the 1662 Act (1693), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org

authors (and the commons) is curious indeed and exhibits the influence of strongly principled intellectual debate upon the development of the Statute of Anne.[14]

In sharp contrast to the extensive and centralized privilege system that served as the common law precedent for the British copyright statutes, colonial and early American governments relied mostly on sporadic privileges determined by local legislatures that were subject to veto by the governor. The US constitution does include a brief clause in Article 1 that provides Congress the general power to encourage the progress of science and useful arts by securing exclusive limited time rights to authors and inventors.[15] However, the first documented instance of an author's copyright was granted to music compiler Andrew Law by the Connecticut legislature in 1781.

In the years following the privilege granted to Law, there was an increase in local and national lobbying efforts for copyright protections by authors, including Noah Webster, who relentlessly pursued to get copyright protections enacted before publishing his *A Grammatical Institute of the English Language*. Indeed, a resolution by the Continental Congress in 1783 recommended that states adopt general copyright statutes to protect the rights of authors and publishers.[16] Between 1783 and 1786, there were significant ideological reorientations in which the twelve of thirteen colonial legislatures articulated authors' copyright based on natural rights

[14] Locke's critique of the renewal of the Licensing Act might surprise some modern scholars, who point to his advocacy for private property in the *Two Treatises of Government*. It is important to note that Locke believed that private property existed in balance with the common good, insomuch as the private property of an individual should not restrict the private property rights of another. More on that later.
[15] The Constitutional Copyright Clause, Philadelphia, Pennsylvania (1789), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org
[16] Continental Congress Resolution (1783), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org

and utilitarian arguments. The rapid emergence of the state statutes represented the states' growing awareness of the Statute of Anne, the need to encourage local authors and learning, and, most importantly, the national interest of the young United States to establish its cultural status among other civilized nations. However, the ad hoc development of copyright law on the state level fostered issues concerning localism of state legislation in a newly national publishing market that certainly was unique to the development of American copyright.

The confluence of intellectual property and cultural developments in the United States in the early years of American nationhood exhibits many of the mixed anti-British sentiments experienced by American legislators. The impulse to transcribe the existing British law to the new national policy contrasted directly with the compulsion to create a uniquely American copyright (and therefore cultural) identity. One of the best ways to explore this tension in early American legal culture is to examine how arguments for copyright were situated during sessions of the Continental Congress, especially those arising in the early 1780s that preceded the 1789 adoption of the US Constitution and the 1790 Copyright Act. The influence of individuals with personal stakes for protecting copyright draws parallels to the conversation in England following the adoption of the Statute of Anne. However, there are aspects of the American debate about how copyright law fit into the wider legal and cultural context of American society that illustrate the distinctiveness of the US copyright from the English system.

As the definitive legal text for much of colonial and post-revolutionary American law-makers, Blackstone's *Commentaries on the Laws of England* were extremely influential in the education of Americans about English common law and indeed were an accessible entry point into the legal profession in general. Though not concerned at length with expressing specifics about copyright protections, Blackstone defines an incorporeal species of property known as

dignities which identifies a right to exercise public or private employment and property. The way Blackstone constructs private property is consistent with the philosophies of Locke, noting that "the public good is in nothing more essentially interested, than in the protection of every individual's private rights."[17] This reflects the Lockean proviso of non-interference with the liberty of another individual and indeed empowers the courts to apply punitive legal measures to protect against infringements of individual private property. Intellectual property, in Blackstone's interpretation of the English common law, can therefore be addressed by legislation as a form of private property (*dignity)* subject doctrines of *ways*, another species of property which governs permissions of individuals to pass over the property of another.[18] Thus, we see the conceptual basis for copyright that was available and taught in colonial and post-revolutionary America and can proceed to examine closer the nuances of American legal culture incorporating intellectual property legislation.

Colonial attempts at copyright legislation generally relied on sporadically applied privileges subject to veto by the colonial governor. These special privileges mirrored in several ways the legal environment of England preceding the enactment of the Statute of Anne in 1710. Without an articulated and explicit legal framework to guide the expansion of intellectual property protections in the colonies, local legislatures deferred largely to British legal logic to support printing enterprises. The granting of the first exclusive printing privilege in the British colonies in 1672 to bookseller John Usher by the Massachusetts General Court highlights many colonial concerns about the status of the press. Though merely a brief paragraph granting vaguely limited privilege to Usher, the assembly did indeed provide protections against

[17] William Blackstone, 1723-1780. *Commentaries On the Laws of England*. Boston: Beacon Press, 1962.
[18] Ibid, 323-324.

infringement of Usher's rights to copy, punishing the infringer "upon forfeiture and penalty of treble the whole costs of printing and paper."[19]

Though not representative of the post-revolutionary copyright schema, this legislative action illustrates the effect of the British Licensing Act of 1662 on New England colonial policy. The Licensing Act represented British attempts to codify government interactions with the press by providing for formal censorship and licensing requirements. Similar aspects considering the value and danger of a public press are expressed through the Usher Petition. The distrust of colonial assemblies to directly enable publishers is representative of the colonial reliance on English example. Other examples of sporadic colonial attempts at copyright protections include North Carolina in 1746 and New York in 1750. Even then, the rights provided by these actions were restricted to the publishing of the colonies' respective laws. At this point, it is clear that the colonial American legal culture did not diverge significantly from the English influence.

Following the Revolutionary War, American legislators faced the challenge of expressing a unique legal culture and copyright protections were in many ways implicated in the process of exploring the role of legal regulations in American society. It is important to note the legal ramifications of the America federation as an untested union of semi-autonomous states. Rather than writing laws based on the centralized English society, early American legislators were responsible for the creation of a national system capable of addressing national as well as regional realities. The activities of lobbyists such as Noah Webster and Joel Barlow surrounding the 1783 Continental Congress are thus very influential in the development of American copyright and advancing a legal culture distinct from that expressed in England. Inevitable

[19] Usher's Printing Privilege, Massachusetts (1672), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer: 527. www.copyrighthistory.org

comparisons to the English legal culture can be drawn of course, both in the clear inspiration American statutes took from British copyright laws and in the endeavors of public intellectuals such as John Locke to influence the philosophical direction of such laws.

Writing to Elias Boudenot, who was then president of the Continental Congress, Barlow's 1783 letter to Congress speaks much of the aspirations of early Americans to establish national identity through intellectual property stipulations. Barlow highlights "the embarrassment which bears upon the interests of literature & works of genius in the United States" as a fundamental error of the still-in-flux legal structure by allowing the degradation of American literary efforts by unrestricted shoddy printing.[20] He argued that copyright laws were necessary to ensure the success of American writers, and thus achieve a depth of diverse American thought rivalling that European intellectuals dedicated fully to their study. Barlow alludes directly to the British copyright policy and suggests direct translation of the principles by the state legislatures. As Barlow does not attempt to distinguish between how American copyright should be different that that of England, Baldwin's suggestion that the two legal cultures develop convergently holds true for the moment.

Through the actions of Barlow and other lobbyists, the Continental Congress published in May 1783 a declaration recommending the adoption copyright statutes by each of the states. Modelled loosely on the Statute of Anne, the recommendation of the Congressional committee (which included James Madison amongst others) was for states to apply terms of at least fourteen years right to copy and renewable at least once. It is curious but not very surprising that the language used in the resolution invested legislatures to enforce copyright "by such laws

[20] Letter from Joel Barlow to the Continental Congress (1783), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org

and under restrictions as to the several states may seem proper."[21] This hands-off approach for post-revolutionary legal development places the onus of copyright protection at state discretion. While general copyright legislation was voted on by most of the new states (twelve of thirteen former colonies wrote in state copyright statutes) according to the formula proposed by the Congress, this emphasis that states were responsible for the protection of the cultural works created within their borders suggests the development of an American legal culture defined by countervailing entities. This is especially clear in New Jersey's copyright statute, drafted also in 1783, which provides explicitly to extend it's reach to works infringing on New Jersey literature that was published in a separate state.[22]

The expansion of the copyright culture in America gathered momentum in the years following the resolution by the Continental Congress, such that the drafting of the US Constitution in that period directly reflected the impetus of the states to craft stronger IP laws. The *Federalist* newspaper published a short piece in 1788 claiming that "the states cannot separately make effectual provision for either of the cases [of authors or inventors]," essentially arguing for the partial centralization of copyright law with the new federal seat of government.[23] This resulted in the famous clause in Article I, Section 8 of the US Constitution, which provided federal legislators to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." (US Constitution, Article 1, Section 8) Certainly, this was an incredibly ambiguous

[21] Continental Congress Resolution (1783), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer: 327. www.copyrighthistory.org
[22] New Jersey Copyright Statute, New Jersey (1783), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org
[23] The Federalist No. 43, New York (1788), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer: 57. www.copyrighthistory.org

clause, yet it is important to emphasize how the clause left open the debate surrounding the position of federal copyright laws within a union of discrete state legislations and how it provided a reference point that later became essential to the court cases that made American legal culture distinct from England. It is from this clause that American legislators began to address the regionalism that Del Duca and Levasseur identify in the colonial legal systems.

The need for such legislation was very clear, as demonstrated by the House Record from April 15, 1789, in which author and bookseller David Ramsey sought copyright privileges for the first time from Congress rather than state legislatures. Ramsey's petition to obtain copyright for his book *History of the American Revolution* entered Congressional deliberation alongside a similar petition by an inventor, John Churchman, seeking patent protections for the development of magnetic navigational techniques and was assigned to a committee of three representatives.[24] Although it seems Ramsey and Churchman did not have their appeals directly granted, the language used in the Ramsey Petition expresses the uncertain enthusiasm of the American public for application of the new Constitutional copyright clause. Ramsey directly addresses his letter to "his Excellency the President and the Honorable Members of the Senate", signifying first and foremost the centrality of the president in his cultural consciousness.[25] This recalls the tension suggested in Brynner comparing the situation of George Washington to that of Oliver Cromwell. If the president is directly involved in granting copyright rights similar to 17th English printing privilege, then what indeed was there to separate the legal implications of presidential censorship of printing from the expansion of a democratic copyright system? By stating his trust that the

[24] Ramsay's Petiton House Record, New York (1789), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org
[25] Ramsay's Petition, Charleston (1789), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org

federal government to institute "such other Regulation as to your wisdom may seem proper for the present purposes," Ramsey addresses these concerns by showing the increased confidence in the national government following the ratification of the Constitution.

Following directly from the powers granted to the US government by the ratification of the Constitution and sped by the increase in copyright submissions like Ramsey's, the Copyright Act of 1790 represented the first attempt by Congress to codify access to limited exclusive copyrights. Not much has to be said about the Copyright Act. The act closely resembled the British 1710 Statute of Anne, retaining the one time renewable 14-year statute of limitations as well as applying a clause allowing infringement cases with (albeit harsher) 50 cent per sheet punitive measures.[26] This suggests the urge to retain the British interpretation of copyright in post-Revolutionary America was balanced with the impetus to develop a national identity through support of writers and inventors. This general copyright legislation did nothing however to attempt to apply the conditions set forth in the 1790 act to the importation and distribution of foreign materials. This makes sense as America, a young nation, did not necessarily have the means to enforce their new legal customs onto foreign entities. By focusing on American intellectual property claims, the 1790 act thus proposed to support the development of a uniquely American legal culture but did little to ensure that such culture was solely American.

In the years after the Copyright Act of 1790, the American public began petitioning Congress to take federal copyright further by strengthening the protections offered to authors and widening the scope of what could indeed by copyrighted. The American Noah Webster, known best for his dictionary works and his contribution to federalist movements in the early US, had

[26] By contrast, the Statute of Anne stipulated a fine of a penny per seized sheet for infringers.

failed to get his dictionary published by English booksellers and was growing frustrated with the status quo of intellectual property law in both America and England. Webster was a tireless advocate for expanding American copyright protections. A staunch proponent of author copyright, he pursued statutory expression within the American intellectual property umbrella that ensured authors' perpetual ownership of copyright.

An 1826 letter exchange between Noah Webster and a Congressman named Daniel Webster provides an example of the arguments presented in the lobbying efforts.[27] Noah Webster rejects the British decision against perpetual copyright and mocks British dependence on statute law to fulfill right to property. He proceeds to argue in a manner consistent with Lockean property theory: "if any thing can justly give a man an exclusive right to the occupancy and enjoyment of a thing, it must be the fact that he has *made* it."[28] The emphasis the lobbyist puts on the labor-ownership logic suggests that his perspective is that intellectual property should not be considered separately from other forms of property, which are treated as a natural private right. Daniel Webster acknowledged and agreed with this argument in the abstract, however, he objected to placing copyright as a perpetual right. The Congressional representative considered intellectual property in a much broader sense:

[27] Daniel Webster was Chair of the House Judiciary Committee at the time. No personal relation to Noah Webster.
[28] Letter from Noah Webster to Daniel Webster, New Haven (1826), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org

> But after all, property, in the social state, must be a creature of law; and it is a question of expediency, high and general, not particular expediency, how and how far, the rights of authorship should be protected.[29]

By recognizing the necessity to adapt American copyright to fit the needs of authors in the emerging 19th century American economy, Daniel Webster highlights these social pressures within the American society regarding property. The immediate comparisons that Noah Webster made concerning American copyright falling behind the English and other European system emphasizes the motivation of 19th American law-makers to continually consider their own copyright through the lens of its English roots. It is significant therefore that lobbying efforts such as those by Noah Webster aided revision of the 1790 US Copyright Act in 1831.

The revised 1831 Copyright Act represented a much stronger stance on copyright protections and thus a more mature legal culture in America. The Act expanded copyright grants to 28 years from 14 years, implemented a penalty of one hundred dollars for false copyright claims, added a hereditary inheritance clause, and empowered US courts to file injunctions to control the distribution of an expanded range of copyrighted manuscripts.[30] Generally, this piece of legislation intended to support the position of authors within American society. While the English had updated their copyright laws in 1814 to cover the same 28-year period, they had also removed the renewability of the copyright and did not expand copyright protections to the authors' families. Whereas the amendments made by the British law-makers more or less maintained the status quo established by the 1710 Statute of Anne, the US Copyright Act of 1831

[29] Letter from Daniel Webster to Noah Webster, Boston (1826), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org
[30] Copyright Act, Washington D.C. (1831), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org

vastly expanded the array of cultural products and granted authors' families more recourse to apply copyright protections. This signals both a change in the US economy toward more commercial enterprise and indicates a compromise between the positions of Noah and Daniel Webster.

Soon after the revision of national copyright legislation in 1831, American authors and other professional writers grew increasingly confident in invoking the federal intellectual property laws to protect their literary labors. Two court cases following the adoption of the revised Copyright Act of 1831 are especially noteworthy and indicative of the legal discussions of this early antebellum era. American law-makers were attempting to reconcile the issues of applying national laws to the union of largely autonomous states and the influence of these attempts are clear in *Wheaton v. Peters (1834)* and *Folsom v. Marsh (1841).* The *Wheaton v. Peters* decision rejected common law copyright in the United States and established a precedent for future discussions regarding public domain, reopening the literary property debate that had been settled in England since landmark cases such as *Donaldson v. Beckett (1774)* and *Beckford v. Hood (1798). Folsom v. Marsh (1841)* was a similarly significant case in the development of a distinct American legal structure, expressing early innovations considering loosely constructed fair use doctrine. The relative turmoil of the American courts as their approach to copyright legislation began to mature parallels the static stability of the English courts ultimately reflects the growth of American exceptionalism in culture and law.

The late 18th century British legal structure and its tendency toward slower, longer considered development of copyright law innovations continues to be a useful benchmark for examining the relative urgency seen in American efforts at constructing a lasting legal culture. By the turn of the century, debates in English courts largely resolved, upholding the rights of

English authors by common law but revoking their perpetual natural right to copy.[31] *Donaldson v. Beckett (1774)* represented this conclusion, acknowledging that the courts necessarily recognized the existence of copyright on the grounds of judicial precedent but that the Statute of Anne (1710) continued to be the predominant source of legitimation for such rights. *Donaldson (1774)* also addressed that the [royal] prerogative copyright from which the common law branched was based on the principle that "Printing belongs to nobody, and what is nobody's is of course the king's."[32] This decision referred to the necessity of eventual expiration of copyright in order for literary works to enter the public domain and effectively combined common law and statutory copyright doctrine.

Establishing that the powers of the Statute of Anne co-existed alongside common law rights to copy enabled open interpretation of the doctrine, as seen in *Beckford v. Hood (1798).* This decision rendered in this turn of the century case established litigatory practices for copyright claims that failed to fulfill the requirements of Statute of Anne, allowing for authors to sue for infringement despite improperly obtaining their statutory copyright privileges.[33] English courts were essentially able to rely on the existence of extensive judicial precedent to handle such cases that were beyond the purview of the Statute of Anne. As a result, the combination of these two decisions were very effective at providing legal legitimation and regulation of copyright. The centralized legislative body, the House of Lords, certainly also contributed to a stable copyright culture that persisted in England throughout much of the 19th century.

The United States, by contrast, was at the turn of the century a young nation that lacked a strong centralized legislative/administrative entity and much of the common law that had been so

[31] Wherein authors would retain all rights to publication and distribution of their works.
[32] *Donaldson v. Beckett, London (1774)*
[33] *Beckford v. Hood, London (1798)*

useful to English law-makers in crafting effective national copyright laws. Direct precedents from Britain were generally seen by American law-makers as artifacts of a separate, altogether unfamiliar cultural and political context. Nor could state common law be directly applied on a national scale. This conclusion came as an intermediary decision by the Supreme Court regarding a copyright claim by Court reporter Henry Wheaton against Richard Peters for infringement on Wheaton's anthologies of Court decisions, which included annotations and summaries of arguments. Peters was Wheaton's successor as court reporter and eliminated Wheaton's work compiling the opinions to release volumes as a much cheaper price, destroying Wheaton's income from printing his compilations and making him take a massive loss on the cost of printing the same.[34] After losing the case in the Pennsylvania circuit court, Wheaton appealed to the Supreme Court to redress the claim.

The Supreme Court first established that there could exist no common law of the United States. As the federal government in 1834 contained twenty-four sovereign and independent states in union, "there is no principle which pervades the union and has the authority of law that is not embodied in the Constitution or laws of the union."[35] Each state may provide for local customs and common law, yet only by selective legislative adoption can that precedent be entered into the federal legal system. The Court also acknowledged that, though colonial Americans brought English common law through Blackstone as part of their legal heritage, English precedent had never been in force in all provisions. Rather, "it was adopted only so far as its principles were suited to the condition of the colonies," an effect notably seen in the 1783 New Jersey copyright statute that specified regional realities about the extent of copyright filed

[34] *Wheaton v. Peters,* 33 U.S. (8 Pet.) 591 (1834)
[35] Ibid, p. 591.

in that state.[3637] The significance of explicitly divorcing English common law from early American state common law should not go unnoted. Because there was no federal common law protecting post-publication copyright in America, Justice John McLean of the Court declared that copyright existed purely by statute after publication.

Because Congress had created (rather than adopted) these statutes, the Court reasoned that every requisite under the congressional acts was essential to obtaining the copyright title. Wheaton's work, aside from ancillary commentaries on court opinions, did not fall under copyright protection, as the opinion of the U.S. Supreme Court could not be copyrighted, nor could the Court confer such copyright. The opinion on *Wheaton v. Peters* concludes with a brief commentary on the accessibility of the Court's decisions to the public. In conjunction with the opinion that British common law did not apply to Court decisions, the expression of a public domain for federal court opinion articulated much of the exceptionalism in American culture at the time. Moreover, *Wheaton v. Peters (1831)* was the landmark case in the Supreme Court concerning copyright and directly confronted British influence in the American courts by ensuring that the decision was argued with solely American law.

Following several years after *Wheaton v. Peters (1834)* concluded, *Folsom v. Marsh (1841)* advanced the scope of copyright protections and established the basis for fair use. The case dealt with publisher Charles Folsom's claim of copyright over a series of letters by George Washington used in biographical context, suing for the wholesale plagiarism of 353 pages by publisher Bela Marsh. Marsh, as defendant in the case, argued that the papers were not copyrightable as the author was deceased and the documents were not private property.

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[36] Ibid, 592.
[37] New Jersey Copyright Statute, New Jersey (1783), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org

Attempting to expand the scope of public domain established in *Wheaton v. Peters (1831),* Marsh wanted to prove above all that an "author has a right to quote, select, extract or abridge from another, in the composition of a work essentially new."[38] Marsh's strategy also claimed that the Washington letters published by Folsom were fair to use because they belonged to the government as presidential property. The fair use of documents such as presidential letters would include these derivative works, as it would be close enough to original labor by compilation.

The Court ultimately decided in the favor of Folsom, ruling that the letters were copyrightable matter and direct extracts could be infringement. In effect, this significantly extended copyright protections by construing derivative works within the rights of the copyright holder. It was judged by the Court that there existed fair use of copyrighted materials within regulatory limits, but that in this particular circumstance there was no such fair use. Justice Story, who gave the Court's opinion on the case, stated

> In short, we must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.[39]

This assertion opened the conversation for American copyright about what constituted fair use and these four factors were repeatedly cited over the next century and a half. The flexibility the *Folsom v. Marsh (1841)* fair use doctrine contributed to allow copyrighted materials to be distributed legally by third parties in specific diminutive editions. Along with *Wheaton v. Peters (1834),* this court case represents efforts from the US government to prevent monopoly over

[38] *Folsom v. Marsh*, 9 F Cas 342 (1841)
[39] Ibid.

information in the young country. In many ways, these two cases formed a legal basis for cultural dissemination of copyrighted materials in America and confronted the legal paradigms that persisted from early British influence.

The question to answer now is what relevance understanding the development of a distinct legal culture in America has for constructing and comprehending intellectual property law in a modern context. Because in several senses early American culture was a blank slate upon which English law was applied, some insights about the imposition of established legal traditions into underdeveloped legal environments might be found. Specifically, the transposition of intellectual property into developing nations where legal systems may not be present or are lacking should be considered. The initial reliance of the American legal systems on British common law is indicative of the traditional wisdom that many developing nations will likely employ at the beginning stages of developing unique legal cultures. This established legal influence continues to exert pressure on the expansion of new legislation in the developing nation until nationalist sentiment separates the new nation from the established nation. We see this with the growth of American exceptionalism in the early nineteenth century, as anti-British sentiment mounted and there was the impetus to develop distinct American copyright legislation as part of the US national identity.

Bibliography

Baldwin, Peter. *The Copyright Wars: Three Centuries of Trans-Atlantic Battle*. Princeton University Press: Princeton, 2014. http://www.jstor.org/stable/j.ctt6wq0z2.

Blackstone, William. *1723-1780. Commentaries On the Laws of England.* Boston: Beacon Press, 1962.

Brynner, Rock. "Cromwell's Shadow over the Confederation: The Dread of Cyclical History in Revolutionary America." *Proceedings of the Massachusetts Historic al Society*, Third Series, vol 106 (1994): 35-52.

Continental Congress Resolution (1783), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org

The Constitutional Copyright Clause, Philadelphia, Pennsylvania (1789), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org

Copyright Act, Washington D.C. (1831), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org

Deazley, Ronan. "Commentary on the Licensing Act 1662", in *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer. (2008) www.copyrighthistory.org

Deazley, Ronan, "Commentary on the *Statute of Anne* 1710", in *Primary Sources on Copyright (1450-1900)*, eds. L. Bently & M. Kretschmer, (2008) www.copyrighthistory.org

Del Duca, Louis & Levasseur, Alain. "Impact of Legal Culture and Legal Transplants on the Evolution of the U.S. Legal System." *The American Journal of Comparative Law*, vol 58 (2010): 1-29.

Friedman, Lawrence. "Legal Culture and Social Development." *Law & Society Review*, vol 4, no 1 (1969): 29-44. https://www.jstor.org/stable/3052760

Hare, Clark. “Towards an Ontology of Intellectual Property: A Suggested Reconstruction.” *The American Journal of Economics and Sociology*, vol 58, no 2 (1999): 285-297. https://www.jstor.org/3487718

Letter from Daniel Webster to Noah Webster, Boston (1826), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org

Letter from Joel Barlow to the Continental Congress (1783), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org

Letter from Noah Webster to Daniel Webster, New Haven (1826), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org

Locke's Memorandum on the 1662 Act (1693), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org

New Jersey Copyright Statute, New Jersey (1783), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org

Ramsay's Petition, Charleston (1789), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org

Ramsay's Petiton House Record, New York (1789), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org

Ross, Richard. “The Legal Past of Early New England: Notes for the Study of Law, Legal Culture, and Intellectual History.” *The William and Mary Quarterly*, vol 50, no 1 (1993): 28-41. https://www.jstor.org/stable/2947234

Usher's Printing Privilege, Massachusetts (1672), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org