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THE MYTH OF COPYRIGHT AT COMMON LAW

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A. Introduction

COPYRIGHT law is in crisis. The law, as it currently stands, is considered by some to be technologically challenged, discriminatory, and overly complex; others wonder about its ability to address effectively the many challenges thrown up by the digital and internet revolutions.[1] Both the US and the EU have responded to such concerns in the guise of the American *Digital Millennium Copyright Act* and the new European *Copyright Directive* respectively. This time of unprecedented technological development demands a necessary reappraisal of the copyright regime; we need to ask, what should copyright law do? Should its primary concern lie with the author (the copyright owner) or with society (the copyright user)? Traditional analyses suggest that at common law the author had a natural right to print and reprint his work, but that this common law right was impeached with the passing of the Statute of Anne of 1709 in the interests of the encouragement of learning and the dissemination of ideas. In short, the pre-existing common law rights of the author were impinged upon in the interests of society. This reading of the origins of the nature of copyright first took root with the seminal decision of *Donaldson* v. *Becket* (1774).[2] It is this orthodox analysis that the author seeks to challenge.

It is suggested that, for over 200 years, our thinking about the historical basis underpinning our modern copyright regime has been guided by an erroneous reading of *Donaldson* that seeks to place the author as the central protagonist of the copyright system. Instead, this author argues that the House of Lords in *Donaldson* explicitly denied the existence of any common law copyright and sought to provide a basis for the law of copyright that is predicated

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[1] A. Christie, "A Proposal for Simplifying United Kingdom Copyright Law" [2001] 1 E.I.P.R. 26–43; M. Wing and E. Kirk, "European/U.S. Copyright Law Reform: Is a Balance Being Achieved?" [2000] I.P.Q. 138–63; A. Brimelow, "Does Intellectual Property Need a New Set of Wheels" [2001] E.I.P.R. 44–48.
[2] *Donaldson* v. *Becket* (1774) 4 Burr. 2408.

primarily upon much broader goals and principles that champion social benefit before the author's commercial interests.

B. Copyright in the Eighteenth Century

The passing of the Statute of Anne 1709 marked a historic moment in the history of copyright. As the world's first copyright statute it provided a maximum copyright protection of 28 years for works published after the commencement of the Act,[3] as well as a 21 year protection for any works already in print. Compared with the 15 years prior to the securing of the 1709 Act, in which there had been no legislative protection available to the book trade,[4] the Statute of Anne ushered in a period of relative calm and security for the London booksellers.[5]

Although secured by the London booksellers, the Act was not, as Feather suggests, one that particularly favoured them.[6] Its final version was markedly different from that which originally had been proposed. The whole emphasis of the Bill as initially presented lay with the presumption that the "copy of a book" was a clearly recognisable form of property. This ideal however underwent some transformation during the Bill's passage through Parliament. What once was a *Bill for the Encouragement of Learning and for Securing the Property of Copies of Books*, became an *Act for the Encouragement of Learning by Vesting the Copies of printed Books in the Authors or Purchasers of such Copies*. Its original preamble spoke of "the undoubted property" that authors had in their books as "the product of their learning and labour"; moreover, the Bill imposed no temporal limit upon the enjoyment of this property. However, the preamble to the final Act was much altered in form and significance. References to, and justifications for, this "undoubted property" were removed, and instead the legislation guaranteed authors the "sole right and liberty of printing" their works in exchange for a continued production of "useful books".

In contrast to Feather, Patterson reads the Act as a "trade-regulation statute directed to the problem of monopoly in various forms".[7] While the temporally limited protection, as well as provisions endorsing the public regulation of the price of books,[8]

[3] 8 Anne, c. 21. The 28 year protection was made up of two 14 year terms: section 1.
[4] Prior to the passing of the Statute of Anne the London book trade received protection for their published works in the guise of the Licensing Act 1662 13&14 Car. 2, c. 33. This Act lapsed in May 1695.
[5] For various accounts of the development of the law at this time see: J. Feather, *Publishing, Piracy and Politics: An Historical Study of Copyright in Britain* (London 1994); L.R. Patterson, *Copyright in Historical Perspective* (Nashville 1968); H.H. Ransom, *The First Copyright Statute* (Austin 1956).
[6] *Op. cit.*, at p. 62.
[7] *Op. cit.*, at p. 150.
[8] Section 4.

and the free "Importation, Vending or Selling of any Books in Greek, Latin, or any other foreign Language printed beyond the Seas",[9] can be read and understood as anti-monopoly measures, designed to address previous inequities in the book trade,[10] Patterson's analysis is too reductionist. Focusing, as he does, upon the relationship between the book trade and the state that had developed in the 150 years prior to the passing of the Statute of Anne, he overlooks a more immediate and compelling rationale that provided the central feature of this new legislation.

The Act was not primarily concerned with securing the position of the booksellers, or with the guarding against their monopolistic control of the press, although it provided an opportunity for addressing both of these issues. It was principally concerned with the continued production of books. Parliament focused upon the author's utility in society in the encouragement and advancement of learning. The central plank of the 1709 Act was then, and remains, a cultural *quid pro quo*. To encourage "learned Men to compose and write useful Books" the state would provide a guaranteed, if temporally limited, right to print and reprint those works. The legislators were not concerned with the recognition of any pre-existing right, nor were they primarily interested in the regulation of the bookseller's market, but rather secured the continued production of useful books through the striking of a culturally significant social bargain, a trade-off involving the author, the bookseller and the reading public.

This analysis is bolstered by an important historical footnote to the Statute of Anne in the guise of the Duties on Sope and Paper Act 1711.[11] This Act complemented the 1709 legislation in two main ways. First, "for the Encouragement of Learning", it provided that both Oxford and Cambridge Universities could claw back any duty they had paid for paper that had been used in printing "Latin, Greek, Oriental or Northern language" texts.[12] In addition to this, it raised a general duty upon "all Books and Papers commonly called Pamphlets, and for and upon all Newspapers or Papers containing publick News, Intelligence or Occurances"[13] and continued that if the duty charged thereon was not paid "then the Author ... shall lose all Property therein" leaving others to "freely print and publish" that material.[14] Parliament was clearly of the opinion that, if it could provide these

[9] Section 7.
[10] Patterson, *op. cit.*, pp. 144–145.
[11] 10 Anne, c. 19.
[12] Section 63.
[13] Section 101.
[14] Section 112.

pamphleteers with a statutory protection for their work, it could just as easily take such "property" away.

When the statutory periods of protection provided by the Statute of Anne began to expire in 1731, the dominant London booksellers sought to safeguard their trade in a number of ways. They did so with appeals to the Court of Chancery,[15] through pleas to the legislature to extend the protections of the 1709 Act,[16] and finally, with the case of *Midwinter* v. *Hamilton* (1743–1748)[17] they turned to the courts of common law. For over 30 years the London monopolists locked horns with a newly emerging and predominantly Scottish book trade over the right to reprint works that fell outside the protection of the Statute of Anne. The Scottish booksellers argued that there existed no copyright in an author's work at common law. By contrast, the southern monopolists proclaimed that the Statute of Anne did not create rights *de novo*, but rather served to supplement and support the pre-existing common law copyright. During this period of legal blast and counterblast both the arguments for and against the existence of the common law right developed through a number of notable cases, including *Millar* v. *Kincaid* (1749–1751)[18] and *Tonson* v. *Collins* (1761, 1762),[19] culminating in the two seminal decisions of *Millar* v. *Taylor* (1768)[20] and *Donaldson* v. *Becket* (1774).

In November 1765 counsel for the bookseller Andrew Millar appeared before the Court of Chancery alleging that Robert Taylor, a printer from Berwick, had "vended and sold" copies of his copyright work *The Seasons* by the poet James Thomson. Taylor

[15] See for example *Eyre* v. *Walker* (1735) 1 Black W. 331, *Motte* v. *Faulkner* (1735) 1 Black W. 331, *Walthoe* v. *Walker* (1737) 1 Black W. 331 and *Tonson* v. *Walker* (1739) 1 Black W. 331 in which the plaintiffs sought injunctions from the Court of Chancery to protect works by authors who fell outside the protection of the 1709 Act.

[16] The booksellers tried twice, in 1735 and in 1737, to secure a new Act to replace the existing *Statute of Anne*. See: *A Bill for the better Encouragement of Learning and the more effectual securing of the Copies of Printed Books to the Authors or Purchasers of such Copies, during the Times therein mentioned*, (1735) Bod. Lib. M.S. Carte 114 391–396; *A Bill for the Better Encouragement of Learning by the more Effectual Securing the Copies of Printed Books to the Authors or Purchasers of such Copies*, (1737) BL B.S. 68/16 (1).

[17] There exist a number of documents relating to this action available in the British Library, London, and the Advocate's Library, Edinburgh. See for example: Petition of the Booksellers of London against the Booksellers of Edinburgh and Glasgow (15 July 1746), Answers for the Booksellers of Edinburgh and Glasgow to the petition of Andrew Millar and other Booksellers in London (29 July 1746) and Answers for the Booksellers of Edinburgh and Glasgow to the Petition of Daniel Midwinter and other booksellers in London, (21 December 1746), Bodleian Library, Vet.A4.e.2197. See also Parks (ed.), *The Literary Property Debate: Seven Tracts, 1747–1773* (London 1974).

[18] *The Case of the Appellants*, 8 February 1751, BL B.M. 18th century reel 4065/03; *The Case of the Respondents*, 11 February 1751, BL B.M. 18th century reel 4065/04.

[19] *Tonson* v. *Collins* (1761) 1 Black. W. 301; *Tonson* v. *Collins* (1762) 1 Black. W. 329.

[20] *Millar* v. *Taylor* (1768) 4 Burr. 2303. While the judgment of the court was handed down in April 1769, the court had earlier decreed that as Millar had died on 8 June 1768 its decision was to be treated as if it had been delivered on 7 June 1768. See also Burrow, *The Question Concerning Literary Property* (London 1773) BL B.M. 515.f.16.(1).

argued that, as Thomson had died in 1748, the work was no longer within the copyright term provided by the 1709 Act. Sewell M.R. ordered that "a case be made for the opinion of the judges of the Court of King's Bench" as to whether "the plaintiff had at the time of filing his bill in this Court a property in the copies mentioned",[21] which referral gave rise to *Millar* v. *Taylor*. Delivering the historic decision that there did exist a common law copyright, Lord Mansfield C.J. in *Millar* set out that "it is agreeable to the Principles of Right and Wrong ... and therefore to the Common Law, to protect the Copy ... *after* the Author has published". Asking himself the rhetorical why this should be so, he observed simply "[b]ecause it is *just*, that an Author should reap the pecuniary Profits of his own Ingenuity and Labour". Moreover, for Lord Mansfield C.J., this turned "upon Principles *before* and *independent*" of the Statute of Anne.[22] As a result, the new Lord Chancellor Apsley, in July 1770, ordered Taylor to account for all the copies of *The Seasons* that he had sold, as well as granting a perpetual injunction protecting the work.

Following *Millar*, Thomas Beckett filed a bill in Chancery in 1771 against the Scottish bookseller Alexander Donaldson praying for an injunction to prevent him from printing the same work, Thomson's *The Seasons*,[23] upon submission of which an interlocutory injunction was granted. In his answer Donaldson argued, as Taylor had done, that the copyright in Thomson's work was limited to the times set out in the 1709 Act. In 1772, the case was heard before Apsley L.C., who, taking note of the King's Bench decision of *Millar*, decreed that the injunction formerly granted be made perpetual.[24] Donaldson however proved a more tenacious adversary than Taylor. In December 1772 his appeal against the Lord Chancellor's decree was read to the House of Lords and it was ordered that the Lords would hear the cause.[25]

C. Modern Readings of Donaldson v. *Becket*

Contemporary readings of the history of copyright and the significance of *Donaldson* v. *Becket* are not, of course, the provenance of the legal commentator alone. Bowry notes that this is an area that "has been written from the perspective of lawyers, printers, authors, literary theorists, Marxist theorists, post-modern writers and post-industrial critics".[26] A number of these writers

[21] *Ibid.*
[22] *Ibid.*, pp. 115–116.
[23] Following Millar's death, Becket and others had purchased his rights in *The Seasons*.
[24] See *Donaldson* v. *Becket* (1774) 2 Bro. P.C. 129.
[25] L.J. vol. 33, pp. 476, 483, 492.
[26] K. Bowry, "Who's Writing Copyright History?" [1996] E.I.P.R. 322–329, 322.

provide a commentary that synthesises the appearance of the classic romantic author-genius alongside the development of the proprietary copyright owner. For Gaines the legal and literary discourse in this area "share the same cultural root" both "positing the bourgeois subject in their notion of what constitutes an author".[27] Rose similarly identifies the legal development of literary property with the emergence of the romantic author. Focusing on the decision in *Donaldson*, he comments that "the representation of the author as a creator who is entitled to profit from his intellectual labour came into being through a blending of the literary and legal discourses in the context of the contest over perpetual copyright".[28] Coombe comments upon the way in which Rose details how the relationship between the author and the text "developed conceptually over an extended period of time, flowering most fully in the aesthetic theories of Romanticism".[29] For Rose, copyright is a "specifically modern formation produced by printing technology, marketplace economics, and the classic liberal culture of possessive individualism".[30]

This author-centric analysis is also reflected in the work of those modern legal commentators on intellectual property law who make reference to *Donaldson*. They provide interesting, if somewhat homogeneous, reading. In the most recent edition of *Copinger and Skone James on Copyright*, Garnett, Rayner James and Davies write that, in *Millar* "[t]he Court held that there was a common law right of an author to his copy stemming from the act of creation and that that right was not taken away by the Statute of Anne".[31] They continue:

> The decision was finally overturned, however, by the House of Lords in *Donaldson* v. *Beckett* in 1774, a case which decided that copyright was the deliberate creation of the Statute of Anne and thereafter treated as statutory property. Thus, the effect of the Statute of Anne was to extinguish the common law copyright in published works, while leaving the common law copyright in unpublished works unaffected.[32]

[27] J. Gaines, *Contested Culture: The Image, the Voice, and the Law* (London 1992), at p. 23. See also A. Kernan, *Samuel Johnson and the Impact of Print* (New Jersey 1987) and M. Woodmansee, "The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'" (1983–1984) 17 Eighteenth Century Studies 425–448.

[28] M. Rose, *Authors and Owners. The Invention of Copyright* (London 1993), at p. 30.

[29] R.J. Coombe, "Challenging Paternity: Histories of Copyright" (1994) 6 Yale Journal of Law and the Humanities 397–422, 400.

[30] *Op. cit.*, at p. 142.

[31] K.M. Garnett, J.E. Rayner James, G. Davies (eds.), *Copinger and Skone James on Copyright,* 14th edn., vol. 1 (London 1999), para. 2–16.

[32] *Ibid.* Similarly see: H. Laddie, P. Prescott, M. Vitoria, A. Speck, L. Lane (eds.), *Laddie Prescott and Vitoria, The Modern Law of Copyright and Designs,* 3rd edn., vol. 1 (London 2000), pp. 55, 321; P. Torremans, *Holyoak & Torremans, Intellectual Property Law*, 3rd edn. (London 2001), at p. 10.

In two recent articles exploring the history of copyright in the western tradition a similar reading can be detected. Brennan and Christie observe that "[c]opyright law's foundations rest upon the common law right of authors in the copy",[33] that the House of Lords in *Donaldson* voted "in favour of recognising the existence of common law copyright prior to the passing of the Statute of Anne",[34] albeit that "the majority in *Donaldson* ... held that this common law right had been divested by the Statute of Anne upon publication of the work".[35] Burkitt equally contends "that the limited term of protection provided by the Statute of Anne removed the perpetual common law right following publication". He continues that "Parliament's intervention effectively removed copyright from the sphere of natural rights, imbuing it with a legal-positivist character which later distinguished it from continental models".[36]

Fundamental to these readings is the understanding that authors had a pre-existing copyright at common law over their work and that the Statute of Anne, in limiting these natural rights, represents the striking of a balance between the author and the wider social good. To allow the author's rights to run in perpetuity would hamper the free circulation of literature, knowledge and ideas. What we take from the author we give to society. Such is the common perception of the balancing act that is copyright regulation and it is a notion that has informed much that has followed from *Donaldson*. To understand copyright we must begin with the author: he was, and still remains, the central protagonist.

D. The Appellate Jurisdiction of the House of Lords

To understand *Donaldson* it is crucial to appreciate the method by which appeals could be brought before the House, as well as the way in which such legal issues were resolved by the lords.[37] In the eighteenth century the judicial capacity of the House could be invoked in one of two ways, either by writ of error,[38] or by a

[33] D. Brennan and A. Christie, "Spoken Words and Copyright Subsistence in Anglo-American Law" No. 4 [2000] I.P.Q. 309–349, 317.

[34] *Ibid.*, at p. 315. Brennan and Christie do make the point that "at least two of [the Lords] members doubted the existence prior to 1709 of any common law right in the copy"; *ibid.*

[35] *Ibid.*, at p. 316.

[36] Burkitt, "Copyrighting Culture—The History and Cultural Specificity of the Western Model of Copyright" No. 2 [2001] I.P.Q. 146–186, 152–153.

[37] R. Stevens, *Law and Politics. The House of Lords as a Judicial Body, 1800–1976* (London 1979); A.S. Turberville, *The House of Lords in the Reign of William III* (Oxford 1913); Turberville, *The House of Lords in the Eighteenth Century* (Oxford 1927); Turberville, *The House of Lords in the Age of Reform, 1784–1837* (London 1958); T. Beven, "The Appellate Jurisdiction of the House of Lords" 17 L.Q.R. 357–371; A.J. Rees, *The Practice and Procedure of the House of Lords 1714–1784*, Doctoral Thesis, University of Wales, Aberystwyth, April 1987.

[38] See Rees, *ibid.*, at p. 187.

petition of appeal which provided a method for contesting decisions of the Lord Chancellor sitting at first instance in Chancery. On such occasions, the case was heard once again before the Lord Chancellor, but now sitting in his capacity as the Speaker of the House, and now to be heard *de novo*.

The jurisdiction of the House to hear such appeals had only been authoritatively established with the decision in *Shirley* v. *Fagg* (1675).[39] What *Shirley* did not resolve, however, was the role the lay peers played in the determination of such cases. The role of the lords, in such appeals, was simply to affirm or reverse the previous decision of the lower court, and it was understood that this was the work of the entire House.[40] In practice, however, the lay peers rarely became embroiled in such matters. Stevens notes that as a result of the increasing number of appeals coming before the House in the eighteenth century "the majority of peers took part actively in only the most important of cases".[41] When they did become involved, the lords had a right to give an opinion and vote on such proceedings as and when it suited them to do so. Generally however, the House would simply acquiesce to the opinions of the law lords, those peers present who had previously held judicial office.

In addition to the law lords the twelve judges of the common law courts also had a role to play as attendants and officials of the House. The Lords, when faced with a particularly complex or difficult legal issue could call upon the common law judges to proffer expert advice for the consideration of the House. When asked for an opinion, if unanimous in their thinking, the senior judge present would deliver a collegiate address. If, however, there existed disagreement then the judges would be asked to answer the lords' questions, each in turn, in order of increasing seniority.[42] Having heard the opinions of the judges, the peers would then give their vote accordingly. Turberville comments that:

> Even if several other peers took part in the proceedings, they were bound, if they had any common sense, to be guided by the knowledge of the experts; and in effect the judgments given by the House were in the vast majority of cases the judgments of the most illustrious judges of the country.[43]

The point must be made however that the lords were not actually bound to follow the opinions of the judges and did sometimes

[39] *Shirley* v. *Fagg* (1675) 6 St.Tr. 1121.
[40] Turberville, *The House of Lords in the Eighteenth Century*, pp. 8–9.
[41] *Op. cit.*, at p. 13.
[42] *Ibid.*, at p. 152.
[43] Turberville, *The House of Lords in the Age of Reform*, at p. 200.

arrive at a contrary decision. It was at these times that the overtly political nature of such decisions came to the fore with greatest clarity. Peers were not averse to lobbying on behalf of a decision that they favoured, regardless of the opinion of the judiciary. Bevan details three such instances, *Bertie* v. *Falkland* (1696),[44] *Bishop of London* v. *Ffytche* (1783),[45] and *Seymour* v. *Lord Euston* (1805–1806),[46] in which the judgment of the House was given in defiance of the judges.[47] To this list of comparatively scarce examples should be added the decision of *Donaldson* v. *Becket*. There is ample evidence to suggest that the vote of the House was contrary to the opinion expressed by the majority of the common law judges present.

E. Donaldson v. Becket

Despite the fact that the Lords were ordered to hear Donaldson's cause in December 1772, his petition was not read to the House until January 1774.[48] In February the twelve common law judges were ordered to attend the House where Edward Thurlow, the attorney general, opened on Donaldson's behalf.[49] Thurlow had long been involved in the literary property debate, having argued against the common law right both in *Tonson* v. *Collins* and *Millar* v. *Taylor*. Alexander Wedderburn, the solicitor general, and John Dunning were heard on behalf of Becket.[50] Both Wedderburn and Dunning had earlier appeared against Thurlow, in *Tonson* and *Millar* respectively, arguing for the existence of the common law right. Once the arguments had been delivered, Apsley L.C., who had earlier granted the perpetual injunction on Becket's behalf, put three questions to the judges for their opinion:

1. Whether, at common law, an author of any book or literary composition, had the sole right of first printing and publishing the same for sale, and might bring an action against any person who printed, published, and sold the same, without his consent?
2. If the author had such right originally, did the law take it away upon his printing and publishing such book or literary composition, and might any person afterward

[44] *Bertie* v. *Falkland* (1696) 1 Salkeld. 231.
[45] *Bishop of London* v. *Ffytche* (1783) 2 Bro. P.C. 211.
[46] *Seymour* v. *Lord Euston* (1805–1806) Cobbett, *Parliamentary Debates, Vol.7*, 577, 669.
[47] 17 L.Q.R. 357, 366–370.
[48] The reason this took so long was because Donaldson's case had been laid before a Mr. Chambers (*i.e.* Robert Chambers, Vinerian Professor of English Law at the University of Oxford), Lord's counsel, for "perusal and approbation". Chambers however had since been "appointed one of the judges to go to the East Indies" as a result of which he had not settled Donaldson's case until 7 January 1774: L.J. vol. 34, at p. 13.
[49] L.J. vol. 34, at p. 19.
[50] *Ibid.*, at p. 20.

reprint and sell, for his own benefit, such book or literary composition, against the will of the author?

3. If such action would have lain at common law, is it taken away by the Statute of 8th Anne: and is an author, by the said statute, precluded from every remedy except on the foundation of the said statute, and on the terms and conditions prescribed thereby?

Lord Camden, however, tabled a further two questions for the consideration of the judiciary and the House:

4. Whether the author of any literary composition, and his assigns, had the sole right of printing and publishing the same, in perpetuity, by the common law?
5. Whether this right is any way impeached, restrained, or taken away, by the statute 8th Anne?

While both sets of questions amounted, in the end, to the same thing, there does exist a fundamental difference between them, identified by Patterson who comments that "analytically, the first three questions were directed to the rights of the author, the latter two to the rights of the booksellers".[51] Apsley L.C.'s questions focussed solely upon the position of the author, omitting any reference to the fact that the common law right claimed was one that lasted in perpetuity. Lord Camden however was clearly wary of the ease with which the perpetual right might be confirmed under the simple rubric of an author's right. Carefully stressing the place of an author's "assigns" and the perpetual nature of the right under discussion, his two questions covered the same ground as Apsley L.C.'s, but in a way that sought to direct the attention of the House from the author to the bookseller.

The judges requested that they be allowed some time for consideration, and on Tuesday 15 February, Apsley L.C. informed the House "[t]hat the judges differed in their Opinions upon the said Questions", whereupon the judges were ordered to deliver each of their answers to the five questions. On this first day, Eyre B., Nares, Ashurst and Blackstone JJ. gave their answers, and the matter was adjourned until Thursday 17 February. Then came Willes, Aston JJ., Perrott B., Gould J. and Adams B., whereupon the issue was again adjourned until Monday 21 February. On this third day Smythe C.B. and De Grey C.J. delivered the remaining opinions. One judge refrained from giving an opinion upon the five questions at all: Lord Chief Justice Mansfield.

There are six different sources for the various opinions delivered by the judiciary. First, there exists a record contained within the

[51] *Op. cit.*, at p. 176.

Journal of the House of Lords itself which is replicated at the end of Burrow's report of *Millar* v. *Taylor*.[52] The third is provided in Cobbett's *Parliamentary History of England*;[53] a fourth was printed in 1774 for Wilkin, entitled *The Pleadings of the Counsel before the House of Lords in the great Cause concerning Literary Property*;[54] and a fifth was also printed in 1774, to which was added *Notes and Observations and References by a Gentleman of the Inner Temple*.[55] Finally, there is an account of the case, which includes only the judges' decision upon the third question, in Brown.[56] Of these various reports only Burrow provides any kind of explanation as to why Lord Mansfield C.J. might have remained silent. Noting that "[i]t was notorious, that Lord Mansfield adhered to his opinion [*Millar*]" he continues that "it being very unusual, (from reasons of delicacy,) for a peer to support his own judgment, upon an appeal to the House of Lords, he did not speak".[57]

A traditional reading of the votes of the eleven judges who did speak follows that detailed by Birrell.[58] He recounts the voting upon the five questions as follows: that there existed a right to first print and publish an author's work (10 to 1);[59] that this was not taken away upon publication of the work (7 to 4); that this right was taken away by the 1709 Act (6 to 5); that an author had a perpetual common law right to print his work (7 to 4); but that this right was taken away by the 1709 Act (6 to 5). This account details that a large majority of the judges considered that there did exist a perpetual common law copyright, while a smaller majority believed it had been impeached through the passing of the Statute of Anne. The reality however was somewhat different.

In relation to the first question in particular, that ten votes were cast in favour of the right to first print does not mean that ten judges were in agreement as to the existence of a common law copyright, or even in agreement as to what the question actually meant. While Apsley L.C. himself no doubt well understood the

[52] L.J. vol. 34, pp. 12–13, 19, 20, 21, 23–24, 26–28, 29–30, 32; *Donaldson v Becket* (1774) 4 Burr. 2408.

[53] Cobbett's *Parliamentary History of England*, vol. 17, pp. 953–1003.

[54] Reprinted in Parks (ed.), *The Literary Property Debate: Six Tracts, 1764–1774* (London 1975).

[55] *Ibid.*

[56] *Donaldson* v. *Becket* (1774) 2 Bro. P.C. 129.

[57] *Donaldson* v. *Becket* (1774) 4 Burr. 2417. Birrell echoes this observation, writing that Mansfield C.J. "did not think fit to attend, considering himself too deeply committed"; A. Birrell, *Copyright in Books* (London 1899), at p. 124. For more on the reasons as to Mansfield's silence, see Rose, *op. cit.*, pp. 99–101.

[58] *Op. cit.*, pp. 124–127. See also Laddie, Prescott, Vitoria, Speck, Lane (eds.), *The Modern Law of Copyright*, at p. 55.

[59] This is sometimes represented as an 8 to 3 vote. See for example J.F. Whicher, "The Ghost of Donaldson v Beckett: An Inquiry into the Constitutional Distribution of Powers over the Law of Literary Property in the United States—Part 1" (1981) 29 Copyright Society of the USA 102–151, 128.

implications of the debate before the House, there is nevertheless an ambiguity at the heart of his first question that has created confusion in the subsequent reporting and understanding of the judicial responses to it. Abrams suggests that, in essence, Apsley L.C.'s first question amounted to asking: "At common law, did the author have a copyright in an unpublished manuscript?"[60] In recasting the enquiry in this light, however, he fails to articulate the question's inherent ambiguity that touches upon both the tangible and the intangible.

With his first question the Lord Chancellor had asked whether an author had the "right of *first* printing and publishing"[61] his work, and there are two distinct ways in which this question can be understood. Of these two competing readings the first, addressing the intangible, implies the existence of a common law copyright in a manuscript. This marries with Abrams' rendition of Apsley L.C.'s question—did copyright exist at common law? The second reading, however, has nothing to do with copyright in a manuscript whether published or not. This alternative reading of Apsley L.C.'s first question simply relates to the existence of certain rights at common law that flow from ownership of a given tangible object, which happens to be, in this case, a manuscript. In other words, the question simply addressed the rights of the owner of the physical manuscript to decide whether or not to publish it to the rest of the world. When different judges were answering this first question, they were in fact answering different questions.

The day after the judges had delivered their opinions it was proposed that the House reverse the decree of the Court of Chancery. This was objected to and, after a debate in which Lords Camden, Lyttleton and Howard, Lord Chancellor Apsley and the Bishop of Carlisle all expressed their views, the question was put to the House once again. Of these five speakers only one, Lord Lyttleton, spoke in favour of the common law right. The proposal was resolved in the affirmative and the decree was accordingly reversed.[62]

Given the history of the case in the Lords it was perhaps inevitable that *Donaldson* would generate much confusion and that the traditional reading of the case is not entirely accurate. Here were two sets of the same, yet different, questions, the individual meaning of which was a matter of some conjecture. Add to this the fact that the peers and legal reporters were left to ascertain each of

[60] H. Abrams, "The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright" (1983) 29 Wayne Law Review 1119–1191, Appendix A, 1188.
[61] My emphasis.
[62] L.J. vol. 34, pp. 29, 30, 32.

the judge's answers in the light of a more general, and often lengthy, response (many of the judges not providing an explicit answer to any or all of the five questions) and it should not surprise us that a correct reading of *Donaldson* is elusive. To say that an accurate account is elusive, however, is not the same as conceding that one cannot be articulated. It is argued that an understanding of *Donaldson* that recognises the existence of copyright at common law is misguided, based as it is upon two erroneous suppositions: first, that the majority opinion of the eleven common law judges who spoke to the House has been accurately recorded and reported, and second, that the decision of the peers corresponded with those majority opinions. Contrary to the orthodox analysis, it is suggested that seven of the judges acknowledged the common law right and that, of these seven, six considered the right to be both anterior and superior to the Statute of Anne. Further, that when the peers finally voted, they did so in direct contravention to this majority judicial view, explicitly rejecting the existence of a copyright at common law.

1. The votes of the judges

The first two judges to speak were Eyre B. and Nares J., the first favouring Donaldson, the second favouring Becket. Of all of the judges who gave opinions in favour of Donaldson, Eyre B.'s answers prove the least problematic. Quite simply, he rejected any notion of the existence of a common law copyright. Nares J., by contrast, concluded that there did exist a common law copyright. There is, however, a discrepancy in the records of his opinion upon the third and fifth questions. The majority of reports give it that Nares J. decided that the common law right, after publication, was removed by the Statute of Anne. However, as Abrams and Rose have pointed out,[63] and as is clear from the various reports themselves,[64] there is sufficient evidence that he was clearly of the opinion that the common law right was *not* impeached by the 1709 Act. Moreover, this was an opinion shared by Ashurst, Blackstone, Willes and Aston JJ. who followed, as well as Smythe C.B. who spoke last but one.

Perrott B., Gould J. and Adams B. followed. There are conflicting accounts of both Perrott B.'s and Adams B.'s response as to the existence of the common law right. The Lords' Journal records that Perrott B. agreed that an author had the sole right of first printing "but could not bring an action against any person who printed, published and sold the same unless such person

[63] *Op. cit.*, pp. 154–158. See Abrams, *op cit.*, pp. 1166–1169.
[64] Cobbett, at p. 975, *Pleadings*, pp. 17–18, and the *Gentleman's* report, at p. 35.

obtained the copy by fraud or violence'', an answer that is often interpreted as a ''conditional yes'' vote.[65] By contrast Cobbett suggests that Perrott B. ''answered the first, second, and fourth questions in the negative, being fixed in opinion that there never existed a common-law right, and that an author had no claim to his manuscript after publication''.[66] That there is conflict in these reports at all lies in the inherent ambiguity of the first question referred to earlier.

It was not the case that Perrott B. thought there existed a common law copyright that was removed by the law upon publication. Rather, he was suggesting that an author had certain rights over his manuscript by virtue of the fact that it was an item of tangible property. Cobbett records that ''[r]especting the statute of queen Anne, [Perrott B.] was perfectly convinced that it was the only security that authors or booksellers had''. Beginning with the observation that ''the argument for the existence of a common law right, and the definition of literary property, as chattel property, was in his idea exceedingly ill founded and absurd'', the report continues:

> An author certainly had a right to his manuscript; he might line his trunk with it, or he might print it. After publication, any man might do the same ... if a manuscript was surreptitiously obtained, an action at common law would certainly lie for the corporeal part of it, the paper. So if a friend to whom it is lent, or a person who found it, multiplied copies, having surrendered the original manuscript, he had surrendered all that the author had any common law right to claim.[67]

Perrott B.'s attitude to the first question is grounded in an author's rights in relation to the physical manuscript as a tangible piece of property: ''he might line his trunk with it, or he might print it''. For Perrott B. there was no common law copyright, only such rights as follow from the ownership of the physical text.

As was the case with Perrott B., so is the case with Adams B. The Lords' Journal records the same series of answers for Adams B., as it did for Perrott B.: that there was a right of first printing the work, but that one could not bring an action against another ''unless such person obtained a copy by fraud or violence''.[68]

[65] Note that while the Burrow's account is identical to that of the Lord's Journal, Abrams incorrectly suggests that Burrow in fact recorded a ''no'' vote from Perrott on this point. See Abrams, *op. cit.*, at p. 1189.

[66] *Op. cit.*, at p. 983. Cobbett's report is essentially the same as both the *Pleadings* and the *Gentleman's* accounts.

[67] *Ibid.*, pp. 981–983.

[68] Again, as was the case with Perrott B., Abrams records a ''no'' vote, rather than this ''conditional yes'' vote. Abrams, while commenting that Adams B.'s ''position on rights in

Abrams, discussing Adams B.'s judgment at some length, draws on the observation of Adams B. in Cobbett's report, that "authors never dreamt of any claim in their favour, after they had parted with their manuscript", and suggests that the implication is that "they had some rights in unpublished manuscripts".[69] That they have "some rights" in their manuscripts is without doubt; however, Abrams erroneously infers that Adams B. supported the existence of a common law copyright, based on his comments concerning an author's rights in the tangible unpublished manuscript. Rather, it is clear that Adams B., like Perrott B., recognised certain rights in the author flowing from ownership of the manuscript as property, while rejecting any idea of a common law copyright.[70]

Gould J.'s position is different again. Both the *Pleadings* and the *Gentleman's* report begin that he "agreed, that an author had a right at Common Law to his manuscript, previous to publication". One might assume that he was agreeing with both Perrott and Adams BB., between whom he spoke; however, Cobbett's report indicates that Gould J.'s overall approach was markedly different. He records that Gould J. agreed "that an author had a right at common law to his manuscript previous to publication, [but] he thought that right should continue to him under certain restrictions after publication". He continues that Gould J. "thought that if a book was kept out of print for an unreasonable time, it was a kind of abandonment of property in the original possessor, and the subject of it ought, for public convenience, to become common". "Under this idea", Cobbett notes, "he answered the first, second, and fourth questions".[71] This, unlike the conventional wisdom about Perrott and Adams BB., does in fact represent a form of qualified common law copyright protection. Of all the judicial responses, Gould J. is the one that stands apart. The brief reports of his opinion suggest that he did consider that a qualified form of copyright existed at common law, that in certain circumstances this could be circumscribed for "public convenience", but that in any case, it had certainly been removed through the passing of the Statute of Anne.

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unpublished manuscripts is ambiguous" records a "yes" vote in Cobbett's account and continues that the *Pleadings* and the *Gentleman's* reports "do not touch the question". This is hard to square with the fact that all three reports recount that Adams B. answered all five questions in the negative.

[69] *Op. cit.*, at p. 1190.

[70] Cobbett records his opinion that "till of late years no idea was entertained that a common-law right existed respecting what was now termed literary property … He was clearly of the opinion that, previous to the statute of queen Anne, authors and printers had no security but by patents … [and that] [t]he Act most evidently created a property which did not exist before"; *op. cit.*, at p. 985.

[71] *Ibid.*, pp. 984–985. Both the *Pleadings* and the *Gentleman's* reports fail to record Gould J.'s answer to either the second or the fourth question.

Last to speak was Chief Justice De Grey. While all of the records agree that he voted "yes" upon the first of the five questions, a close examination of these various texts reveal that his understanding of the issue actually accorded with that of Perrott and Adams BB.[72] He began that "[w]ith respect to the first question, there can be no doubt that an author has the sole right to dispose of his manuscript as he thinks proper; it is his property, and, till he parts with it, he can maintain an action of trover, trespass, or upon the case, against any man who shall convert that property to his own use". However, he continued:

> [B]ut the right now claimed at the bar, is not a title to the manuscript, but to something after the owner has parted with, or published his manuscript; to some interest in right of authorship, to more than the materials or manuscript, on which his thoughts are displayed, which is termed literary property ... which right is the subject of the second question proposed to us.[73]

Clearly De Grey C.J., in addressing the first question, was not answering the question of whether or not there exists a common law copyright. He simply asserted that everyone has certain rights flowing from the fact of ownership of a certain given tangible property. This was not a common law copyright, but simply a case of common law rights over your copy. It was not until he turned to the second question that he considered himself to be addressing the issue of the existence of a common law copyright. Upon this matter he commented that "this new doctrine", this "idea of a common-law right in perpetuity ... cannot be supported upon any rules or principles of the common law of this kingdom".[74] In short, De Grey C.J., like Eyre, Perrott and Adams BB., comprehensively rejected any notion of copyright at common law.

2. A brief summary

On a close reading of *Donaldson*, the picture that emerges is somewhat different from that presented in Copinger or Laddie.[75] Examining the substance of the opinions of each of the eleven judges, three definable approaches to the question of literary property emerge. On the one hand there were six judges in support of the common law copyright, who did not believe that such a right was lost either upon publication of the work, or as a result of the enactment of the Statute of Anne. On the other hand, there were four judges who, rejecting any notion of a perpetual right, did

[72] Cobbett, the *Pleadings* and the *Gentleman's* report are all essentially the same.
[73] Cobbett, *op. cit.*, at p. 988.
[74] *Ibid.*, at p. 992.
[75] See note 32 above and accompanying text.

recognise the existence of a right to first print, which had nothing to do with a common law copyright, but flowed as a consequence of owning the physical manuscript. For these four judges, Eyre, Perrott, Adams BB. and De Grey C.J., what rights an author had over his work after publication were entirely delineated by the Statute of Anne. Third, standing somewhere between both of these camps, was Gould J., who accepted the existence of a common law copyright (albeit a qualified one), but considered this right lost upon the passing of the 1709 Act. To summarise, the House of Lords had heard a majority of the speaking judges (seven) acknowledge the existence of a common law copyright; in addition a majority of the judges (six) considered this common law right pre-eminent over the Statute of Anne. That was what the peers had heard; whether they had listened was an entirely different affair.

3. After the judges

On the day after De Grey C.J. had delivered the last of the judicial commentaries, five further opinions were added to what had already been said. The first to speak was Lord Camden who had introduced the fourth and fifth questions. He began with the "whole bread-roll of citations and precedents" that had been relied upon in support of the common law right, castigating them as a "heterogeneous heap of rubbish, which is only calculated to confound your lordships, and mislead the argument." The patent cases, the Star Chamber decrees, the stationers' bye-laws; all were dismissed.[76] Only once he had "cleared the way of those spurious, pretended authorities" could the real question begin "to assume its natural shape".[77]

While he decried the notion that authors should write for anything other than glory,[78] it was not however the author that remained Camden's main concern. Rather, it was the bookseller. With his additional two questions he had shifted the focus of the House away from the rights of the author, to the consequences of such rights existing in a bookseller (the author's assign) in perpetuity. He reminded the peers that "the common law right now claimed at your bar is the right of a private man to print his works for ever, independent of the crown, the [stationers'] company, and all mankind".[79] Should the Lords vote in favour of the perpetual right, he warned, "[a]ll our learning will be locked up in the hands of the Tonsons and the Lintots of the age". These booksellers,

[76] See the various arguments that were elaborated both for and against the existence of the common law copyright in *Midwinter*, *Tonson*, *Millar* and *Donaldson*.
[77] Cobbett, *op. cit.*, pp. 993–997.
[78] Camden commented that "[i]t was not for gain, that Bacon, Milton, Newton, Locke, instructed and delighted the world"; *ibid.*, at p. 1000.
[79] *Ibid.*, at p. 994.

these "engrossers", could set upon books whatever price "their avarice chuses to demand, till the public became as much their slaves, as their own hackney compilers are". This pretended common law right was, to Camden, "as odious and selfish as any other, it deserves as much reprobation, and will become as intolerable". It was the free market of ideas, not the market place of the bookseller, which remained of paramount importance. "Knowledge and science" he maintained "are not things to be bound in such cobweb chains".[80]

Lord Chancellor Apsley, who had granted the original injunction now under discussion, spoke next. Unfortunately, none of the reports of the case provide a verbatim account of his opinion. In general we are told that he:

> [E]ntered into a very minute discussion of the several citations and precedents that had been relied upon at the bar, shewed where they failed in application to the present case; and one by one described their complexion, their origin, and their tendency; in each of which he proved that they were foreign to any constructions which could support the respondents in their argument; he was no less precise and full in exposing the absurdity of the authorities derived from the Stationers' Company ... He then very fully stated the several cases of injunctions in the court of Chancery, produced several original letters from Swift to Faulkner and others, relative to the statute of queen Anne, and gave an historical detail of all the proceedings in both Houses upon the several stages of that Act, and the alterations it had undergone in the preamble and enacting clauses, all tending to shew the sense of the legislature, at the time of passing it, to be against the right.[81]

He explained that in granting the original injunction, he was acting "entirely as of course" regarding it as "merely a step in the gradation to a final and determinate issue in the House of Peers". Apsley L.C. then informed his peers that, had he been free to do so, he would never have granted the injunction in the first place. Rather, he "was clearly of opinion with the appellants".[82] What force this had upon the House can only ever be guessed at, but, following as it did Lord Camden's high impact rhetoric, it can only be supposed that the Lord Chancellor's role in determining the final outcome of *Donaldson* was of much greater significance than has traditionally been recognised.

Of the three remaining speakers, Lord Lyttleton, the Bishop of Carlisle and Lord Howard, only Lyttleton favoured the perpetual right, arguing that it offered "a lasting encouragement" to

[80] *Ibid.*, pp. 999–1001.
[81] *Ibid.*, pp. 1001–1002.
[82] *Ibid.*, at p. 1002.

creativity, whereas making such works free to all was "like extending the Course of a River so greatly, as finally to dry up its Sources".[83] By contrast Howard considered the prospect of perpetual control dangerous "to the constitutional Rights of the People" as politicians and ministers might buy up the rights to print critical pamphlets "thereby choaking the Channel of public Information".[84] His fear was one of unchecked political suppression. The Bishop of Carlisle took up a different constitutional point. He began by commenting upon the "many foreign Topics" which had been introduced into the arguments at hand, such as "[w]hether it is a Property properly so called, or only a Right to some Property?" and "[w]hether such Property be a corporeal one, or incorporeal?".[85] Such speculations, the very lifeblood of the debate born out of *Midwinter* v. *Hamilton*, which debate had now spanned over three decades, while "always entertaining", the Bishop considered "in a great Measure foreign to the main Point". Instead, he directed the peers simply to consider the Statute of Anne. Such legislation he argued, however flawed, stood "directly opposite to the Notion of any abstract independent perpetual Copy-right".[86] The real issue for the Bishop remained one concerned with the sovereignty of Parliament, and the relationship between the legislature, the common law and the judiciary. "[I]f it once comes to the established Maxim, that Acts of Parliament can have no Effect on Claims subsisting at Common Law; in vain surely does the Legislature employ itself in framing any concerning them". So long as the Statute of Anne remained in force "it must exclude all that Right paramount and inextinguishable, which is exhibited along with it".[87] Lord Camden had also expounded upon the same theme in reminding the judiciary that "[t]heir business is to tell the suitor how the law stands, not how it ought to be". "[O]therwise" he continued "each judge would have a distinct tribunal in his own breast" and "[c]aprice, self-interest, [and] vanity would by turns hold the scale of justice" while "the law of property" would be "indeed most vague and arbitrary".[88]

4. The vote of the peers

Over the course of a week 16 opinions had been delivered for the peers' consideration, eight of which endorsed the existence of a common law copyright while eight rejected such a notion, though

[83] *Gentleman's*, *op. cit.*, pp. 55–56.
[84] *Gentleman's*, *op. cit.*, at p. 59.
[85] *Ibid.*, at p. 56.
[86] *Ibid.*, pp. 56–59.
[87] *Ibid.*
[88] Cobbett, *op. cit.*, pp. 998–999.

those positions were not necessarily clear to the House. Nor was it immediately apparent what the judges' position had been upon the relationship between an existing copyright and the Statute of Anne. If the clerk of the House of Lords, and Cobbett, could mistake Nares J.'s opinion on the all-important third and fifth questions, the peers present could have made a similar mistake. Moreover, while the judges were tied to the questions asked by the House, the lords who spoke were not so bound. While they all addressed the existence or not of the common law right, only two, Camden and the Bishop of Carlisle, made any comment upon the relationship between a common law right, should one exist, and the statute, both determining that the Act "plainly circumscribed" the common law.[89] In any event, the Lords decided, by a majority vote, that "[t]he decree of the Court of Chancery was accordingly reversed".[90]

The nature of the mechanism for deciding the appeal to the House renders it difficult to settle upon a definitive reading of *Donaldson*. There are a number of possible explanations for the vote of the peers. Perhaps they mistakenly voted against the existence of the perpetual right, believing that they were in fact voting with the majority of the judges. Perhaps the peers knew that the majority of judges were in favour of the perpetual right and, moved by the rousing sentiments of Camden and the denunciation by the Lord Chancellor of his own earlier decision, voted in defiance thereof. Perhaps the truth lies somewhere between these two poles.

On balance, it is suggested that the peers did consider they were voting in defiance of the opinion of the majority of the judges, and as such the decision in *Donaldson* should take its place alongside those of *Bertie*, *Ffytche* and *Seymour*. The judges in the majority had expressed sentiments that broadly concurred with those of the silent Lord Mansfield C.J. By contrast, the majority of those lords who spoke denied outright the existence of the common law right and it was this position that the House embraced. Lord Camden had identified and expounded upon two central themes that rang true in the heart of the upper chamber. The first concerned the nature of the relationship between the Houses of Parliament and the unelected judiciary, and the supremacy of the legislative body. The second concerned the relationship between the author, his work, and the needs of the wider society. When the Statute of Anne had been passed, it had been for the purpose of benefiting society through the encouragement of learning and the continued

[89] See for the *Gentleman's* report, *op. cit.* pp. 53–58.
[90] Only Cobbett provides any indication of the numbers involved in the vote itself; *op. cit.*, at p. 1003.

production of useful books. In seventy years it would seem that little had changed about this basic impulse. There was still a want and need for useful books and there remained the desire that they be produced and made available at an affordable cost.

5. Two pleas for legislation

Six days after the *Donaldson* decision, a petition was received in the House of Commons from the "booksellers of London and Westminster". The booksellers complained that they "had constantly apprehended, that the [Statute of Anne] did not interfere with any copy-right that might be invested in [them] by the common law". "[B]y a late solemn decision of the House of Peers" they continued "such common law right of authors and their assigns *hath been declared to have no existence*, whereby your petitioners will be very great sufferers thro' their involuntary misapprehension of the law".[91]

The petition was referred to a committee of the House for examination and, on 24 March, a Mr. Feilde reported that William Johnston had appeared before the committee on behalf of the London booksellers declaring that it had always been the presumed that "the Booksellers had a perpetual right in the copies they had purchased", that had such a common law right not existed such vast sums of money would not have been laid out in the purchase of such copies, that without any relief being granted those who had invested in such copies would suffer heavily, and that similarly there was a danger that "elegant editions" of "valuable books" would soon run out of print. The question was put to the House whether leave should be given to bring in a Bill for the Relief of Booksellers, and it was decided that Feilde and others, including Wedderburn and Dunning, who had both represented Becket in *Donaldson*, should prepare and bring in such a Bill. Among those who voted against bringing in the Bill was the attorney general, Thurlow.[92]

Following this decision a number of other petitions were presented. The booksellers of Edinburgh claimed that "the special indulgance (*sic*) prayed for by the London booksellers", would be highly injurious to everyone concerned in "Bookselling, the Paper manufacture, the Art of printing, and other Branches therewith connected". Acknowledging that the Scottish book trade was primarily concerned with "re-printing English books" when the terms of the 1709 Act permitted it, they declared that extending the monopoly asked for by the London booksellers would "be the ruin

[91] C.J. vol. 34, at p. 513; my emphasis.
[92] *Ibid.*, pp. 588–590.

of many families in Scotland'' as well as being ''prejudicial to the community at large''.[93] Similar sentiments were expressed by other booksellers from London, Westminster, Glasgow and York, each decrying the deleterious consequences of the proposed Bill.[94]

Not surprisingly, Donaldson did not remain silent. He delivered a petition referring to the decision he had secured before the Lords and expressed his mortification at seeing it ''ready to be snatched out of his hands by the very people who have been hitherto guilty of oppression''. Should the Bill pass into law it would be ''to the great detriment of the publick, to the injury of letters, and to the utter ruin of inferior booksellers both in town and country''. Rejecting the ''pretence of hardship'' claimed by the London booksellers as ''without foundation'' he prayed to the House ''that the statute of Queen Anne, which was expressly made for the encouragement of learning, may not now be altered or suspended, for the encouragement of the London booksellers only''.[95]

In April Feilde presented the Booksellers Bill. While it was in committee further petitions were laid before the House from a number of provincial booksellers all advocating the retention of the Statute of Anne.[96] Like the earlier petitions, however, these were to no avail and in late May the Bill was passed and carried to the Lords.[97] Without drawing any distinction between works in which copyright had expired, or works in which copyright under the 1709 Act currently subsisted, this Bill simply provided that any author or, crucially, his assign, who had already printed and published his work, should, from 4 June 1774, ''have the sole and exclusive liberty of printing such book ... for the term of fourteen years ... and no longer''.[98] Four days later the Bill was received in the Lords whereupon it was ordered that it be read for the first time on 2 June.[99] On this day it was suggested that it be read for a second time two months hence. In effect this signalled the end of the Bill as later that month the parliamentary session was adjourned. Once again, the House of Lords had been the undoing of the London booksellers.

The London monopolists were not however the only interested parties alarmed by the decision in *Donaldson*. Carter writes that ''[a]s soon as the House of Lords decided in 1774 that no subject

[93] *Ibid.*, pp. 665–666.
[94] *Ibid.*, pp. 668, 698.
[95] *Ibid.*, at p. 679.
[96] These petitions came from New Malton, Nottingham, Bawtry, Leeds and Knaresborough. *Ibid.*, at p. 757.
[97] *Ibid.*, at p. 788.
[98] An Act for Relief of Booksellers and others, by vesting the Copies of Printed Books in the Purchasers of such Copies from Authors, or their Assigns, for a limited Time.
[99] L.J. vol. 34, at p. 222.

had a perpetual copyright in a published work ... the Universities took steps to secure exceptional treatment".[100] In April 1775 leave was given in the Commons for Lord North, the Chancellor of Oxford University at the time, to prepare and bring in a *Bill for enabling the Two Universities to hold in Perpetuity the Copy Right in books, for the advancement of useful Learning, and other purposes of Education, within the said Universities*.[101] North, although a peer, presented the Bill, steered it through the Commons, and brought it before the Lords in less than three weeks.[102] Moreover, after only eight days before the upper chamber, the Universities Act received the Royal Assent.[103] This Act, modelled on the Statute of Anne, dictated that the named universities and colleges should "have, for ever, the sole Liberty of printing and reprinting all such books as shall at any time heretofore have been ... bequeathed or otherwise given by the Author" which was granted in order that the selling of such works could contribute to funds "for the Advancement of Learning, and other beneficial Purposes of Education within the said Universities and Colleges".[104] In a matter of weeks, the universities had secured what the London booksellers had unsuccessfully pursued for over thirty years.

That Parliament should sanction the granting of a statutory perpetual copyright in certain books was not, in itself, considered problematic. What mattered, to the House of Lords at least, was who had control over these perpetual monopolies and why. When those in control were the Universities and when the perpetual monopoly they commanded was to be directed towards the betterment of those educational establishments, then both parliamentary chambers could agree that a perpetual copyright, framed in such terms, was not such a controversial prospect. Indeed, the Act specifically provided that should a University sell any of these perpetual copyrights on, then all privileges granted under the Act were to be revoked.[105]

With the passing of this Act the legislature had come full circle. The Statute of Anne and the Universities Act stand as twin pillars. Both concerned the copyright in printed books, and both were secured on the strength of the social impact that each would have. Both were fundamentally concerned with the advancement of education and learning within Great Britain, and both supported

[100] H. Carter, *A History of the Oxford University Press, Vol. 1, to the year 1780* (Oxford 1975), at p. 367.
[101] C.J. vol. 35, at p. 299.
[102] *Ibid*., pp. 340, 351, 370, 373.
[103] 15 Geo.III, c. 53. See L.J. vol. 34, pp. 451, 454, 455, 458, 462, 463, 470.
[104] See the preamble and section 1.
[105] Section 3.

the continued production of socially useful books. With the Statute of Anne a necessary, if finite, bargain had been struck with the author and the bookseller; with the Universities Act a useful, non-finite, source of revenue was provided for the support of some of the country's most prestigious seats of learning. Two contrasting measures directed toward the same end.

Moreover, the success of the university lobby in 1775, in contrast with the failure of the London booksellers to secure further legislation in 1774, serves to reinforce the understanding that the *Donaldson* decision, regardless of the wealth of argument and counter-argument on the nature of literary property, turned primarily upon the same basic impulse that underscored both of these legislative bookends: a desire to encourage and promote the advancement of learning and to nurture a buoyant marketplace of ideas. In all of this, the interests of the wider society were paramount.

In *Donaldson* the House was asked whether or not the decree for the perpetual injunction granted by Apsley L.C. to Becket in 1772 should be reversed. It voted that it should. Despite the fact that five questions had been put to the judges, only one question had been put for the consideration of the peers. In light of the various opinions that had been expounded within the Lords, this single question approximated most closely to a choice between a perpetual common law right and the time-limited Statute of Anne, with the protection offered by the legislation being preferred. However, this still left open the issue of whether the Act had simply created a new property right in printing books, or whether it had abrogated a pre-existing common law copyright. The decision to reverse the Lord Chancellor's decree said nothing of this.

Nevertheless, while the actual vote of the peers did not speak directly to this issue, Apsley L.C. had addressed it and, as Abrams observes, while "the judicial statements were only advisory", "the Lords' statements were the law of the case".[106] This was the Lord Chancellor who "entered into a minute discussion of the several citations and precedents that had been relied upon at the Bar", who "proved that they were foreign to any constructions which could support the Respondents", who exposed "the absurdity of the authorities derived from the Stationers Company", who "very fully stated the several cases of injunctions in the Court of Chancery", and who "gave an historical detail of all the proceedings in both Houses upon the several stages" of the Statute of Anne "all tending to shew the sense of the legislature, at the time of passing

[106] *Op. cit.*, at p. 1169.

it, to be against the right".[107] In short, Apsley L.C. had explicitly denied the existence of any common law right.

That this was the actual position of the Lords is further reinforced in the petition for, and drafting of, the Booksellers Bill. Drawing upon the language of the booksellers' petition to the House in February 1774, and the preamble to the Bill itself, it is clear that the decision of the peers was initially understood to have dismissed any notion of the common law right. The booksellers complained that *Donaldson* declared the common law right "to have no existence". Moreover, had the Bill passed into law, its preamble would have recounted that it had "lately been adjudged in the House of Lords that *no such copy right in authors or their assigns doth exist at common law*".[108] In the opinion of the booksellers themselves the House of Lords had denied that any common law copyright pre-dated the Statute of Anne and decided that the legislation had in fact created a new, temporally limited, property right in literary works.

F. Re-reading Donaldson

That the House of Lords in *Donaldson* rejected the existence of any common law copyright is not of course how their decision is popularly portrayed or understood. Laddie, Prescott and Vitoria open their "historical review" of copyright with the observation that "[t]here are contained in the various law reports thousands of cases on copyright law going back some 280 years. However, few were decided under the current Act; and while a great many are still relevant today, some are not, can positively mislead, and have mislead judges in the past".[109] Such commentary seems tailor-made for re-reading *Donaldson*. Because of the nature of the single vote in the appeals process to the House of Lords, the lack of attention that the speeches of the individual lords themselves have attracted, the emphasis that has been placed upon the eleven judicial opinions delivered to the House and the misreporting of key aspects of those opinions, this singular determination in *Donaldson* has provided a conclusion to the eighteenth debate concerning the existence of copyright at common law that has mislead judges, practitioners and academics alike for over 200 years. When the peers voted in favour of reversing the earlier decree, they were voting against a perpetual right, but, regardless of their actual intention, their vote has been taken to correspond with the (mis)reported opinion of the majority of the speaking judges.

[107] *Pleadings*, *op. cit.*, at p. 35.
[108] My emphasis.
[109] Laddie, Prescott, Vitoria, Speck, Lane (eds.), *The Modern Law of Copyright*, at p. 51.

One of the first English copyright cases to reconsider the decision of *Donaldson* was that of *Beckford* v. *Hood* (1798).[110] In this case the plaintiff was the author of *Thoughts Upon Hunting*, a work that fell within the 28 year protection provided by the Statute of Anne. The plaintiff had not registered the work in accordance with the legislation but was seeking damages by an action upon the case, rather than the penalties provided by the statute. The question for the King's Bench was whether or not such an action could be sustained. Kenyon C.J., basing his decision upon the construction of the 1709 Act, commented that "it vests the right of property in the authors of literary works, for the times therein limited, and that consequently the common law remedy attaches, if no other be specifically given by the Act".[111] It was, however, Grose J. who specifically addressed *Donaldson* and its relationship with the issue before the court.

> I was struck at first with the consideration, that six to five of the Judges who delivered their opinions in the House of Lords ... were of opinion that the common law right of action was taken away by the Statute of Anne; but upon further view, it appears that the amount of their opinions went only to establish that the common law right of action, could not be exercised beyond the time limited by that statute.[112]

Such adoption of the eleven judges' opinions as the law in *Donaldson* has not been limited to this jurisdiction. In one of the seminal copyright decisions of the United States Supreme Court, *Wheaton* v. *Peters* (1834),[113] a case which turned ultimately upon how much of the English common law relating to literary property had been adopted by Pennsylvania upon its formation, both *Millar* and *Donaldson* were discussed at some length. In a majority decision, the Supreme Court concluded that the common law copyright did not transfer to Pennsylvania, which decision, as Abrams notes, "essentially concedes that common law copyright did exist in England".[114] Justice McLean delivered the majority opinion of the court relying upon Burrow's account of *Donaldson* in the process. Following an examination of the five questions, he continued that "[i]t would appear from the points decided, that a majority of the judges were in favour of the common law right of authors, but that the same had been taken away by the statute".[115]

[110] *Beckford* v. *Hood* (1798) 7 T.R. 620.
[111] *Ibid.*, at p. 628.
[112] *Ibid.*, at p. 629.
[113] *Wheaton* v. *Peters* (1834) 33 U.S. 591. Abrams describes *Wheaton* as defining "the underlying philosophy of copyright in the United States"; *op. cit.*, at p. 1185.
[114] *Ibid.*, at p. 1183.
[115] *Wheaton* v. *Peters* (1834) 33 U.S. 591, 656.

It quickly becomes clear why the opinions of the eleven speaking judges bear so much importance. It is not because they were decisive of the issue in *Donaldson*, but because they were later believed to represent an accurate summary of the collective opinion of the House itself. Ultimately, what has been taken from *Donaldson* is that there *did* exist a perpetual common law copyright, that this right was *not* lost upon publication of an author's work, but that it *was*, on publication, prescribed by the Statute of Anne. With the reversal of the Lord Chancellor's decree, the existence of a common law copyright in an author's *unpublished* manuscript was given life, and a perpetual common law copyright in the unpublished manuscript was *created*, albeit by default, which would exist until the passing of the Copyright Act 1911.[116]

G. Re-thinking Copyright

Laddie, Prescott and Vitoria, in their opening discussion of the modern law of copyright observe that "an outline account of its origins is surely not without general interest" and while they concede that "[a] detailed historical treatment would be inapposite in what is a practitioners' textbook," they continue that such work "is more fittingly the task of academic workers, who have yet to publish, perhaps, the final word in this field".[117] This article cannot pretend to offer the final word on the history of the development of copyright in the eighteenth century, but it does seek to proffer the most complete account and understanding of *Donaldson* v. *Becket* to date. With *Donaldson* what has taken on greater importance is not the empirical reality of events, but instead the story of those events. A myth has developed surrounding this House of Lords decision, which myth has since taken on a life and vitality that has proved ultimately more influential than the reality. The true significance of *Donaldson* has been lost and the import and historical significance of both the Booksellers Bill and the Universities Act 1775 obscured.

In *Donaldson* the House of Lords understood the copyright regime, first and foremost, as addressing the broader interests of society. A purely statutory phenomenon, copyright was fundamentally concerned with the reading public, with the encouragement and spread of education, and with the continued production of useful books. In deciding the case as they did, these eighteenth century parliamentarians did not seek to advance the rights of the individual author. Rather, explicitly denying the existence of a common law copyright, they acted in the furtherance

[116] 1&2 Geo.5, c. 46, section 3.
[117] *Op. cit.*, at p. 51.

of much broader social goals and principles. The pre-eminence of the common good as the organising principle upon which to found a statutory system of copyright regulation stands revealed. Wing and Kirk, in their concern that the current trend of copyright regulation is to be too over-protectionist, too author-centred, advocate that the notion of the "public good" "should always be the overriding concern" of a copyright regime.[118] This article suggests that, whether we realised it or not, it always has been. A primary focus upon the public good, upon the public interest, overlooked or perhaps ignored in other historical tales of the development of copyright, once moved to its very core.

[118] Wing and Kirk, "European/US Copyright Law Reform", at p. 161.