1. Introduction to Part I: the history of copyright

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The 2009 ALAI Conference was held in London in recognition of 300 years of the Statute of Anne. That Act is traditionally claimed to be the world’s first copyright statute, and has thus become viewed as the origin of a system of national laws that today exist in virtually all countries of the world. But, while there is some truth in such a claim, it is also important that it be treated with caution, because it is apt to mislead – in at least three ways.

1 THE WORLD’S ‘FIRST’ COPYRIGHT ACT

First, the statement might imply that the Act represented the world’s first system of regulation of the reproduction of published books. But this is not true at all. As Ronan Deazley and Willem Grosheide describe, many countries had equivalent systems of Guild regulation and royal printing privileges long before 1710, with many of the print privileges schemes developed in the wake of the practices of Venice and Rome.4

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1  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, 1710, 8 Anne, c.19.
3  See herein, Chapters 3 and 6 respectively.
4  For a sample of key documents, with commentaries, see the contribution of Joanna Kostylo to L. Bently and M. Kretschmer (eds), Primary Sources on Copyright in Five Jurisdictions, 1450–1900, at www.copyrighthistory.org. For a
With respect to the United Kingdom, the Act of Anne had been preceded by well over 150 years of regulation of printing, via the grant of printing privileges (some over individual works, but several important ones over categories of works), through the regulations established by the Guild of Stationers and the statutory mechanisms that gave teeth to those privileges and regulations, namely the Licensing Acts. In Lyman Ray Patterson’s account of the Statute of Anne, the Act was a ‘trade regulation device’ that ‘restored’ order to the book trade that has arisen when the Licensing Act was not renewed in 1695. So the Act of Anne was not, in substance, something that was new. The Act merely created a legislative system giving authors and publishers standardised, time-limited, privileges as of right. And, as Michael Suarez argues very little changed as a result of the Act.6

And if the Act of Anne did not inaugurate a substantively different system of regulation, then all that was ‘new’ about it was that it was an ‘Act’ – a public law enacted by the Crown in Parliament, rather than a regulatory system dependent on a mix of custom, privilege and law. Of course, this shift might be thought significant, because legislation represents the form of most contemporary laws. But legislation in 1710 should not be credited with the same kind of aura of legitimacy that legislation has in an era of democracy where the legislature is voted in by a free vote of all adults, whatever their wealth, property or status.

Footnote 4 (cont.)
specific ‘contender’ for the title of ‘world’s first copyright Act’ see Venetian Decree on Author-Printer Relations (1545), in ibid., but note also Kostylo’s commentary noting that although the Decree is ‘often celebrated as the first European legislative act to recognise the author’s “copyright”. . .[i]n reality. . .it was one of a series of remedial decrees designed to regulate the printing trade and, rather than constituting an assertion of author’s rights as such.’


6 See Chapter 4 in this volume.
2 THE WORLD’S FIRST ‘COPYRIGHT’ ACT

Secondly, the reference to the Act of Anne being a ‘copyright’ Act is also misleading, for we might question whether the Act of Anne was a ‘copyright’ statute at all. After all, it did not use the term ‘copyright’ – so we cannot justify calling it a ‘copyright Act’ because this was how the Act described itself. The rights the Act conferred were described as the rights to ‘print and reprint’ books, not ‘copyright’. Moreover, it is unclear how widely the term ‘copyright’ was used in 1710. Certainly some references to such a term have been found in the Stationers Company (dating from 1678) and court records (1681/2) dating from before 1710, but even then the term referred to ‘rights in copies’, that is manuscripts, rather than the ‘right to copy’. Had anyone celebrated the passage of the Act in April 1710 by declaring ‘this is the world’s first copyright Act’, the chances are that few, if any, would have understood what that meant.

As is clear from what I have just said, to contend that the Act was the first ‘copyright Act’ rather begs the question as to what we mean by ‘copyright’. And here, I think, we need to be careful, because the term ‘copyright’ is resonant with meaning (as Paul Goldstein observed in his 1989 Brace Memorial Lecture). If all we mean by ‘copyright’ is the right to control copying, then I think there is not much harm in the statement (though, it should be noted the right was confined to published works). But, if one understands ‘copyright’ to mean the rights of authors, or the regime of regulation of literary and artistic works, or a regime of

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7 Perhaps this is one answer to Professor Cornish’s inquiry, at Chapter 2, Section 1 in this volume, into why it came to be known as the ‘Act of Anne’: a term had yet to be generally known that would satisfactorily describe the Act’s operation.

8 Tomás Gómez-Arostegui, ‘What History Teaches Us About Copyright Injunctions And the Inadequate-Remedy-At-Law Requirement’ (2008) S. Cal. L. Rev 1197, 1225-6, referring to Herringman v. Clerke, C8/301/33. Indeed, at least one pamphlet preceding the 1710 Act used the term ‘Copy-Right’ as well as the more common phrase ‘rights in copies’: Reasons Humbly Offer’d for the Bill for the Encouragement of Learning (1709), L. Bently and M. Kretschmer (eds), Primary Sources on Copyright (1450–1900) www.copyrighthistory.org.

9 For a typical example of such usage, see Reasons Humbly Offer’d for the Bill for the Encouragement of Learning (1709), L. Bently and M. Kretschmer (eds) Primary Sources on Copyright (1450–1900), www.copyrighthistory.org (referring to the ‘sole and undoubted right to the copy of his own book’, the ‘assignment of such copy’ and so on).

10 P. Goldstein, ‘Copyright’ (1990–1) 38 Journal of the Copyright Society of the USA 109.
Global copyright

regulation related to but distinct from laws of patents and designs, then we need to be much more wary.

For the 1710 Act was, in its inception, concerned with the regulation of published books. The Act conferred protection on existing works for 20 years. It was conceived as a device that would prevent other booksellers copying those published works. It was not, primarily, a mechanism for recognising ‘authorship’, even if it was expressly directed at ‘the encouragement of learned men to compose and write useful books’. As has now been thoroughly exposed, the Act preceding the generation of ideas of authorial genius, the so-called ‘romantic author’,¹¹ and to read back such later conceptualisations into the word ‘author’ (or the inclusion of a reversionary term) is to commit a historical sin.

Similarly, if we think of the Act as the origin of the legal regime for the protection of literature and art, we read back into the moment a conception that simply was not present: an abstract vision of the ‘creative field’ – the ‘fine arts’ or ‘les beaux arts’. But the Act was about books, and sought by booksellers. It would come to be a legislative model which was copied, and adapted, by others who sought protection for engravings against copying, and later for fabric designs and sculpture.¹² But that is not how it was conceived. And, in Britain, no legislative protection was given to an artist over his drawings and paintings until 150 years later when the Fine Art Copyright Act was passed in 1862.¹³ The world’s first copyright act, in this sense, was almost certainly the French decree of 1793.¹⁴

¹¹ M. Rose, Authors and Owners: The Invention of Copyright (London: Harvard University Press, 1993).

¹² An Act for the encouragement of the arts of designing, engraving, and etching historical and other prints, by vesting the properties thereof in the inventors and engravers, during the time therein mentioned, 1735, 8 Geo. II, c.13; An Act for the Encouragement of the Arts of designing and printing Linens, Cottons, Callicoes, and Muslins, by vesting the Properties thereof, in the Designers, Printers and Proprietors, for a limited time, 1787, 27 Geo.III, c.38; An Act for Encouraging the Art of Making New Models and Casts of Busts, and other things therein mentioned, 1798, 38 Geo.III, c.71.


¹⁴ French Literary and Artistic Property Act (1793), L. Bently and M. Kretschmer (eds), Primary Sources on Copyright (1450–1900) www.copyrighthistory.org. However, as Frédéric Rideau explains elsewhere, even the interpretation of this Act required a considerable degree of judicial creativity: ‘Nineteenth century controversies relating to the protection of artistic property in France under the 1793
Moreover, we might think of the Act as the first ‘copyright’ statute, in the sense of marking a differentiation from other fields of (what we now call) intellectual property, such as patents, designs and trade marks. But, as Deazley reminds us, this is hardly accurate: printing privileges continued to be granted, renewed and enforced well into the eighteenth century. The Statute of Anne was not a ‘clean break’ of book regulation from the patent system. Moreover, the regulation of designs was to develop through a process of legislative mimicry from the Engravers Act, which itself was an adaptation of the Act of Anne. Indeed, as Brad Sherman and I have argued elsewhere, these distinct categories of intangible monopoly rights really only crystallised into their ‘modern’ form in the middle of the nineteenth century.

3 THE ‘WORLD’S’ FIRST COPYRIGHT ACT

Thirdly, the claim that this was ‘the world’s’ first Act is also somewhat misleading, at least in so far it may be thought to suggest that it was British genius that led to the Act, the first in the world, which was subsequently imitated rather mechanically elsewhere. Such an image over-emphasises the distinctiveness of the British contribution, and marginalises the contributions of some other countries to the construction of today’s conception(s) of ‘copyright’.

It is true, of course, that the Act of Anne was influential. It became – despite its widely recognised flaws – a model within Britain on which subsequent legislation was based. Moreover, the Statute of Anne was a model for other countries. It was copied in many of the newly independent American states, and doubtless came to exert some sort of influence.

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16 See Oren Bracha, ‘Connecticut Copyright Statute (1783)’, in L. Bently and M. Kretschmer (eds), *Primary Sources on Copyright (1450–1900)* www.copyright-history.org (and other state statutes passed between 1783 and 1786). In his commentary Bracha reviews the state laws and concludes:

The state enactments were the first time that a general copyright regime, as opposed to ad hoc privilege grants, was created in the United States. Their legislation situated the Statute of Anne as the dominant framework for such a general copyright regime and familiarised Americans, some of whom would be
over the United States federal copyright law enacted in 1790. The choice of term, in multiples of 14 years, at the very least is evidence of continued influence, right up until the 1976 overhaul that preceded the decision of the United States to adhere to the Berne Convention. Moreover, the operation of the Statute of Anne was explicitly extended outside of Britain to its colonies through the 1814 Act. The indirect influence of the Act in other countries of Europe is more difficult to identify, though I have little doubt that such influence did exist. Even in 1710, the British legislature did not operate in a vacuum, uninfluenced by what was going on elsewhere (with one of the petitions that preceded the Bill, specifically referring to practices in Amsterdam). Ideas circulated around Europe, and indeed across the Atlantic, through books, correspondence, trade fairs, diplomatic contacts, colonisation and the movement and migration of peoples. So, it seems plausible to assume (even if the historical proof has yet to be provided), that the Act of Anne was known about in France, the German states, and elsewhere in Europe over the following century.

I have little doubt that the Act of Anne was an influential legal text in Europe for precisely the same reason that I consider it potentially misleading to call the Act ‘the world’s first’. This phrase fails to recognise the significant contributions of other European legal systems both before 1710 (which influenced the development of the Act) and thereafter to the idea of, and institutional reality of copyright law and practice. We need to look outside of the Statute of Anne, and beyond British shores, for other key

Footnote 16 (cont.)
later involved with creating the federal regime, with its details. By the time that the United States embarked on creating a national copyright system it was only natural that the Statute of Anne would provide the basic template for its creation, at least in part thanks to the Americanisation of the statute’s model in the previous decade.

17 An Act for the Encouragement of Learning, by securing copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned (1790). In his commentary on the 1790 Act, Oren Bracha observes that ‘the statute of Anne served as a general inspiration, as well as a source of basic concepts and specific technical details for the 1790 Copyright Act’.

18 An Act to amend the several Acts for the Encouragement of Learning, by securing the Copies and Copyright of Printed Books, to the Authors of such Books or their Assigns, 1814, 54 Geo.III, c.156.

19 ‘Reasons Humbly Offer’d for the Bill for the Encouragement of Learning (1709)’, L. Bently and M. Kretschmer (eds), Primary Sources on Copyright (1450–1900) www.copyrighthistory.org (‘Nor is it in England alone that this Copy-Right is observ’d, but in all other Countries whatsoever where Printing is Exercis’d: And it is but a few Years since the Copies of Mr Henry Wetstein of Amsterdam were sold for several thousand Gilders.’)
contributions, such as the development of the idea of authors’ rights, of the right to control performances of work, of moral rights and contractual protection for authors, of institutions such as collecting societies, and, of course, to the development of international laws.20

20 While it is appropriate in a context such as ALAI to recognise the multiple, international contributions to the development of copyright law and practice, let us at the same time be careful not to think of ‘copyright’ as ‘the world’s’ in the sense of ‘of the world’. The ‘copyright’ that we know is not the product of, or even a symbol of, some common, consensual, global legal culture. Rather, the concept of ‘copyright’ that is embodied in international norms is one that was developed primarily in Europe. That concept is built on ideas and institutions, such as creativity, individualism and property, that are today widespread but are nevertheless not universally shared. And the process by which this concept of ‘copyright’ has been institutionalised elsewhere has involved processes that have not always been voluntary, such as colonisation and its post-colonial equivalents.