Interrogating Copyright History

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An understanding of the past – how we got to where we are today – informs the approach of much recent scholarship about copyright. The *EIPR* is no exception: in an article published in 2003, one co-author of this article (Ronan Deazley) argued that the interpretation of aspects of eighteenth century copyright history – the ruling of the House of Lords in *Donaldson v Becket* in 1774[1] – had implications for twenty-first century policy-making and judicial reasoning.[2] This interest in the past has been traced to a 'historical turn' in scholarship in the late 1990s, which marked a move away from the more forward-looking approach of the earlier twentieth century, when lawyers had little time for historical perspectives.[3] The climate of renewed scholarly interest in copyright history in recent decades, amongst other things, has seen the launch in 2008 of the AHRC funded digital archive of *Primary Sources on Copyright History* (hosted at *www.copyrighthistory.org*), now expanded to cover seven jurisdictions (Italy, UK, USA, Germany, France, Spain, the Netherlands), as well as the founding of the International Society for the History and Theory of IP (or 'ISHTIP') which will see its 8th annual workshop in July 2016. That both initiatives are linked to CREATe (and so to both co-authors[4]), the RCUK-funded centre for research into copyright, the creative economy, and the future of creative production in the digital age,[5] illustrates well a current perception that a study of the past is of value to those researching the present.

So, what exactly is the point of copyright history? Is it and should it be considered of value to those concerned with copyright law and policy today? These questions were fully debated at a two-day symposium hosted by CREATe, University of Glasgow, in

[1] (1774) 1 E.R. 837.

[2] R. Deazley, 'Re-Reading Donaldson (1774) in the Twenty-first Century and Why it Matters', 2003, EIPR 270-79.

[3] See M. Kretschmer, with L. Bently and R. Deazley, 'Introduction: The History of Copyright History: Notes from an Emerging Discipline' in R. Deazley, M. Kretschmer and L. Bently, *Privilege and Property: Essays on the History of Copyright* (Open Book Publishers, 2010), 2-3.

[4] Ronan Deazley was the Founding Director of CREATe, and Elena Cooper is currently a Post-doctoral Researcher in Copyright, History and Policy at CREATe.

[5] See the 'About' section of the CREATe website, under the title 'What is CREATe?' (http://www.create.ac.uk/blog/category/about/ accessed in November 2015). CREATe is the joint sponsor of the Primary Sources project and the host of ISHTIP's 2016 workshop.

March 2015, to which a number of distinguished academics contributed.[6] The point of departure for the event was the publication of *Copyright at Common Law in 1774* by H. Tomás Gómez-Arostegui of Lewis & Clark Law School, Portland, Oregon, USA, in the *Connecticut Law Review* and as a CREATe Working Paper,[7] which seeks to cast fresh light on the interpretation of *Donaldson* put forward in Deazley's 2003 *EIPR* article.

The Debate over Donaldson

By way of background, the first copyright statute – the Statute of Anne 1710, protecting 'books and other writings' – provided protection for a limited time only: a maximum term of 28 years.[8] As statutory copyrights began to expire, one question before the courts was whether copyright protection predating the 1710 Act existed at common law and, if so, whether that protection was perpetual or was abridged by the more limited terms of the statute. In recent years, scholars – principally Howard Abrams (a panellist at the symposium event), and Deazley (as detailed in the 2003 *EIPR* article) – have interpreted *Donaldson* to hold that there never was a copyright at common law and therefore the origin of copyright was exclusively statutory. This reading differs from previous understandings of the case that copyright was an inherent right in authors protected at common law and pre-dated the Statute of Anne.

These divergent scholarly views stemmed from the manner in which the decision in *Donaldson* was reported, as well as differences in understandings as to how the House of Lords ruled on appeals at the time of the decision. The view that copyright at common law pre-dated the Statute of Anne is rooted, in part, in the belief that the majority of the opinions delivered by the judges in *Donaldson*, was the rule in the case. By contrast, the work of Abrams and Deazley draws attention to the widespread

6 The event began with a lecture delivered by Gómez-Arostegui, open to the general public, followed by questions from the floor. The following day, Gómez-Arostegui's paper formed the starting point for a roundtable discussion chaired by Hector MacQueen of Edinburgh Law School, with the deliberately provocative sub-title: 'What is the point of copyright history?' This involved contributions from an invited audience of academics, including five distinguished panellists: Howard Abrams of University of Detroit Mercy, Lionel Bently of Cambridge University, Oren Bracha of the University of Texas, Mark Rose of University of California, Santa Barbara, and Charlotte Waelde of the University of Exeter.

7 (2014) 47 Conn L Rev 1 and CREATe Working Paper 2014/16 (3 November 2014).

8 The Statute of Anne conferred protection for a period of 14 years and then for a further period of 14 years if the author was still alive at the end of the first period.

misreporting of the case and also argues that the opinions delivered by the judges were merely advisory; rather the speeches of the Lords were determinative.

Gómez-Arostegui contends that the account put forward by Abrams and Deazley is incorrect: the decision was not misreported and the Lords' speeches alone cannot represent the decision of the House; the opinions of the Law Lords, like those of the judges, were not binding on the House of Lords, and the Lords delivered their speeches before the vote in the case. Instead, Gómez-Arostegui argues that detailed research into the history of the procedures of the House of Lords shows that it was only in the nineteenth century, once law reports included the speeches of the Lords (after 1814) and also once it was established that lay peers would not vote on judicial matters (after 1844) that the speeches of the Lords took on the form of 'judgments' in the way that we know them today. On this view, the reasoning of the House cannot be determined; 'the House, as a body, did not determine the origin of copyright…'.[9] It is, in the words of Mark Rose a judicial 'black hole'.[10]

The Debate over Donaldson and the Nature of Academic Research

When the co-authors of this article were planning the symposium – at that time both as academics at CREATe – the idea that Gómez-Arostegui should present his paper in a lecture open to the general public appealed; knowledge exchange and public transparency is an important component of CREATe's mission and we both felt that the debate over *Donaldson* exemplifies, in a number of respects, the nature of much academic work. These points are well illustrated by the CREATe Working Paper providing a lasting record of the event, comprising written responses to Gómez-Arostegui's paper by five panellists (Howard Abrams, Lionel Bently, Oren Bracha, Mark Rose and Charlotte Waelde), a written reply by Gómez-Arostegui, and an edited record of the more general discussions at the symposium.[11]

First, the debate over *Donaldson* speaks to the nature of scholarly research generally, as objective, disinterested, evidence-based and open to challenge; access to new evidence and source material has the capacity to re-open the debate of issues that

[9] Gómez-Arostegui, *Copyright at Common Law in 1774*, 6.

[10] Cooper and Deazley, 40.

[11] E. Cooper and R. Deazley (eds), 'What is the Point of Copyright History? Reflections on Copyright at Common Law in 1774 by Tomás Gómez-Arostegui', CREATe Working Paper 2016/?? (DATE). This article is drawn from our Introduction to the Working Paper.

were previously considered settled. The response of Howard Abrams, for example, shows that academic debate over how *Donaldson* is to be interpreted is set to continue;[12] Abrams remains of the view that it is the speeches of the Lords that contain the rule of the House. And that is entirely appropriate. As a community, academics welcome the emergence of new evidence and new challenges to existing theory and orthodoxy, as well as the opportunity to debate and interrogate these contested perspectives. Academia is guided by intellectual inquiry, not dogma.

Secondly, the *Donaldson* debate reveals the importance of careful attention to context in legal-historical work. In *Copyright at Common Law in 1774*, this involves detailed research into the procedures of the House of Lords at the time of *Donaldson*, which cast light on the working of the House, and therefore how the surviving records of the decision are to be interpreted. The more general symposium discussion by panellists and invited audience,[13] uncovered yet more important contexts, which impact on our understanding of *Donaldson*. Comments and questions posed by Bently and Hector MacQueen situated *Donaldson* within the particular constitutional settlement with Scotland of the time.[14] Those by Jose Bellido drew attention to the law reporting context,[15] which in turn, as MacQueen noted, affected how the House was understood and may have meant that the lay peers voted as a 'jury of the nation', to deliver a result (the entry of many books into the public domain) that was tremendously popular amongst the general population.[16] Oren Bracha, in both his essay and contribution to the discussion,[17] noted the changing nature and significance of the 'common law' through time which, in turn, he argued, resulted in dynamics in the notion of 'common law copyright'; unlike the period since the twentieth century, when the predominant understanding of 'common law' was in the positivist sense, of judge-made law, in the eighteenth and nineteenth centuries 'common law' denoted more than this: a natural law reflecting precepts of reason. In addition, MacQueen drew attention to more general legal-historical questions about the relationship between common law and equity at the time of the decision.[18]

[12] Cooper and Deazley, Chapter 2.
[13] Ibid, Chapter 8.
[14] Ibid, 62 and 63-4.
[15] Ibid, 67-8.
[16] Ibid, 69-70.
[17] Ibid, 33, 72-3 and 75-6.
[18] Ibid, 63-4.

Thirdly, academic difference about *Donaldson* demonstrates the importance of original material, such as archival and/or other documentary records (e.g. newspapers) to legal-historical academic research. As Gómez-Arostegui explained at the symposium, he was once a proponent of the account put forward by Abrams and Deazley; his reassessment of *Donaldson* came about after he had obtained and read every available record of the case (of which he is aware): every surviving newspaper report, as well as rare unpublished manuscript material that might cast light on the ruling. This illustrates the importance of unpublished material to academic researchers, an issue that a number of contributors to the symposium specifically addressed.[19]

Copyright, Unpublished Works and Academic Research

Ironically, barriers to the use of archival material exist today in the form of copyright rules that stem historically from the protection of unpublished works at common law, one of the issues at the heart of the debate around *Donaldson*. In short, many types of historic archive material – including unpublished literary works such as personal correspondence, diaries, notebooks, and so on – are currently protected under UK copyright law to 2039,[20] however old those works might be. Moreover, the exceptions to copyright that permit fair dealing with a work for the purpose of quotation, whether for criticism and review or otherwise, only apply to works that have been 'made available to the public',[21] a legal term of art that does not necessarily encompass making a work physically accessible for consultation within an archive.

As one co-author of this article (Deazley) has explored at length elsewhere, that these historic records and documents remain in copyright beyond the standard copyright term impacts on the scholarly, educational and creative reuse of this material, a situation that archivists and academics have often decried as absurd;[22] or, to borrow a

[19] See e.g. the comments of Jose Bellio at 67-68, or Giles Bergel at 70-71.

[20] Schedule 1, para.12(4) Copyright Designs and Patents Act 1988. This applies to works created by an author who died before 1 January 1969 and were unpublished at the time when the Copyright Designs and Patents Act 1988 came into force (1 August 1989). See further R. Deazley and V. Stobo, *Archives and Copyright: Risk and Reform*, CREATe Working Paper 2013/3 (17 March 2013, Version 1.1 10 April 2013), 6.

[21] s.30(1)(1ZA)(1A) Copyright Designs and Patents Act 1988.

[22] See e.g. the comments of Tim Padfield, the former Chair of the Libraries and Archives Copyright Alliance, at an event organised by CREATe in September 2013: 'We've been told, and we keep being told, that the purpose of copyright is to encourage innovation, to encourage creativity, and yet we have a duration of copyright the standard of which is 70 years from the death of the creator.

turn of phrase from Abrams, investing time and money to clear rights in work that was created two, three or four hundred years ago or more, is a prospect that many regard as irritating, burdensome and obnoxious.[23] In this respect, the work of the copyright historian itself raises copyright policy issues today, also the subject matter of research at CREATe.[24]

What is the Point of Copyright History?

As well as illustrating facets of academic research, the *Donaldson* debate provides an entry-point into the discussion of the more general question noted at the outset: what is the point of copyright history? Gómez-Arostegui – like Deazley's 2003 *EIPR* article – claims interpreting *Donaldson* is of significance to contemporary copyright law and policy. Writing in a US context, Gómez-Arostegui draws attention to the doctrinal and normative relevance of his work to copyright today. First, in the USA, judicial interpretation of copyright often rests on a reading of the intellectual property clause of the constitution of 1787, empowering Congress 'to promote the progress of science and the useful arts, by securing for limited times' inter alia 'to authors… the exclusive right' to their 'writings'. On this view, *Donaldson* may be evidence of what the Framers and First Congress intended for US copyright policy. Secondly, in certain instances, for example, sound recordings fixed before 1972, it is US state common law that provides protection; as certain US states adopted the common law of England, *Donaldson* is of doctrinal relevance in those states.

Finally, Gómez-Arostegui makes a broader claim, which was closely scrutinised in the symposium: that history sets the 'default basis' for copyright. As he asserts, if copyright originated as a common law right, this suggests that 'the principal purpose was to protect authors', whereas if it originated as a privilege created by statute, this

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Why you are giving the benefits to the grandchildren and the great grandchildren of the creator, in order to encourage innovation, I really don't understand. It makes the 2039 date for the termination of copyright in unpublished literary works and some other works even more absurd, which means that 15th century works are protected by copyright, even though they weren't when copyright was created in 1709. I find it really bizarre'; R. Deazley and V. Stobo (eds), *Archives and Copyright: Developing an Agenda for Reform*, CREATe Working Paper 2014/04 (24 February 2014), 70.

[23] Cooper and Deazley, 22.

[24] See http://www.create.ac.uk/blog/2014/06/02/will-uk-unpublished-works-finally-make-their-public-domain-debut/ and the following CREATe Working Papers: Deazley and Stobo (eds), *Archives and Copyright: Developing an Agenda for Reform*; V. Stobo, with R. Deazley and Ian G. Anderson, *Copyright & Risk: Scoping the Wellcome Digital Library Project*, CREATe Working Paper 2013/10 (13 December 2013); Deazley and Stobo, *Archives and Copyright: Risk and Reform*.

indicates that copyright should principally benefit the public'.[25] In this way, copyright history is presented as having a supporting role in normative arguments over the proper scope of copyright; it is, in that respect, of relevance to policy-making today, particularly in a US context where reference is often made to the 'original purpose' of copyright.

This last claim – the normative policy relevance of copyright history to copyright policy today – was questioned by a number of contributors to the symposium. Oren Bracha, writing from a US standpoint, considered *Donaldson* to have little bearing as a 'normative basis' for copyright law. As he expresses in his essay in the Working Paper, 'natural rights theories have power to the extent they are persuasive on the merits'; 'the name of the game is substantive persuasion not authority'.[26] Further, Charlotte Waelde, a copyright law professor who is also Chair of the Unregistered Rights Research Expert Advisory Group to the UK Intellectual Property Office, considered *Donaldson* to be inconsequential to UK copyright policy today; as she concludes in her essay, 'preoccupations are more with the technicalities of the law and how changes might impact on stakeholders in contemporary society particularly in the context of technological advancement than with the nuances of *Donaldson* and how it might have changed the legal landscape as it stood in 1774'.[27]

While doubts were expressed as to the breadth of certain of Gómez-Arostegui's claims, more nuanced and complex aspects of the significance of copyright history were identified in the course of the symposium discussion. Lionel Bently's published work with co-author Brad Sherman, for instance, presents eighteenth century debates over literary property as a time for the rich debate of ideas about the notion of property rights in intangibles,[28] a point which is also made in Bently's Chapter in the Working Paper;[29] on this view history is a source of ideas and arguments which may well be instructive to policy-makers today, amongst others.[30]

The cross-disciplinary nature of the audience at the symposium also brought copyright history into conversation with the discipline of book history. For Giles

[25] Gómez-Arostegui, *Copyright at Common Law in 1774*, 1.
[26] Cooper and Deazley, 34.
[27] Ibid, 45.
[28] B. Sherman and L. Bently, *The Making of Modern Intellectual Property Law* (Cambridge University Press, 1999), Chapters 1 and 2.
[29] Cooper and Deazley, 29-30.
[30] Ibid, 80.

Bergel, a book historian, copyright law is of interest for what it reveals about 'how the market for books was made'.[31] This resulted in specific questions about the relation between *Donaldson* and the contemporaneous practices of the book trade and, in turn, observations about the relation between law and trade practice more generally. From this perspective, *Donaldson* provides an example of what happens when an assumption that law supports a widespread trade practice is displaced; transactions that were thought to be enforceable, were suddenly held to be unenforceable. In the case of *Donaldson*, the transactions related to book publishing. In the course of the symposium discussion more recent examples were noted: Hector MacQueen drew parallels with swap transactions concluded in the City of London in the 1990s, which were subsequently held to be unenforceable by the House of Lords,[32] and Isabella Alexander noted the trade in recent times by the entertainment industry in television programme 'format rights' despite difficulties with their legal protection.[33] These examples, argued Alexander, point to the value of copyright history to the work of property theorists. Indeed, as an existing essay on copyright history concludes, discussing the lucrative trade in 'painting copyright' in the eighteenth and early nineteenth century (prior to the statutory protection of painting in 1862): ''Copyright law' needs to be understood as having been only one mechanism for the articulation of proprietary relations: other legal norms (personal property, contract, bailment), and, more interestingly, other social norms, allowed for systems of ascription and control, flows of money, as well as the transfer and sharing of ideas and expression.'[34]

The parallel between past and present in this regard also draws attention to another way in which history might be of interest to policy-makers; as Bently argued, research into the impact of *Donaldson* on the practices of the book trade, might well provide policy-makers today with empirical evidence of how a change in the law (for instance, such that subject matter that was previously thought to be protected, was held not to be protected) might affect 'markets and incentives and payments to authors' amongst other things.[35]

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[31] Ibid, 70-1.
[32] Ibid, 70.
[33] Ibid, 75.
[34] Kretschmer, Bently and Deazley, 'The History of Copyright History', 6.
[35] Cooper and Deazley, 80.

Above and beyond all these observations, however, lies the more general 'point' to all academic scholarship which both co-authors of this article firmly endorse; as Mark Rose described, the purpose of history, and we would add the purpose of academic scholarship more generally is 'the advancement of knowledge or advancement of understanding', a purpose which, of course, has its 'own validation' as an enquiry in its own right.[36]

Those wishing to read further about the CREATe Symposium are directed to http://www.create.ac.uk/resources/copyright-history-symposium-resource/ where the Working Paper, as well as Gómez-Arostegui's original paper, is available for free download.

[36] Ibid, 76.