A well regulated propriety of Copies among Stationers, makes Printing flourish, and Books plentifull and cheap.
—Stationers' Petition to Parliament (April 1643)

Books seem to me to be pestilent things, and infect all that trade in them . . . with something very perverse and brutal. Printers, binders, sellers, and others that make a trade and gain out of them have universally so odd a turn and corruption of mind that they have a way of dealing peculiar to themselves, and not conformed to the good of society and that general fairness which cements mankind.
—John Locke

Copyright in the Beginning
A Publisher's Right

In 1557, eighty years after William Caxton had introduced the printing press into England, Philip and Mary (Tudor) granted the guild of stationers a royal charter, thereby creating the Stationers' Company. As one of the livery companies of the City of London—all of which were essentially incorporated craft guilds—the stationers immediately proved to be a valuable ally of the government in its campaign to suppress dissent by
controlling the output of the press (which, indeed, had been Mary's motive in granting the royal charter).

The stationers were businessmen who manufactured and sold books, and to them press control was a means to their own ends—government protection of their market monopoly. As Edward Arber, commenting on "the virulence of their trade competition," has said: "We must think of these printers and publishers as caring chiefly for their crowns, half-shillings and silver pennies. They bore the yoke of [governmental] licensing as best they could, but only as a means to hold themselves harmless from the political and ecclesiastical powers. Their business was to live and make money; and keen enough they were about it." These were the men who created the stationers' copyright—the first English copyright, and thus (by way of an indisputable series of causally related events) the direct antecedent of the modern American copyright.

That copyright in the beginning was a publisher's right is hardly surprising; indeed, it is remarkable that later it somehow came to be generally known as an author's right. This shift in how copyright was perceived will be examined primarily in the next chapter, but it is essential first to concentrate on the origins of copyright and the nature of the stationers' copyright as a publisher's right. For regardless of conventional wisdom, which has long viewed copyright as belonging to authors, copyright began and continues to function much the same as it did for its originators, that is, primarily to protect the publisher's marketing of works.

The Stationers' Copyright

The complex details of the history of the Stationers' Company (the membership of which included bookbinders, printers, and booksellers) and the stationers' copyright will not be examined in depth here, for—apart from the fact that they have been related by others and can be found in the transcripts of records—only certain aspects of any historical development survive to influence the future. Thus it is irrelevant for present purposes that not all books printed in England during the time of the stationers' copyright were registered with the company, that the incidents of copyright may have varied during its long history, or even that no one can precisely determine the date of its beginning (which almost surely preceded the grant of the charter to the Stationers' Company). The vital fact is that the stationers' copyright lasted for almost two centuries and clearly provided the basic legal structure that its successor, the statutory copyright, inherited and carried forward—first in England, then in the United States.

Although the specific source of the idea for the stationers' copyright is not revealed by the records of history, it may well have been the printing patent, which was granted by the sovereign in the exercise of the royal prerogative and preceded the trade practice that resulted in the stationers' copyright. The monarch's grant of letters patent was not limited to printing; it could be for any trade, since such a grant was a source of income for the sovereign. But the earliest printing patents, for which the grantee was willing to pay a desirable sum, granted the exclusive right to publish books that had an assured market—such as the ABC Book (the first schoolbook for English children), the Bible, and law books.

If the sovereign could grant the exclusive right of publication, it was logical for stationers to agree to a similar right among themselves. And since the right to print and publish books was essentially limited to the members of the guild (later company) of stationers, the exclusive right of individual members to publish a particular book was relatively easy to enforce. The basic requirement was to establish a record of who was entitled to print a work by registering the title of the manuscript (the "copy"), thus identifying the owner.
In assessing the stationers’ copyright some three hundred years after its demise, it is important to view it in proper perspective, and there are several points to aid one in doing so. First, one should understand the nature of that copyright, which was granted by a group of businessmen who agreed to allow one of them the exclusive right to publish a specific work in perpetuity. The right could be secured only by an entry of the title of the work in the company register for a fee that came to be sixpence. A typical entry was as follows:

Quarto die Julii
Edward White/ Entred for his Copie vnder the wardens handes, a ballad intituled

A Dittie worthie to be vewed of all people declairinge the
dreadfull comynge of CHRIST to Judgement and how
all shall appeare before his presence . . . . . . . . . . . . . . . . . vjd

The “copy,” or manuscript, belonged to the individual stationer, clearly indicating that in the beginning the word *copy* in *copyright* was used as a noun, not a verb. (The term *copyright* itself does not appear in the register books until the 1670s.) How the stationer acquired ownership of the copy from the author was, by and large, of no concern to the wardens, whose responsibility it was only to register the copies. In fact, who created a given work was irrelevant, since authors, not being members of the company, had no role in the stationers’ copyright. Copyright, in short, originally had to do with the manufacture and sale of books, not the creations of authors.

Second, the Stationers’ Company, as a London company, had the power of self-regulation. The major officers were the master and wardens, with the central component of its internal machinery being a court of assistants, which promulgated company ordinances (subject to approval by government officials) and resolved copyright disputes between its members. This meant, of course, that issues concerning stationers’ copy-right were not litigated in the common-law courts. Copyright was thus initially shaped not by the common law but by members of the industry.

Third, the stationers—good businessmen intent on protecting their monopoly of the book trade—were acutely sensitive to the fact that their ordinances were binding only on members of their company, and that in fact their copyright was essentially a matter of private law. As a result, one theme dominates the history of the stationers’ copyright: the continual efforts of the stationers to obtain *public* law support for their *private* copyright by petitioning for laws regulating the press that made it a crime for anyone to print books in violation of the stationers’ copyright.

Copyright and Censorship

The stationers’ desire for legal copyright protection coincided fortuitously with the government’s perceived need to gain control over “the dangerous possibilities of the printed word.” It had been Henry VIII’s break with the Roman Catholic church in the 1530s that had contributed most to creating conditions of instability, unrest, and religious strife in England. Henry was succeeded in 1547 by his Protestant son Edward VI, who was succeeded by his Catholic half-sister Mary Tudor (wife of Philip of Spain), who was succeeded by her Protestant half-sister Elizabeth I—all within the space of eleven years. It was Philip and Mary’s desire to prevent the publication of “seditious, heretical, and schismatical” materials that finally led to their granting to the Stationers’ Company in 1557 a royal charter that limited most printing to members of that company and empowered the stationers to search out and destroy unlawful books. But Mary’s Protestant successor, Elizabeth I, renewed that charter in the first year of her reign for the same reasons that Mary had granted it initially.
Despite Elizabeth’s long reign (1558–1603), the religious unrest continued with her successors: James I; his son Charles I (who lost his head to the Puritans); Oliver Cromwell, who ruled during the Interregnum; the pro-Catholic Charles II; and finally his brother, the avowed Catholic James II, whose actions precipitated an end to the religious controversy in 1688. The continuous political unrest proved beneficial to the stationers, for without it (and the various monarchs’ perceived needs for censorship) the stationers’ copyright probably would not have survived as long as it did. Less than twenty-five years after the Glorious Revolution of 1688 assured the Protestant succession, Parliament displaced the private stationers’ copyright with a public statutory copyright.

Throughout this period, decrees of press control were continually in force—even during the Interregnum, when Parliament enacted ordinances to replace the censorship decrees of the Court of the Star Chamber. Promulgated during Elizabeth’s reign were the Star Chamber decrees of 1566 and 1586, and during the reign of Charles I, the Star Chamber Decree of 1637. Despite the relatively short life of the 1637 decree (because of the demise of the Star Chamber in the 1640 Revolution), it turned out to be the most important. Parliament had filled the void during the Interregnum with the ordinances of 1643, 1647, and 1649, but the importance of the 1637 decree is that it was essentially reenacted by Parliament as the Licensing Act of 1662, two years after Charles II ceased his travels and ascended to the throne. Although the Licensing Act contained a sunset provision—it was to expire by its own terms after two years—it was actually renewed continually until 1694, when Parliament finally refused to renew it again.

The stationers’ role in promoting these various regulations was continuous and ongoing, because regulation of the press meant protection for their copyrights. “Whatever other problems may have exercised the minds of whatever combination of Master, Wardens and Assistants,” according to the historian Cyprian Blagden, “the fundamental and perennial worry was the protection of copyright.” One of their earliest achievements in this regard was acquiring “[t]he right to search—nominally for seditious or heretical books—but really for infringements of copyright.” And one of their most notable achievements was the Star Chamber Decree of 1637.

The earlier Star Chamber Decree of 1586 had given the stationers a large part of the power they wanted, particularly for the protection of copyright, but there were still many cases of pirated editions—especially of popular and less expensive books. And the government had been unable to halt the printing or importing of works critical of King Charles I’s administration. Consequently, on 11 July 1637, the Privy Council approved in Star Chamber a decree “Concerning Printing,” which the attorney-general had drawn up. (“For his Loue & kindness to the Company,” the stationers soon after voted to give the attorney-general twenty pounds—a payment to a public official that reflects fairly transparent motives.) As Blagden notes in his history of the Stationers’ Company: “There is no doubt that the 1637 Decree, like that of 1586 and like the grant of the Charter in 1557, was promoted by the Company for the benefit of stationers and obtained the sanction of the Government because it promised more effective safeguards than those already in existence, against the printing and distribution of schismatical publications which were, as on previous occasions, becoming sources of extreme embarrassment.”

The Star Chamber Decree of 1637 was revived in the form of the Licensing Act of 1662, and the stationers continued their support of press control as a means of protecting their copyrights, working in “uneasy partnership” with Sir Roger L’Estrange, the Surveyor of the Press. According to Blagden, “Urged on by L’Estrange, the Wardens seized Quaker pam-
prophets and Catholic books and had them burned in the garden at Stationers' Hall or damasked [defaced or destroyed]; and in the Michaelmas Term 1681 no fewer than twelve cases were pending, seven instituted by the Crown and only five by the Wardens who were known to send warning of impending searches to such members of the Company as were foolish enough to be caught dealing in unlicensed books yet not knavish enough to handle counterfeit primers."17

By promoting censorship and press control the stationers were utilizing the best means available to protect their "property." The government was not really interested in copyright as property, only as an instrument of censorship. And that is our point. As a device to control the distribution of printed material, copyright was ideal, since it combined so well the interest of the government with the self-interest of the copyright owners. And though it may come as a surprise to many, American copyright still retains the features that once made it such an effective device of censorship. Indeed, the 1976 Copyright Act betrays the origins of copyright as such in that it gives courts a similar power to burn and damask offending copies—in a clause that would have pleased Sir Roger L'Estrange, even though its language is less direct than the Surveyor of the Press might have desired.18

Human nature has not changed much in three hundred years. Copyright owners today are no more willing than the stationers were in seventeenth-century England to put the public interest ahead of their private-property concerns. The Stationers' Company has its American successors in the media conglomerates, who control the use of the nation's airwaves courtesy of governmental licenses—and then control the use of the material they present over those airwaves courtesy of a copyright law they have had an active role in shaping. In many respects the stationers' copyright can be regarded as the grand sire of today's corporate copyright.

To understand why this is so, one need only trace the story of copyright after the 1694 demise of the Licensing Act of 1662, which meant that the only copyright in force was left without support in the public law. No longer was it a criminal offense to print books in violation of the stationers' copyright. The "death" of copyright, however, was not universally mourned, for by this time the publishers had become dominant in the Stationers' Company and had established what was known as the "booksellers' monopoly," based on the perpetual nature of the stationers' copyright. The ownership of the major copyrights was limited to small groups of booksellers known as the Congers.19 (Although the copyrights were sold at auction, apparently only booksellers with the appropriate credentials were allowed to participate.) Contemporary reports suggest that the monopolists were notorious, powerful, and ruthless in protecting their self-created prerogatives. And it seems clear that growing resentment against the monopoly—much more than against censorship—led to Parliament's refusal to renew the Licensing Act.20

The Statute of Anne

The end of legally sanctioned censorship after 1694 meant that the booksellers had no public protection for their private stationers' copyrights, and in the following years they frequently petitioned Parliament for relief.21 Their first efforts were to secure full reinstatement of censorship laws, but when these attempts failed, the booksellers tried a new tactic: they sought legal protection not for themselves but for authors, who would be expected to convey their copyright to the bookseller as in the past. This tactic succeeded in 1710, and the result was the Statute of Anne, which carried the full title of "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.” A relatively short statute of eleven sections, it actually dealt with three copyrights: the stationers' copyright (which was extended for twenty-one years); the printing patent (which was not to be affected by the statute, but which was no longer significant); and the new statutory copyright.

Although the Statute of Anne ostensibly provides for an author's copyright, the main beneficiaries were the booksellers, because the law made copyright assignable to others. It may be anachronistic to call this a catch-22 situation, but the label is otherwise appropriate in every way. Since an author had to assign the copyright in order to be paid—otherwise, no bookseller would publish the work, and without a printed book there could be no copyright—the benefit of the statute to authors was minimal.

There were, however, two notable aspects of the Statute of Anne. The first was that it transformed the stationers' copyright—which had been used as a device of monopoly and an instrument of censorship—into a trade-regulation concept to promote learning and to curtail the monopoly of publishers. Arguing that the new statutory copyright benefited authors appears to have been a canard of the booksellers to enable them to hide behind authors while retaining their old power. If so, Parliament perceived the ruse and turned the tables on the monopolists, using the author primarily as a decoy to create a copyright that was really a trade-regulation concept.

Indeed, when the first English copyright act is interpreted in light of the history that led to its enactment, the almost inescapable conclusion is that it was designed as a trade-regulation statute intended to destroy (and prevent the recurrence of) the booksellers' monopoly. A comparison of the new statute with the Licensing Act of 1662 strongly suggests that the draftsmen used the latter as the starting point for their efforts in order to erode the undesirable features of the stationers' copyright that had made it an instrument of censorship and monopoly.

The features of the Statute of Anne that justify the epithet of trade regulation included the limited term of copyright, the availability of copyright to anyone, and price-control provisions. Copyright, rather than being perpetual, was now limited to a term of fourteen years, with a like renewal term being available only to the author (and only if the author were living at the end of the first term). Since authors normally assigned copyrights to booksellers, the provisions meant that the work of any author who died during the initial term would go into the public domain without a renewal term—consistent with the antimonopoly purpose of the statute.

Copyright, which had theretofore been limited to members of the Stationers' Company, was made available to anyone. Indeed, the statute even contained an alternative provision for securing copyright if the stationers refused registration. The ordinary means for securing the statutory copyright continued to be the same as it had been for the stationers' copyright; the alternative method was by advertisement in the Gazette, the legal newspaper.

The statute also contained price-control provisions, although they seem never to have been invoked. Obviously created in response to the high prices the booksellers had charged, the price controls may have served their intended purpose merely by existing.

**Creation of the Public Domain**

An even more notable aspect of the Statute of Anne was its creation of the public domain for literature. From our vantage point in history, so far removed from the stationers' copyright, it is difficult to realize that the perpetual nature of early copyright had essentially precluded the existence of such a public
domain. Under the old system, all literature belonged to some bookseller forever, and only literature that met the censorship standards as administrated by the booksellers could ever appear in print. Moreover, the whole system—so amenable to both the governing authorities and the stationers who enforced it by their own regulations—lay completely beyond the jurisdiction of the common-law courts.

The public domain resulted from three rules in the Statute of Anne: the requirement of the creation of a new work in order to obtain copyright (which protected extant works against recapture); the limited term of copyright (which ensured that all copyrighted works would eventually be free for any to publish); and the limited rights granted to the copyright owner: to print, publish and vend (which limited the copyright owner’s control of the use of the work after it was purchased by the consumer).

These two aspects of the Statute of Anne—copyright as trade regulation and the creation of the public domain—constituted a watershed recognition of the public interest that copyright serves. First, the publishers were limited in their use of copyright as a support for their monopoly. Second, the public was assured not only of access to copyrighted works at a fair price but eventually of ownership of the work in the public domain.

The design of the Statute of Anne was thus a remarkable feat of legal architecture—with one fatal flaw that prevented its immediate success in destroying the booksellers’ monopoly. Because the old stationers’ copyrights were “grandfathered” for twenty-one years, the booksellers could (and did) continue business as usual. The monopolists were thus made a present of time, the most precious of commodities, which (as we will show in the next chapter) they used to great advantage. When the Statute of Anne was finally given its definitive judicial interpretation in the House of Lords’ decision of Donaldson v.