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What is the Point of Copyright History?

Reflections on *Copyright at Common Law in 1774* by H. Tomás Gómez-Arostegui

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Elena Cooper and Ronan Deazley (eds)

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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. This 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.[1] The climate of renewed scholarly interest in copyright history in recent decades has, amongst other things, 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 an international scholarly society – the International Society for the History and Theory of IP (or 'ISHTIP') – which will see its 8th annual workshop in July 2016. That both these initiatives are now linked to CREATe, a centre established for research into 'copyright and new business models in the creative economy' today, and 'the future of creative production in the digital age',[2] 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 March 2015. 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.[3] 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

[1] 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.

[2] This is stated in the 'About' section of the CREATe website, under the title 'What is CREATe?' See 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.

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

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. This Working Paper is a lasting record of the event. It comprises six short essays: written responses to Gómez-Arostegui's paper by the five panellists (Chapters 2-6) and a written reply by Gómez-Arostegui (Chapter 7). As Gómez-Arostegui's reply was prepared prior to the inclusion of Bently's response in this Working Paper, the reply deals only with the comments of the other four panellists (Abrams, Bracha, Rose and Waelde). Finally, an edited record of the more general discussions at the symposium is included at Chapter 8.

Gómez-Arostegui's paper, which is available for download on the CREATe website, is rooted in extraordinary original archival research; it is meticulous in its rigour, attention to detail and in the range of sources on which it draws. The paper seeks to cast fresh light on the interpretation of a landmark eighteenth century case: the ruling of the House of Lords in *Donaldson v Becket* in 1774.[4] By way of introduction, 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.[5] 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. As Gómez-Arostegui's article outlines in detail, in recent years, scholars – principally Howard Abrams (a panellist at the March event), and one of the co-editors of this Working Paper (Ronan Deazley) – 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 (referred to by Gómez-Arostegui as the 'the modified account') differs from previous understandings of the case (in Gómez-Arostegui's phrase, 'the conventional view') 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 'conventional view' is rooted, in part, in the belief that the majority of the opinions delivered

[4] (1774) 1 E.R. 837.

[5] The Statute of Anne conferred protection for a period of 14 years, and for a further period of 14 years if the author was still alive at the end of the first period.

by the judges in *Donaldson*, was the rule in the case. By contrast, the 'modified account' draws attention to the widespread 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's view is that the 'modified account' 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. Accordingly, Gómez-Arostegui concludes that the reasoning of the House cannot be determined; 'the House, as a body, did not determine the origin of copyright…'.[6] It is, as Mark Rose comments in his essay (at Chapter 5 of this Working Paper, p.40), a judicial 'black hole'.

When the editors of this Working Paper 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 Gómez-Arostegui's work exemplifies, in a number of respects, the nature of much academic work.

First, it speaks to the nature of scholarly research generally, as objective, disinterested, evidence-based and open to challenge. Gómez-Arostegui's paper shows that access to new evidence and source material has the capacity to re-open the debate of issues that were previously considered settled. As the response of Howard Abrams at Chapter 2 of this Working Paper shows, academic debate over how *Donaldson* is to be interpreted is set to continue; Abrams remains of the view that it is the speeches of the Lords that contain the rule of the House. Further, the introductory paragraphs to Gómez-Arostegui's reply indicate that there are points of disagreement between Gómez-Arostegui and Lionel Bently. 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

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

interrogate these contested perspectives. Academia is guided by intellectual inquiry, not dogma.

Secondly, Gómez-Arostegui's work 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. As Chapter 8 shows, the more general symposium discussion, by panellists and invited audience, uncovered yet more important contexts, which impact on our understanding of *Donaldson*. Comments and questions posed by Lionel Bently and Hector MacQueen situated *Donaldson* within the particular constitutional settlement with Scotland of the time (pp.62 and 63-4). Those by Jose Bellido drew attention to the law reporting context (p.67-8), which in turn, as Hector 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 (p.69-70). Oren Bracha, in both his essay (at Chapter 4, p.33) and contribution to the discussion (pp.72-3 and 75-6), notes the changing nature and significance of the 'common law' through time which, in turn, he argues, 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, Hector MacQueen drew attention to more general legal-historical questions about the relationship between common law and equity at the time of the decision (p.63-4).

Thirdly, Gómez-Arostegui's paper 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 in his public lecture, he was once a proponent of the 'modified account'; 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 (see e.g. the comments of Bellido at p.67-8, or Bergel at p.70-1).

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,[7] 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',[8] a legal term of art that does not necessarily encompass making a work physically accessible for consultation within an archive.

As one co-editor of this Working Paper (Ronan 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;[9] or, to borrow a turn of phrase from Abrams's paper, 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 (p.22). In this respect, the work of the copyright historian itself raises copyright policy issues today, also the subject matter of research at CREATe.[10]

As well as illustrating these three facets of academic research, Gómez-Arostegui's work provides an entry-point into the discussion of the more general question noted at the outset:

[7] 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.

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

[9] 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. 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.

[10] 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*.

what is the point of copyright history? More than just a reassessment of *Donaldson*, Gómez-Arostegui claims his work to be 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'. Accordingly, Gómez-Arostegui argues, *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 indicates that copyright should principally benefit the public'.[11] In this way, Gómez-Arostegui considers copyright history to have 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 the essay at Chapter 4 of this 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' (p.34). 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 at Chapter 6, '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

[11] Gómez-Arostegui, *Copyright at Common Law in 1774*, 1.

nuances of *Donaldson* and how it might have changed the legal landscape as it stood in 1774' (p.45).

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,[12] a point which is also made in Lionel Bently's Chapter in this Working Paper (p.29-30); on this view history is a source of ideas and arguments which may well be instructive to policy-makers today, amongst others (Bently p.80).

The cross-disciplinary nature of the audience at the symposium also brought copyright history into conversation with the discipline of book history. For Giles Bergel, a book historian, copyright law is of interest for what it reveals about 'how the market for books was made' (p.70-1). 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 (p.70) and Isabella Alexander noted the trade in recent times by the entertainment industry in television programme 'format rights' despite difficulties with their legal protection (p.75). These examples, argued Alexander, point to the value of copyright history to the work of property theorists (p.75). 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,

[12] B. Sherman and L. Bently, *The Making of Modern Intellectual Property Law* (Cambridge University Press, 1999), Chapters 1 and 2.

allowed for systems of ascription and control, flows of money, as well as the transfer and sharing of ideas and expression.'[13]

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 Lionel 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 (p.80).

Above and beyond all these observations, however, lies the more general 'point' to all academic scholarship which both co-editors of this Working Paper 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 (p.76).

[13] Kretschmer, Bently and Deazley, 'The History of Copyright History', 6.

The Persistent Myth of Perpetual Common Law Copyright

Howard B. Abrams[14]

The principle of copyright is this. It is a tax on readers for the purpose of giving a bounty to writers. The tax is an exceedingly bad one; it is a tax on one of the most innocent and most salutary of human pleasures.
—Thomas Babington Macaulay, 56 Parl. Deb. (3d ser.) 341, 350 (1841).

They were works requiring great learning, great industry, great labour, and great capital in their preparation. . . . [T]hey constituted a species of property better than any other. The tenure of that property was not fictitious; it was primitive; it was the most natural and the least liable to be disputed. It was a tenure by creation.
—Benjamin Disraeli, 42 Parl. Deb. (3d ser.) 575 (1838).

Did English common law, from which the United States common law was derived, recognize a perpetual and exclusive right of publication, i.e., a perpetual copyright? This revolves around the meaning given to statements made by members of the House of Lords in 1774 in deciding *Donaldson v. Becket*,[15] a case that refuted the claim that a perpetual copyright existed at common law totally independent of any statutory limit on the duration of copyright protection.

In 1983, challenging the then prevailing assumption that the common law indeed recognized a perpetual copyright, I argued then, as I do now, that the grounds for the House of Lords decision in *Donaldson v. Becket* was that a perpetual right of exclusive publication did not exist as a common law right.[16] In his 2014 article, my friend and colleague, Tomás, takes the position that the proper reading of *Donaldson* is 'that published works were subject to the durational terms of the Anne[17] but the reasoning of the decision cannot be determined,'[18]

[14] © 2015 Howard B. Abrams. This paper is a preliminary response to *Copyright at Common law in 1774* by Tomás Gómez-Arostegui. It is an updated version of notes prepared for an oral presentation at a two-day Symposium on copyright history hosted by CREATe, University of Glasgow, on 26-27 March 2015. So far, one major and a number of minor mistakes have been corrected. Undoubtedly more will come to light. I hope to publish a more thorough response later.

[15] *Literary Property*, The Morning Chronicle and London Advertiser (24-26 Feb. 1774). The problem of first finding the statements made by the Lords deciding *Donaldson* then determining which citation form to use for the various, scattered and often inconsistent reports of *Donaldson* is covered in Appendix A.

[16] Howard B. Abrams, *The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright* (1983) 29 Wayne L. Rev. 1119 [hereinafter *The Myth of Common Law Copyright*].

[17] An Act for the Encouragement of Learning by vesting the Copies of printed Books in the Authors or Purchasers of such Copies during the Times therein mentioned, 8 Anne, c. 19 (1710).

concluding that *Donaldson* should be read to say no more or less than ' '*if* [an author] had such a right at common law, that right had been taken away by the statute.' '[19]

After reading and rereading Tomás's article, I cannot but admire the tenacity with which he explored the history of *Donaldson v. Becket* in painstaking detail but still reject the claim that the common law ever recognized a perpetual and exclusive right of publication other than for the brief period from the decision of the King's Bench in *Millar v. Taylor*[20] in 1769 until that holding was overruled in 1774 by the House of Lords in *Donaldson v. Becket*.

The Issue

The critical question is whether the common law ever recognized a perpetual right of exclusive publication. That it did is a position long advocated by copyright owners and others seeking financial benefit from lengthening the term of copyright protection to the point where it had become accepted dogma. In an article published in 1983, I argued that this contention was a myth that was perpetuated in part due to gaps in the reports of the *Donaldson*, in particular the failure of the versions widely available in the United States to report the statements made by the Lords who decided the case.[21] In his more recent article, Tomás argued that filling in the historical gaps surrounding *Donaldson*, particularly those concerning the advisory opinions that eleven judges gave to the House of Lords, concluded the older view was correct and the position taken by Professor Ronan Deazley, myself and others was 'revisionist.' [22]

Background

To determine if a perpetual right of exclusive publication was part of the common law, we cannot ignore the regulation of publishing in the period prior to the adoption of the Statute of Anne in 1710. Beginning in the reign of Henry VIII, we find patents for exclusive rights to print various works being issued by royal proclamations as well as requiring printers to submit to censorship. The Stationers Company, a medieval guild, was subsequently granted an exclusive right to print and publish, again by a royal proclamation, under the condition that the members of the Company submit anything they sought to publish to a royal censor known as the Licenser or Licensor. During and after the Interregnum, the same scheme—the

[18] Gómez-Arostegui, *Copyright at Common Law in 1774*.
[19] *Ibid* (quoting Lysander Spooner, *The Law of Intellectual Property* (1855), 212-13).
[20] 4 Burr. (4th ed.) 2303, 98 Eng. Rep. 201 (K.B. 1769) (3-1).
[21] Abrams, *The Myth of Common Law Copyright*.
[22] 8 Anne, c. 19 (1710).

grant of a monopoly on printing to the Stationers Company in exchange for their willing participation in censorship—was enacted by Parliament through a series of licensing acts. Nothing here that speaks of any concern for authors or any argument that copyright is a natural right. [23]

The last of the licensing acts expired in 1694. The Statute of Anne, the first author-based copyright act in the history of Anglo-American copyright law, was enacted in 1710. If ever the time was right for a common law court to declare that the author of a work held an exclusive perpetual right to print that work, this was it. Yet I have been unable to find a common law case arising during this period that supports this proposition. So at a time when there was no statute and only judge made law could provide an author (or the author's successor-in-interest, i.e., the publisher) with an exclusive right, no such case emerged. Even more telling evidence against the claim of an exclusive and perpetual common law right of publication, was the continued efforts by the publishers to get a statute passed that would protect them. Professor Deazley's analysis of the run up to the Statute of Anne shows that that Parliament was not moved by the protestations of economic harm suffered by the members of the Stationers Company due to the loss of their monopoly but only enacted the Statute of Anne when the publishers switched their lobbying strategy to the utilitarian argument that an incentive was needed 'for the Encouragement of Learning by vesting the Copies of printed Books in Authors or Purchasers of such Copies during the Times therein mentioned.'[24] Would this have been necessary if there indeed was a basis in the common law for a perpetual right of publication?

What happened after the Statute of Anne was adopted? It appears that when the statutory term provided by the Statute of Anne expired, the publishers sought extensions of their monopoly in 1735, 1738 and 1739.[25] These attempts to lengthen the term of the statutory monopoly bore no fruit. More importantly for the debate over a perpetual common law copyright, they again raise the screamingly obvious question of why should the possessors of a perpetual exclusive right to publish at common law need legislation.

[23] *The Myth of Common Law Copyright*, 1135-39.

[24] 8 Anne, c. 19 (1710), s.1.

[25] *Literary Property* (report of the statement of William De Grey, Chief Justice of the Court of King's Bench), Morning Chronicle, 23 Feb. 1774 (Burney Collection, Morning Chronicle Issue 1484; Gale Document Number Z2000831467). Lack of time and lack of access to relevant materials did not permit a more precise citation to the proposed legislation.

The argument that the Stationers needed additional remedies to supplement their alleged common law right rings hollow. If there was a common law right, a common law court could assess monetary damages without needing a statute. Moreover, if such a common law right existed, a court of equity could grant equitable relief (inunctions, accounting for the infringer's profits) either after or before a common law action. Also, if the common law did recognize such a right in 1710, why would Parliament restrict the remedies to a period of years? It is far more rational to conclude Parliament saw itself as, and indeed was, creating a new statutory right rather than providing time limited remedies for the violation of an existing common law right.

The publishers, perhaps inevitably, then turned to the courts, advocating the theory of a perpetual and exclusive common law right of publication. A few cases prior to *Millar v. Taylor* and *Donaldson v. Becket* deserve passing mention. The publishers made a serious push to establish a perpetual common-law copyright in *Tonson v. Collins*,[26] but the case was aborted when it turned out to be collusive litigation. In *Osborne v. Donaldson*[27] the publishers tried again, but upon a showing that the term of protection under the Statute of Anne had expired, the Lord Chancellor vacated the injunctions until the legal issue had been decided. Further, it must be noted that notwithstanding *Millar*, the Court of Session of Scotland unmistakably rejected the claim of a perpetual common-law copyright in 1773 in *Hinton v. Donaldson*.[28]

Donaldson v. Becket

In 1769, the Court of King's Bench held there was a perpetual common law copyright that was not restricted by the Statute of Anne,[29] setting the stage for *Donaldson v. Becket*. In keeping with the procedures of the time, the House of Lords requested the judges from the courts of Common Pleas, the Exchequer and the King's Bench to provide their respective views of the legal issue before the Lords. Here is where I must part company from Tomás. It is the Lords, not the judges, who decided the case. This cannot be overemphasized. My central contention was and is that the statements made by the Lords clearly demonstrate that they were of the opinion that the common law did not recognize perpetual copyright.

[26] 1 Black. W. 344-45, 96 Eng. Rep. 189-90.

[27] 2 Eden (2d ed.) 327, 28 Eng. Rep. 924 (Ch. 1765).

[28] J. Boswell, *The Decision of the Court of Session, upon the Question of Literary Property; in the Cause of John Hinton of London, Bookseller, Pursuer; against Alexander Donaldson and John Wood, Booksellers in Edinburgh and James Meurose, Bookseller in Kilmarnock, Defenders* (1774).

[29] *Millar v Taylor*, 4 Burr. (4th ed.) 2303, 98 Eng. Rep. 201 (K.B. 1769) (3-1).

The historical record of the statements of the Lords is less than ideal, but their thrust is unmistakable. Lord Camden, who moved for the reversal of the decree, was vehemently and unmistakably opposed to existence of a perpetual common law copyright, before, during or after the Statute of Anne. So too was Lord Chancellor Apsley, who seconded Lord Camden's motion. It is simply impossible to read the reports of their statements and conclude otherwise. Moreover, these were the only two Law Lords who spoke on the issue.[30]

As Tomás correctly observes, the Bishop of Carlisle argued from the Statute of Anne. I agree. Tomás, however, conceives the Bishop's position should be interpreted as saying that the Statute of Anne displaced any common law right. If the Bishop's statement is read as saying, that a common law right, *if it existed*, was displaced or impeached by the Statute, I could continue to agree. But if Tomás is arguing, as I read him to say, that the Bishop is conceding that a perpetual common law copyright existed only to be nullified by the Statute, I cannot agree. This reads into the Bishop's statement something which simply is not there. In what seems to be the most accurate first-hand report of his statement, the Bishop suggested there might be some need to amend the Statute of Anne, however,

> [S]o long as this same act [the Statute of Anne] does keep its ground, it must be considered as standing on principles directly opposite to the notion of any abstract independent perpetual Copy-rights; which right, whatever it were supposed to be originally, is now circumscribed and subjected to certain restrictions . . . .[31]

The Bishop also stated as follows:

> [A] fair stating and unforc'd construction of [the Statute of Anne], I apprehend is sufficient for deciding the whole controversy. . . . The *method* there adopted for this encouragement of learning, was, we find, very maturely digested in several conferences between the two houses, and at last declared to be (not by *securing* any original Copy Right, as was proposed by those booksellers who promoted the bill; but)

[30] The only other Law Lord then in the House of Lords, Lord Mansfield, was silent. This is intriguing as he had been the Chief Judge of the King's Bench when it rendered its opinion in *Millar* and had authored the longest of the three opinions supporting the existence of an exclusive and perpetual common law right of publication even after the expiration of the durational limit of the Statute of Anne.

[31] *Literary Property*, Morning Chronicle, 26 Feb. 1774 (Burney Collection, Morning Chronicle Issue 1487; Gale Document Number Z2000831512).

> by *vesting* copies of *printed books in the authors or purchasers of such copies, during the time therein mentioned, and no longer*.[32]

The point the Bishop was making was that the Parliament which enacted the Statute of Anne knowingly rejected the argument that there was, independent of any statute, a perpetual common law right of exclusive publication. In short, Parliament in 1710 rebuffed the booksellers' and publishers' argument that such a right existed at common law.

The other speaker against the claim of a perpetual common law copyright, Lord Effingham Howard, founded his position on the need 'Liberty of the Press.'[33] He did not touch on whether or not a perpetual copyright was a common law right. The only speaker in favour of a perpetual common law copyright was Lord Lyttleton, who was concerned, not with a natural rights theory which could justify a perpetual common law copyright, but with the more utilitarian notion that the lack of such a perpetual right there would discourage production of the very works that should be encouraged:

> If authors were allowed a perpetuity, it was a lasting encouragement; making the right of multiplying copies a matter common to all, was like extending the course of a river so greatly as finally to dry up its sources.[34]

There is no way this can be read as any endorsement of the existence of perpetual copyright.

Tomás's Counter-Arguments

Tomás's essential argument is that it is erroneous to accord any precedential weight to the statements of the Lords who spoke on the matter when the House of Lords decided *Donaldson*. Rather, it is the advisory statements of the Judges summoned by the Lords for their opinions on five questions[35] posed by the Lords that should be read as stating the

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[32] *Ibid*.

[33] *Ibid*.

For U.S. copyright junkies, this brings to mind the unsuccessful First Amendment arguments against extending copyright protection in *Eldred v Ashcroft*, 537 U.S. 186 (2003), and *Golan v Holder*, 565 U.S. ___, 132 S. Ct. 873, 181 L. Ed. 2d 835 (2012).

[34] *Ibid*.

[35] The five questions were:

> 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?

common law. As six of the eleven judges who rendered their opinions answered the third and fifth questions in the affirmative, i.e., that such a common law right was 'taken away' or 'impeached restrained and taken away' by the Statute of Anne, Tomás maintains this is the more definitive statement of the common law of copyright in 1774 and thus is the grounds for decision of the case.

He rests his position on several sub-arguments.

1. Because most of the Lords did not speak on the matter, it is a mistake to attribute to the silent Lords the positions of those Lords who spoke.[36]

2. Because the statements of the Lords were made prior to the vote deciding the appeal, these should not be equated with a judicial opinion rendered as part of a final judgment.[37]

3. Until inaccuracies in the reports of the judges' opinions came to light, everyone believed that on the third and fifth questions, the judges had voted six to five in favour of a perpetual common law copyright notwithstanding the Statute of Anne, however, the actual vote was six to five in favor of the Statute pre-empting the common law right.[38]

From these premises, he concludes that what he labels as the 'conventional'[39] or 'orthodox'[40] interpretation of Donaldson—that there was a perpetual common law copyright that was pre-empted by the Statute of Anne—is correct, as opposed to the 'revisionist'[41] or 'modified'[42] view—that the common law did not recognize a perpetual common law copyright.

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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 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?

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 of 8th Anne?'

Donaldson v Becket, 17 Parl. Hist. Eng. 953, 970-71 (H.L. 1774); 4 Burr. (4th ed.) 2408, 2408, 98 Eng. Rep. 251, 257 (H. L. 1774).

[36] Gómez-Arostegui, *Copyright at Common Law*, 34.

[37] *Ibid*, 35-36.

[38] *Ibid*, 28-33.

[39] *Ibid*, 4.

[40] *Ibid*, 6.

[41] *Ibid*, 1.

The first sub-argument is perhaps the easiest to counter. Taken to its conclusion, it seems to say that the grounds for a decision cannot be determined unless a majority of the deciding judges actually not only concur but expressly opine in agreement with the articulated position of the other speakers. Tomás's argument here is that 84 Lords were in attendance for the decision in Donaldson,[43] the vote was a voice vote without any formal tally,[44] the voices heard all were heard as saying 'content,' i.e., supporting Lord Camden's motion to reverse the decision below, and no voice was heard in opposition to the motion.[45] From these facts, he contends that we should not attribute the positions of the speakers to the non-speakers who voted in support of the speakers' position. It seems far more reasonable to believe that the majority of non-speakers were silent because of agreement with the speakers rather than the other way around.

Also on this point, Tomás argues there are suggestions in the statements of the Bishop of Carlisle that could have influenced the Lords who voted to reverse the decree upholding the existence of a perpetual copyright to do so on the grounds of pre-emption: 'For all we know, the Lords adopted the suggestion of the Bishop of Carlisle to limit their thinking and deliberation to the issue of preemption.'[46] This ignores the positions clearly advocated by Lord Camden and Lord Chancellor Apsley as well as reading less into the statement of the Bishop of Carlisle than is there.[47]

The second sub-argument is more serious, however, I believe it is unpersuasive. If we are to draw comparisons between decision making in the House of Lords in 1774 and our modern appellate courts, I think the appropriate comparison to the House of Lords debate in *Donaldson* is the in chambers discussions of an appellate bench after a pending case has been fully argued. If anything, this would be far more revealing of the state of the law, i.e., what we would or should expect a court to do the next time the issue arises, than a more formal opinion.

Crucial to Tomás's third sub-argument—indeed the underpinning of his principal argument—is that the advisory opinion of Justice Nares was misreported in the reports of *Donaldson* that

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[42] *Ibid*, 4.
[43] *Ibid*, 34.
[44] *Ibid*, 23.
[45] *Ibid*, 23 n.108, citing Edinburgh Advertiser, 1 March 1774, at 132.
[46] See *supra* text accompanying notes 31 and 32.
[47] *Ibid.*

were available to me when I wrote that a perpetual copyright did not exist at common law.[48] Prior to Tomás's research, the accepted thinking on both sides of the issue of common law copyright was that a six to five majority of the judges consulted by the House of Lords favoured survival of a perpetual common law copyright beyond the limits of the Statute. Because the reverse was true—the six to five majority favoured pre-emption of a common law right—Tomás believes this seriously weakens if not overturns the argument that *Donaldson* held there was no perpetual copyright at common law.[49]

Let us concede, as I am more than willing to do, that Tomás is absolutely right about Justice Nares position. He then argues that this means a majority of judges rendering advisory opinions to the House of Lords favoured reversing the decree in *Donaldson*. From this he concludes that this proves the House of Lords was in fact endorsing the existence of a perpetual common law copyright but holding that it had been pre-empted (modern jargon) or 'impeached' (1774 jargon) by the Statute of Anne.

This is simply too much to swallow. First of all, some of the judges who thought the decree should be reversed were of the opinion that a perpetual right of publication never existed at common law. Moreover, some of the judges who voted to reverse the decree seem to have taken the position that the right never existed, but, belt and suspenders, if it did exist they chose to say it was it was pre-empted or impeached—choose your preferred jargon—rather than say the question or questions were unanswerable because of their false assumptions.

Second, I return to my earlier point; the Lords, not the judges, decided the case. They were the decision makers. I cannot be persuaded that we should not give priority to the statements made by the Lords over the advisory statements of the judges. I cannot help but find a parallel to the practice of the House of Lords seeking comments from the lower court judges to the practice of the Supreme Court of the United States Supreme to invite the Solicitor General to address the Court on an issue which the Court then decides either way on whatever grounds the Court chooses.

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[48] *See Donaldson v Becket*, 17 Parl. Hist. Eng. 953 (H.L. 1774); 4 Burr. (4th ed.) 2408, 98 Eng. Rep. 257 (H.L. 1774); 2 Bro. P.C. (Tomlins' ed.) 129, 1 Eng. Rep. 837 (H.L. 1774); *The Pleadings of the Counsel Before the House of Lords, in the Great Cause concerning Literary Property; together with the Opinions of the Learned Judges, on the Common Law Copy Right of Authors and Booksellers* 27 (1774) (author unknown) [hereinafter 'Anonymous Report']; *The Cases of the Appellants and Respondents in the Cause of Literary Property, Before the House of Lords: Wherein the Decree of Lord Chancellor Apsley was Reversed*, 26 Feb. 1774 (authorship attributed to 'a Gentleman of the Inner Temple') [hereinafter 'Gentleman's Report'].

[49] *Ibid*, 28-36.

Third, one point in Tomás's argument is that the statements of the Lords were made before the vote was taken and thus should not have the credence we would give to a judicial opinion released after a case had been decided. That the procedure—a motion to reverse a decree, followed by statements of position preceding a vote—was legislative is beyond doubt. This, however, by no means leads to the conclusion that the statements of the Lords should be disregarded or discounted. Do we not pay close attention to Parliamentary or Congressional debates when we try to discern the meaning of a statute? In fact, we value these statements more because they came before the vote than we would if they were post hoc. I see no reason to give less deference to the statements of the Lords. If there is a parallel to a modern appellate court, it is that we have been privileged to hear the in chambers discussion of the judges rather than their after the fact rationalizations.

Fourth, where, as in *Donaldson*, there is a strongly expressed viewpoint stated by all the Lords who spoke on the matter, which is directly opposed to the position expressed by judges, the statements of the Lords must be treated as the authoritative and thus the holding of the case.

There is a related point here. An opinion can easily take a position broader than necessary for the decision of the matter before a court. The decision of the Supreme Court of the United States in *Golan v. Holder*[50] struck me as an obvious example. The issue was the restoration of foreign copyrights whose protection had been forfeited due to failure to comply with formal requirements of the United States copyright law that had since been repealed. The majority opinion took a sweeping view of the power of Congress to grant copyright protection to works that had entered the public domain, although it could have justified its decision on the less far-reaching ground that it was simply following a treaty obligation of the United States and merely undoing a forfeiture that occurred because of a statutory formality that had been repealed.[51] Could not the Lords in *Donaldson* have chosen to articulate the broader rather than the narrower grounds for their decision? They certainly eschewed the narrower grounds.

One other point should be noted. Assuming, as I do, that Tomás's recount of the judicial positions is correct, we are left with a situation where five of the eleven judges believed there was a perpetual common law copyright unhindered by the Statute, three who believed that

[50] 565 U.S. ___, 132 S. Ct. 873, 181 L. Ed. 2d 835 (2012).

[51] *See generally*, Howard B. Abrams, *Eldred, Golan and Their Aftermath* (2013) 60 J. Copyright Soc'y of the U.S.A. 491.

there was a pre-existing common law right that was pre-empted by the Statute and three who believed there never was a common law right. Thus half of the judges who voted as part of the six to five majority on the third and fourth questions were of the opinion that no common law right ever existed.

I would like to bring up a point that is outside the scope of Tomás's article. It is my perception, with only anecdotal rather than statistical evidence, that the judiciary disfavours a perpetuity. The prime example known to every first year law student is the Rule against Perpetuities. Another example, from the U.S. experience, is the opinions of the California Supreme Court in the cases involving right of publicity claims by the heirs of Bela Lugosi and Ralph Guglielmi, p/k/a/ Rudolf Valentino, which recognized a right of publicity but held it died with the person in the absence of a statute.[52] Also, the United States courts have recently recognized a common law copyright in sound recordings fixed prior to February 15, 1972.[53] It must be noted, however, that section 301 of the United States Copyright Act[54] pre-empts any state law copyright protection for sound recordings after 2067, a provision that was in place well before these cases were brought.

Why is this 1774 Decision Relevant Today?

Tomás believes, as do I, that the reason for this archaeological delving into the legal past of copyright is that it may inform the current debates over the future of copyright:

> The salient issue is whether, in the late eighteenth century, copyright was a natural or customary property right, protected at common law, or a privilege created solely by statute. These viewpoints compete to set the default basis of the right. The former suggests the principal purpose was protect authors; the latter indicates it was principally to benefit the public.[55]

I see these goals not as a dichotomy but as intertwined. A desirable copyright regime would, could and should serve both purposes. Indeed, I would argue that the preambles of the Statute of Anne and the first U.S. Copyright Act[56] should be taken seriously, as should the

[52] *Lugosi v Universal Pictures*, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979); *Guglielmi v Spelling-Goldberg Productions*, 25 Cal. 3d, 860, 603 P.2d 454, 160 Cal. Rptr. 352 (1979).

[53] *Flo & Eddie, Inc. v Sirius XM Radio, Inc.*, ___ F. sup. 3d ___, 2014 WL 6670201 (S.D.N.Y. Nov. 14, 2014), *appeal filed* No. 15-1164 (2d Cir. April 15, 2015); *Flo & Eddie, Inc. v Sirius XM Radio, Inc*., 2014 WL 4725382 (Sept. 22, 2014).

[54] 17 U.S.C. (2012), s.301.

[55] Gómez-Arostegui, *Copyright at Common Law*.

[56] Act of May 31, 1790, ch. 18, 1 Stat. 124 (Peters ed., 1845).

statement of purpose for copyright in the U.S. Constitution, 'To promote the Progress of Science.'[57] But this requires a balance, and an essential component of the equation is the duration of protection. It is my personal opinion that it is currently way too long. (We may have to live with life plus fifty years for a long time to come, thanks to the Berne Convention and TRIPS, but life plus seventy is repugnant.) After enough time to ensure that authors (using 'author' in the broadest sense) are not only incentivized but, if successful, well rewarded financially as well as given appropriate recognition (yes, I believe we should have moral rights in the U.S. which we lack), the monopoly becomes irritating, then burdensome, then obnoxious. For better or worse, I think the Berne Convention minimum term of life of the author plus fifty years is far more than adequate. (Every author or artist who benefits from this should give daily thanks to Victor Hugo.) Unfortunately, the arguments for a perpetual copyright inevitably seem to be made by those who stand to profit from the ownership of ever longer lasting copyrights whose concern is their own financial gain, not any concern for the creator or the public.

In Conclusion

If it is not already obvious, I want to make it clear that I regard Tomás as a cherished friend and a respected colleague. Moreover, I have no wish to quarrel with his factual research nor do I intend to replicate the enormous effort Tomás made to track down contemporary newspaper accounts and the underlying documents of the case. I simply disagree quite strongly with the interpretation he places on the decision of the House of Lords *Donaldson v. Becket*.

Tomás, I am in awe of your incredible effort to look in every possible nook and cranny for something, anything that would shed even a glimmer of additional light on *Donaldson* and the debate over perpetual common law copyright. But I believe the better understanding of the basis for the House of Lords decision is that there was no perpetual copyright at common law.

[57] U.S. Const. art. I, § 8, cl. 8.

APPENDIX

Citing Donaldson v. Becket

Deciding how to cite *Donaldson v. Becket* is itself a puzzle. The case was decided by the House of Lords on February 22, 1774. At that time, it was still a contempt for anyone to publish the statements made by the Lords in the House of Lords, although this was not strictly enforced and was soon to be discarded. For this reason, the most widely available reports of the House of Lords' decision in *Donaldson*[58] do not report the statements of the Lords who spoke on the matter. Two reports which omit the names of the authors do report the statements of the Lords.[59] More accessible is the report found in Volume 17 of the Parliamentary History of England.[60] Tomás's research demonstrates rather convincingly that all of these reports are essentially derived or even copied verbatim from the reports of the case in the *Morning Chronicle,* a London Newspaper of the day.[61] This is available in both digital and microform in the British Library and the University of Michigan Graduate Library, but is not available online.[62] Although this source is not readily accessible, I cite to it as it is quite arguably the basis for the other reports.

[58] 4 Burr. (4th ed.) 2408, 98 Eng. Rep. 257 (H.L. 1774); 2 Bro. P.C. (Tomlins' ed.) 129, 1 Eng. Rep. 837 (H.L. 1774), itself a reprint of the report from an earlier edition, 7 Bro. P.C. (1st ed.) 88 (H.L. 1774).

[59] *The Cases of the Appellants and Respondents in the Cause of Literary Property, before the House of Lords: Wherein the Decree of Lord Chancellor Apsley was Reversed*, 16 Feb. 1774 (authorship attributed to a 'a gentleman of the Inner Temple') [hereinafter 'Gentleman's Report'] [cataloged in the British Museum, now the British Library, under classification number, 515.f.16(2)]; *The Pleadings of the Counsel Before the House of Lords, in the Great Cause concerning Literary Property; Together with the Opinions of the Learned Judges, on the Common Law Copy Right of Authors and Booksellers* (1774) (author unknown) [hereinafter 'Anonymous Report'] [cataloged in the British Museum, now the British Library, under classification number, 515.f.16(3)]. These reports can be found in *The Literary Property Debate: Six Tracts* 1764-1774 (Garland ser.) (Parks ed. 1975) [catalogued in the British Museum, now the British Library, under classification number, 6573.g.11].

[60] 17 Parl. Hist. Eng. 953 (H.L. 1774). This apparently is derived from the Anonymous Report.

[61] Gómez-Arostegui, *Copyright at Common Law,* 16-19.

[62] It is part of the Burney Collection of British newspapers. Prior to arriving in Glasgow for the CREATe symposium, I was able to spend some hours at the British Library and anticipate spending even more time in the future at the University of Michigan Graduate Library.

A Few Remarks on *Copyright at Common Law in 1774*

Lionel Bently

Professor Tomás Gómez-Arostegui has presented us with an immaculately researched account of *Donaldson v. Becket*, and draws many sensible conclusions. Aided by new technologies, as well as considerable sweat of the brow, he has revisited old sources and found new ones. And he has offered a correction to the recent accounts of the judicial holding in *Donaldson*, accounts which asserted that properly understood, the decision (understood as that of the Lords) held there was no common law copyright (as opposed to finding merely that the Statute of Anne 1710 removed copyright from published works). In so doing, Gómez-Arostegui has offered the best-researched account that can be offered, at least for the moment.

At times the work is breath-taking, particularly in the treatment of the judgment of Justice Nares. The closeness of analysis of the various newspapers reports of the Judge, the pivotal role of William Woodfall, the reporter from *The Morning Chronicle*, and the manner in which those accounts were copied, certainly adds new insight to the historical account (at once highlighting the importance of sources and uncovering new content). The discovery that on this occasion William may have been helping out his brother at *The Public Advertiser*, because Henry had been incarcerated, demonstrates clearly that there is no lead that Gómez-Arostegui has left untouched.

But as impressed as I can be by his fantastic research, his tenacity, his use of sources, his supreme understanding of the various institutions and procedures, as well as his elegant presentation of his conclusions, I cannot help but wonder whether the corrective is not a little over-stated and whether it matters as much as he supposes. More importantly, I wonder whether the focus on the result does not neglect what is really significant about the case and the 'literary property debate' more generally.

An Over-Correction?

Gómez-Arostegui shows that the House of Lords vote cannot be viewed as having decided the issue of the existence of common law copyright (before or after publication). The House were not asked to vote on this question – only that of whether the injunction granted should stand. The House voted that it should not, thus indicating that whatever author's rights

existed at common law, no such rights survived after the end of the terms prescribed in the Statute of Anne. All the decision of the Lords decided was that – whatever the position at common law – any copyright that *might have existed* at common law did not survive the terms set in the Statute of Anne. Importantly, this meant the question of the common law was never authoritatively decided. While five Members of the House of Lords spoke on the issue, the House left the pre-existence of common-law copyrights undetermined. The basis for the vote is simply unknown.

Gómez-Arostegui counters the views of those who treated the statements of the Law Lords as 'the law of the case', governing the issue of common law copyright. In my view, he is right to do so (though one must acknowledge nevertheless that they are qualitatively of quite some weight). Gómez-Arostegui also agrees that the House did not affirm the existence of the common law right.[63]

But is he right to say that his corrective restores the 'conventional view'?[64] According to Gómez-Arostegui, this was that there was an antecedent right that the Statute of Anne effectively cut down.[65] I am afraid I do not think the 'conventional view' is sustainable, despite Gómez-Arostegui's corrective. The better view, surely, is that the matter had been thrown once again up in the air in England. After *Donaldson*, what remained was a plethora of divergent views as to the position at common law before 1710, and with respect to protection of books both before and after publication. These views included (i) the views very powerfully expressed by the Law Lords (Lord Camden and Lord Chancellor Apsley) in the House of Lords; (ii) the views of the judges of the common law courts advising the House of Lords (the counting of which is the focus for the work of Abrams, Deazley and now Gómez-Arostegui); (iii) the views of the Court of Kings Bench (including the view of Chief Justice Mansfield, but the dissent of Mr Justice Yates against any such common law right) in *Millar v Taylor*; (iv) the views of the Scottish courts against the common law right in *Hinton v Donaldson* and *Midwinter v Hamilton*. These judicial expressions of opinion were also accompanied by the many tracts that had been issued over the previous decades. Different people – indeed different judges – as well as different commentators and commercial operators believed different things. As Lord Mansfield CJ observed, describing the failure of the Court of Kings Bench to act unanimously in *Millar v Taylor*, 'We have equally tried to

[63] Gómez-Arostegui, *Copyright at Common Law,* 46.
[64] *Ibid*, 5.
[65] *Ibid*, 4, 25.

convince, or be convinced: but, in vain.' After *Donaldson v Becket*, the status of the common law right was *yet to be authoritatively decided.*

Of course, one can speculate what the views of various judges would have been. But one is treading on dangerous territory when one embarks on this game, because it is not obvious that the same figures would necessarily have expressed the same position after the vote in *Donaldson* as they might have done before. Of course, in many cases the views expressed before the decision in *Donaldson* may have been maintained, or modified, to acknowledge the holding of the Lords. But for some, the decision in *Donaldson* might well have undermined the basis of the reasoning altogether. Take for example the views of Edward Willes J, expressed in *Millar*, and re-expressed as one of the judges who advised. He regarded the arguments from first principles as too abstract to assist. Instead, he based his finding in *Millar* in favour of the perpetual right on the basis of precedent and his reading of the Statute of Anne. Following the decision in *Donaldson*, the precedents on which he had relied would likely be assumed to have been wrong; and the argument based on the Statute had clearly not proved persuasive, as the Lords voted that any common law right did not survive. Willes J thus might well, post *Donaldson*, have revisited his prior views altogether. He might have made sense of the new situation by taking the view that there was no common law right except in unpublished works. It seems likely that Aston J, who founded his arguments primarily on principles, would have maintained them as far as possible following *Donaldson*. And, as Gómez-Arostegui reports, Blackstone modified his position only by recognising that post publication 'the durational terms of the Statute of Anne' applied.[66] But what would Ashurst J and Smythe CB have thought about the antecedent right after the decision in *Donaldson*? Both, in part, relied on authorities such as *Eyre v Walker* that could not have survived the *Donaldson* decision,[67] though the reports of Ashurst J suggest he also supported the right on the basis of natural justice. Would either have thought it was pre-empted (as Nares and Gould JJ had done), or would they have revisited their views on the common law right after publication? One could examine closely all the reports of their reasons, but I don't think we can ever be really confident of the answer.

In the post-*Donaldson* era, various commentators expressed various different understandings as to the position. Of some, we can perhaps say that the position they advocated was simply wrong (for example, that the House of Lords affirmed the existence of common law

[66] *Ibid*, 24.
[67] As reported in (1774) *Gentlemans Magazine* 99-100 (Ashurst J), 104 (Smythe CB).

copyright). But many of these expressions seem better understood as parties claiming that a particular understanding of the position was to be preferred. One might also examine the actions of parties, post-*Donaldson*, to gauge whether they continued to operate on the assumption of a common law right that had merely been restricted as to term, or whether the rights of publishers were henceforth found solely in the statute.

One situation Gómez-Arostegui does not discuss, and in which I would be interested in his views, is what can be learned, if anything, from claims outside the field of books? In so far as the argument in favour of common law copyright was grounded in first principles of 'property',[68] were not such claims equally understood to apply to realms other than books? If the 'conventional view' is right, and there was an antecedent right that had been pre-empted by the Statute of Anne, why did interest groups time after time seek statutory protection? Certainly, after *Donaldson v Beckett*, no-one seems to have ever tried to rely on a claim to common law rights in a published sculpture, design or painting.[69] Those interested in such protection sought the benefit of legislation, typically modelled on existing regimes. Thus, the Calico Printers, the sculptors and eventually painters and photographers sought statutory protection in 1787, 1798 and 1862. Would Gómez-Arostegui be prepared to draw any inferences from this behaviour as to the impact of *Donaldson*? Does it suggest that those people did not consider there to be any common law right in such creations?

Does the Corrective Matter?

Tomás Gómez-Arostegui claims that his correction of the historical treatment matters because 'commentators and interest groups often turn to it to support their normative arguments for how broad or narrow copyright protection should be'. He cites as a prime example, Bill Patry, who had written that 'The House of Lords found that there was no common law [right] in published works.'[70]

[68] See e.g. Aston J at 4 Burr. 2303, 2346 (recognising 'an author's property in his works'), based on reasoning elaborated at 2338-41 ('The best rule, both of reason' and justice, seems to be, 'to assign to every thing capable of ownership, a legal and determinate owner.') Willes J based his reasoning in *Millar* primarily on precedent. Note too, Yates J's description of Blackstone's argument that 'the labours of the mind and productions of the brain are as justly intitled to the benefit and emoluments that may arise from them, as the labours of the body are.'

[69] One possibility is that even those who believed in the common law right did not think it went beyond cases of 'duplication', whereas cases of making engravings from paintings, for example, were cases of imitation: Aston J at 4 Burr. 2348-9.

[70] William Patry, *Moral Panics and the Copyright Wars* (OUP, 2009), 80, 99, 112 and 124 (cited by Gómez-Arostegui, *Copyright at Common Law*, 4-5).

Maybe Gómez-Arostegui emphasises the contemporary relevance of the issue because that is the only way to convince the student editors of the *Connecticut Law Review* to publish his research. It is a real shame that law review editors always seem to insist on demonstrating the contemporary relevance of historical research. Whatever his motivations, it seems to me that the claims about the contemporary implications of the historical debate are overstated. There appear to be two ways in which the 'most accurate' historical account of *Donaldson v Becket* could be mobilised: first, to guide interpretation of contemporary copyright law; second, to guide policy making.

As regards interpretation, one could envisage an argument that the limitations contained in the Copyright Designs and Patents Act 1988 should be construed narrowly because the Act (or its predecessors) took away a common law right. But the passage of time, and various legislative interventions make such an argument absurd. The UK has had the 1842 Literary Copyright Act, the 1911 Act, the 1956 Act and the latest 1988 Act. The interpretation of those statutes depends on the words used, the structure of the Act, leaving no place for concern with what the position at common law might have been had there been no statute. A changed view of the common law does not, in these circumstances, offer any basis for significant change in interpretative practices. The field is now wholly (or almost wholly) legislative.

As for policy-makers, there may be some people whose normative views about copyright law today may be shaped by what was 'really decided in 1774' (or 'the original purpose' of copyright), but those people are surely few and far between. Maria Pallante (the US Registrar of Copyrights) will have plenty of serious concerns about the impact of changes to US copyright on particular activities – the operation of content industries, of Internet intermediaries, of educational institutions, of scientific researchers as so forth. She will face huge amounts of lobbying. I do not think the question of the proper interpretation of *Donaldson v Becket* will weigh particularly heavily amongst her concerns.

If I am wrong, and Maria Pallante does take an interest in the question of common law copyright, she will likely find that it does not have much of a bearing on the issues in hand. Even if the 'conventional view' was correct, and there was an antecedent perpetual right that was cut back by the Statute of Anne, she will find little in the debate that supports the sort of 'bloated' copyright regime (the 'billowing white goo', as Jessica Litman calls it) that modern legal systems operate with today. Indeed, those that supported the perpetual common law right, envisaged a right that was particularly narrow in breadth. This can be seen in the

judgments of the judges in Kings Bench in *Millar v Taylor*, who favoured the perpetual common law right. For example, Willes J stated that: 'It is found too 'that the defendant sold several copies of the said book.' And therefore this case is not embarrassed with any question, 'wherein consists the identity of a book.' Certain, bona fide imitations, translations, and abridgments are different; and, in respect of the property, may be considered as new works: but colourable and fraudulent variations will not do.'[71]

Aston J. likewise acknowledged that a purchaser of a book protected by the common law right obtains 'an unlimited use of every advantage that [he or she] can reap from the doctrine and sentiments which the work contains. He may improve upon it, imitate it, translate it; oppose its sentiments…'[72] The perpetual common law copyright that Aston J supported would have merely prevented the purchaser from publishing 'the identical work.'

Similarly, the advocates of common law copyright (even after publication) recognised that there might be other limitations on the right: they doubted it would apply to foreign works;[73] they recognised the right might not be enforced if it had been used to raise the prices of books to unreasonable levels;[74] and they recognised that the author might expressly or impliedly abandon the right and make the work available to the public domain.[75] Moreover, they were clear that such a right would not extend to the use of any of the ideas communicated in a work.[76]

The Literary Property Debate

Few people know their way round the literary property debates as well as Gómez-Arostegui, though the material has fascinated many scholars (including many who are at this round

[71] 4 Burr. 2310 (Willes J).

[72] *Ibid*, 2348 (Aston J).

[73] *Ibid*, 2310 (Willes J) ('Therefore this case has nothing to do with foreign books; which stand on a very different footing.')

[74] *Ibid*, 2335 (Willes J) ('I never heard any inconvenience objected to literary property, but that of enhancing the price of books. This judgment will not be a precedent in favour of a proprietor who is found by a jury to have enhanced the price.')

[75] *Ibid*, 2310, (Willes J) ('Therefore there is no occasion to meddle with cases, where the author may be supposed to have relinquished the copy, and consequently to have given a general licence to print. Many of the best books fall under that description. A very little evidence might be sufficient, after the author's death, to imply such a tacit consent: as if the book had not been entered before publication; it would be a circumstance to be submitted to the jury, 'that the copy was intended to be left open.' So, if after publication, the author had not transferred his right, or acted himself as proprietor'); 2332 (Willes J, referring to *Basket v University of Cambridge*); 2345-6 (Aston J). See 2392-3, Yates J (dissenting, finding the idea of abandonment unworkable, confirming his view that no such common law right should be recognised once a work has been published).

[76] *Ibid*, 2331 (Willes J).

table). In part that is because the sheer volume of material that survives, but it is also because those engaged in contributing to the debate were investigating fundamental questions and offered up an array of sophisticated arguments. There was, over a number of decades, a thoroughgoing analysis of the idea of protecting intellectual creations of various sorts by 'property rights', which examined closely why it might be thought granting such rights was justified and what the effects of so doing might be. The arguments were wide-ranging, sometimes involving broad questions about the relationship between law and justice, law and custom, law and history, as well as between law and philosophy. There was consideration of the nature of property, the evolution of subjects of property rights, and the relationship between tangibles and intangibles. There was reflection on whether unpublished material should be protected, and if so, why; and whether and if so why it should make a difference that the same material was published. There was reflection on the importance of the circulation of ideas. There was exploration of whether the same reasons would justify protection of inventions as books or other creations, and if not, where the differences between different types of intellectual productions lay. In so doing, the debates explored the very ideas of creation, and the constitution of creative acts (ideas, sentiments, expression, mental labour, material labour). There was consideration of differences between the laws of England and Scotland, the respective roles of the legislature and judiciary in developing or recognising legal rules, and the significance of legislative history in legal interpretation. And much more.

The literary property debate continues to fascinate because many of the questions that were debated remain relevant today – in the sense that the arguments and ideas deployed remain instructive. Consider for example, the various ways of distinguishing between 'books' and 'inventions' to explain why the former should benefit from protection post-publication, while the latter should fall into the 'public domain' (unless protected by patents). For the last few decades the legal system has tried to locate a satisfactory place for 'computer programs': whether they are properly the subject of patents or should be protected by copyright or both. The debates that occurred two hundred and fifty years ago do not offer an answer – of course. But they do offer up intellectual resources with which one can start.

A Page of History

Oren Bracha

Professor Tomás Gómez-Arostegui has done it again. *Copyright at Common Law* is an impressive piece of legal history scholarship based on the kind of excellent, meticulous archival research characteristic of Gómez-Arostegui's work. The toil paid off. It appears that Gómez-Arostegui proved his main argument, at least by preponderance of the evidence: the common view according to which the votes of the common law judges in the seminal 1774 House of Lord's decision in *Donaldson v. Becket* were incorrectly reported is not well supported. This pulls the rug from under any grand theory about the meaning of the decision that is built on the premise of such erroneous reporting. *Donaldson* remains, in the words of Mark Rose, a 'black hole.' In the absence of a convincing theory of its exact meaning, the decision's holding is susceptible to various readings. Contrary to the argument of a few important modern commentators, it appears that *Donaldson v. Becket* was not an unequivocal sweeping rejection of common law copyright that was distorted and misrepresented in later English decisions. The match over the 'real meaning' of *Donaldson v. Becket* is won, if not by a knockout then by points; at least for now.

But Gómez-Arostegui wants something more. He argues in earnest that his historical findings have a direct normative and doctrinal significance for copyright law today. Is this true? How and why would a late eighteenth century copyright decision by the House of Lords be relevant in the twenty first century? Ironically, the argument for the modern relevance of *Donaldson v. Becket* carries much more weight in the United States than in the United Kingdom. In its native country the case had long passed into the pantheon of great historical decisions. Much like the exhibits in the British Museum, it attracts the attention of historians and perhaps some subset of the general public, but it had long ceased being relevant for actual living practices. In the United States, however, the dead body of *Donaldson v. Becket* is periodically exhumed from its ancient tomb and its spirit is summoned to haunt modern living copyright law. This odd situation has to do with certain pathologies of the American legal culture that cannot be fully elaborated here. In brief, American legal culture lives in the shadow of the fear of legal indeterminacy, a fear that sends it on a constant quest for secure sources of objective, stable meaning in the law. Over a century of deep critical currents have eroded the ability of American jurists to possess a carless belief in the objective meaning of legal texts, meaning that may be uncovered by using a set of professional, neutral techniques.

The lurking crisis of legitimacy consistently sends Americans on a search for sources of objective determinate meaning in the law. The most common result produced by this quest is originalism, not just in the strict sense of a theory of constitutional interpretation, but as a more comprehensive phenomenon. Originalism in this broader sense holds the promise (which is never free from distressingly persistent doubts) that knowledge of the historical meaning of legal texts and concepts can supply the determinacy that too often seems lacking in the law. Hence the turn to an eighteenth century British decision as a source for clear answers about hard contemporary copyright law questions. Hence the invocation in important American copyright decisions of Justice Oliver Wendell Holmes Jr.'s aphorism that 'a page of history is worth a volume of logic.'

Even if one adopts the logic of originalism, the way for producing clear valid answers to legal question in modern American copyright law remains long and traitorous. One has to answer such questions as: What was known to the drafters of American legal texts about the British decision and how was that decision understood? What part of the British decision was adopted in which way in local sources such as the U.S. Constitution, the common law or statutory texts? And to what extent does any meaning adopted historically into local sources still retain viability today? In *Copyright at Common Law* Gómez-Arostegui lays aside such complex historical and doctrinal questions and therefore the inquiry about the exact significance if any of *Donaldson v. Becket* in contemporary American copyright law. I am going to follow this wise example and do the same here. I will focus instead on more abstract questions of principle about the possible role of *Donaldson v. Becket* in modern American copyright. On this more general level, what could be the significance to modern legal observers of our now-corrected knowledge of the exact holding and the voting tally in the case? It appears that the hope is that this knowledge can provide material assistance with answering one or both of the following questions: What should the law be? And what was the law?

The first question is normative. It inquires after some *justification* for shaping contemporary copyright law in one way rather than another. Presumably better knowledge of past understandings of common law copyright in *Donaldson v. Becket* and more generally can help us obtain a better normative purchase of this kind. To evaluate whether this is indeed the case, one needs a clear understanding of the normative dimension of arguments about common law copyright. A good place to start is the historical meaning of the concept of common law copyright. During the eighteenth century and most of the nineteenth century

arguments about common law copyright were laden with normative connotations. Such arguments were built on a thick layer of conceptual and normative background assumptions that no longer exist. Against this intellectual backdrop, to argue that copyright was a common law property right was to assert much more than simply that some court in the past authoritatively recognized copyright as a legal right protectable independently of any statutory grounding. The common law and especially common law property rights meant much more than that to eighteenth century English jurists. In fact, there was a spectrum of different meanings possibly associated with common law rights. Completely unpacking this rich meaning is beyond the scope of these remarks, but three competing yet also related concepts of the common law may be mentioned. First the common law in the narrow technical sense simply meant the branch of the law whose origin was not statutory, applied by the common law courts. Second, common law rights were understood to reflect some preexisting principles of reason or natural justice. Finally, obscuring the difference between those two concepts was a third one, that of the common law as immemorial custom.

It was the second concept that was most laden with normative assumptions and overtones. Its basic premise was that the common law was not simply based on human choices but reflected higher principles of natural law or reason. Several interlocking binary distinctions constituted this understanding of the common law by contrasting it with statutory law. Statutory law was political in the sense of being the product of human choices and decisions; the common law was pre-political. Statutory law was arbitrary in the sense of reflecting mere human interests and preferences; the common law was natural. Legislatures made statutes; judges discovered the common law. Within this framework asserting that copyright was a common law property right invoked a rich baggage of connotations. Specifically it meant grounding copyright in one variant or another of natural property rights theory. Arguing that there was common law copyright and that copyright was a pre-political property right dictated by reason was the same thing. In fact, it was this need to explain common law copyright as grounded in natural reason that posed one of the most serious challenges faced by advocates of common law copyright. In historical perspective, copyright was plainly a relatively new phenomenon, one that was grounded in novel technological developments (i.e. printing), but the principles of natural reason were usually thought of as constant and timeless. It was this difficulty together with other challenges associated with fitting copyright into the traditional mould of natural property rights that produced some of the most elaborate intellectual manoeuvres of the eighteenth century literary property debate.

This eighteenth century understanding of common law copyright is mostly lost today. We no longer associate this rich normative background with the concept of common law property rights. One may still take, however, this eighteenth century perspective on common law copyright and ask: what is the significance of the revised account of *Donaldson v. Becket*? I think the answer is that such significance is trivial, perhaps non-existent. If one takes seriously the idea of the common law as a reflection of natural principles of reason, what one specific court decided or said about a particular question can hardly be determinative. How one judge voted or the exact tally of votes in a specific decision, no matter how seminal, is even less relevant. The fundamental premise is that the rules of the common law are based on reason not on human policy choices. Counting votes or even carefully isolating the holdings of specific cases seems beside the point. To be sure, historically the traditional concept of the common law supplied it with legitimacy exactly by obscuring the line between authoritative human choices and natural principles of reason, claiming for the common law the status of the latter but only too often identifying it with the former. But we need not succumb to this confusion.

A modern observer may, however, adopt a natural rights conception of copyright without the richer historical construct of the common law. From this vantage point asserting that copyright is a natural property right is a normative theory or a policy basis for the law. The argument is simply that the most normatively attractive justification of copyright is as a natural property right and that the law—whether common law or statutory—should be made to conform to this proffered normative basis. Although dominated by utilitarian justifications, modern Anglo-American copyright discourse still contains a robust variety of natural property rights views, especially different variants of the Lockean labour theory of property as applied to intellectual works. So the question arises: does the revised account of *Donaldson v. Becket* have a significant bearing on natural property rights analysis of contemporary copyright law, now understood simply as a proffered normative basis for the law? Again, the answer is no. As a normative basis for the law, natural rights theories have power to the extent they are *persuasive* on the merits. One engages in this debate by offering substantive support to various arguments, critiquing them or pointing at alternatives. The name of the game is substantive persuasion not authority. The fact that some court produced a specific holding in the past or that a certain number of judges voted in a particular way has no bearing on the substantive arguments offered. To be sure, one may find insight or guidance in what luminaires of the past wrote or said on the issue. But this would be only because the

substantive force of the content of the arguments, not because of any content-independent authority imputed to the speaker or institution. To the extent the past can provide guidance here then, it is to be found in the substantive content of the sources that remain available to us, not in exact counts of votes or technical extractions of authoritative rules from legal decisions.

If the revised account of *Donaldson v. Becket* is of little help for modern-day normative analysis of what copyright law *should be*, perhaps it is of greater use for the positivist endeavour of clearly identifying what copyright law *is*. As explained, I bracket here the complex questions related to the degree, if any, to which late eighteenth century British case law affects the content of modern copyright law. But what of asking the positivist question in regard to the past? Doesn't an accurate account of the proceedings and outcome of *Donaldson v. Becket* help at least with understanding what the law was circa 1774 (which is the first step in a long series required to deduce what the law is today under the originalist method)? The answer is yes, but not in the way hoped for by those who would find authoritative answers to modern copyright questions in ancient precedents.

One way of trying to extract clear meaning from *Donaldson v. Becket* is through a variety of formalist technical manoeuvres. Perhaps one could limit *Donaldson* to the narrowest possible holding that supports its outcome and maintain that any part of the 1769 *Millar v. Taylor* (that recognized common law copyright post-publication) not in conflict with this narrow holding remained good law. Alternatively, the holdings of the two decisions could be combined in some other way producing one clear rule. Gómez-Arostegui toys briefly with some of these possibilities without firmly committing himself to any of them. The trouble with this mode of analysis is that it creates an artificial construct of a clear post-*Donaldson* rule; one that most likely has little to do with how real historical actors actually experienced and understood the law at the time. Modern-lawyers may thus obtain their determinate past legal meaning, but only at the cost of manufacturing an invented version of it. Historians, on the other hand, are unlikely to be interested in such a manufactured past meaning that tells us little about how historical agents actually behaved, talked or thought.

A historian inquiring after the meaning of *Donaldson v. Becket* is much more likely to be interested in understanding how contemporary lawyers, judges and publishers actually understood the law and experienced it. Consider the following thought experiment. Imagine a client entering the chambers of an English barrister in 1780 asking for advice on a specific post-publication common law copyright question. The client is not interested in the kind of

formal answer wrapped by the rhetoric of certainty that the barrister would provide were he making his pleadings before a court. He wants a 'real' answer. What would the attorney answer? Most likely he would say that the matter is very 'complicated.' As Gómez-Arostegui's discussion of perceptions of *Donaldson* shows, the House of Lords' decision left considerable uncertainty in its wake not just for modern readers but for contemporaries as well. In real time there was no clear determinate holding, only competing interpretations and probabilities. This may be disappointing for modern lawyers seeking certainty in the past, but this is how real law often works. The exact legal meaning of *Donaldson* would be created gradually in the decades following it, with subsequent courts pouring specific content into the doctrine of common law copyright, shaping and reshaping it in concrete ways.

What is it then that *Donaldson*'s 'page of history' can teach us? To answer this question it would be fitting to return to Justice Holmes' views of the role history in law; views that are often ignored by courts who cite his aphorism. In his 1897 essay *The Path of the Law* Holmes famously described the historical meaning of legal rules as a 'dragon' and had this to say about it:

> When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next is either to kill him, or to tame him and make him a useful animal... It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.

For Holmes history must be part of the 'rational study of law' not because it offers readymade answers to contemporary legal questions, but because it is 'the first step toward an enlightened scepticism.' History, in other words, may provide knowledge about the original function of a law as well as the economic, social and intellectual context within which it received its meaning. This, however, is just a first step that must be followed by critical examination of the law in light of modern conditions and policies. In the spirit of the Progressive Era in which he wrote Holmes hoped that such critical examination would be made by the 'man of statistics and the master of economics.' One may turn to other sources. History alone, however, will not supply clear answers about the actual or desirable shape of modern law. Setting the record straight on the ruling of *Donaldson v. Becket*, as Gómez-Arostegui had done so marvellously, is an important part of our understanding of the origin of

copyright. To tell us anything about the present, it must be followed by a healthy dose of enlightened scepticism.

Donaldson and the Muse of History

Mark Rose

I am delighted to have the opportunity to see old friends. I am delighted to revisit Glasgow, a fascinating city. But I am not at all sure that I am delighted to be launched once again into the phantasmagoria of trying to make sense of the House of Lords' decision in *Donaldson v. Becket*. I found the matter dizzying some 25 years ago when I was writing a book on the early history of British copyright. I find it dizzying now.

Eleven judges rendered opinions on five different questions. Three were put to them by the Lord Chancellor. Two more, framed by Lord Camden, were designed to emphasize the issue of perpetual copyright. There were, then, fifty-five separate opinions. And there was in addition the sibylline silence of the twelfth common-law judge, Lord Mansfield, who might have addressed the house but did not. In addition, five more lords, two of them law lords, delivered speeches. And then the question was called – not in the same form as the topics that the judges had addressed but simply on the injunction. Were the lords content that the injunction against Donaldson's publishing Thomson's poems be reversed? To add to the confusion, there is doubt about the method by which the house voted. Was there a formal division as Cobbett reports or simply a voice vote? Well, perhaps this last matter is now resolved, thanks to Tomás. It appears that the vote was indeed a voice vote, as I once guessed.

The outcome was clear: the Lord Chancellor's injunction against Donaldson was dissolved. But upon what reasoning, what grounds, what theory? We do not know. As John Whicher nicely put it some fifty years ago, we know that the Lords in *Donaldson* overturned the King's Bench ruling that declared that literary property was a common-law right, but 'when we ask what doctrine, precisely, the lords preferred to that which they thus cast aside, Clio (that coy muse) simply shrugs.'

Ronan Deazley, who is exquisitely aware of the conceptual problems that *Donaldson* involves, suggests that in dissolving the injunction the peers understood very well that they were voting in defiance of the opinion of the majority of the judges. But knowing how difficult it is to keep track of the eleven judges' opinions even when we have charts such as those that Tomás provides, I am not so sure. Ronan notes that the majority of the lords who addressed the house after the judges gave their opinions denied outright the existence of the

common-law right. These speakers included of course Lord Camden who delivered a long and in some respects provocative address referring to 'dirty booksellers' and Lord Chancellor Apsley who had issued the injunction in the first place. In voting as it did to dissolve the injunction, Ronan suggests, the house embraced the position that common-law copyright did not exist. The House of Lords, he suggests, was asserting its supremacy over the judges and reaffirming that the purpose of copyright as established by the Statute of Anne was for the enlightenment goals of the encouragement of learning and the benefit of society.

I would certainly like to believe this theory, but it seems to me a back-formation. How can one say what was in the minds of the various members of the house when they were asked to shout 'Content' or 'Not' in response to the call for a vote? One member might well have voted because he disliked the booksellers and was pleased with Lord Camden's aristocratic sneers against them. Another might have thought that he was following the majority of the judges. Still another, confused by the eleven judges' fifty-five separate opinions on the five questions, may simply have observed that it was Lord Chancellor Apsley who had issued the injunction and the same Lord Chancellor who was now recommending that it be dissolved. I do not know that I understand the issues, this man might have said, but if the very same officer who issued the injunction is now recommending that it be dissolved, I am content.

Does Ronan's argument that in dissolving the injunction the Lords were reaffirming the enlightenment goals of the Statute of Anne depend upon the precise tally of the judges' opinions? As I have suggested, I have doubts about whether the lords as a group were making any kind of clear ideological statement but I do not see how Ronan's argument logically fails simply because our understanding of the tally changes. And now I believe that it has changed. Tomás has brought forward new and compelling evidence that Ronan and I and Howard Abrams before me have all been wrong in our understanding of the tally of the eleven judges. The crux of the matter is the vote of Justice George Nares. When I was studying *Donaldson* in the 1980's, I paid a visit to the library of the House of Lords to examine the original Minute Book from 1774 precisely because I was curious about Nares's vote. (In passing I will note that as an American, I was tickled to be doing research that took me to the House of Lords and of course I wore a jacket and tie for the occasion. The venerable library turned out to be a rather plain old room of scarred oak tables and chairs occupied by two young researchers in jeans and presided over by a helpful young librarian, also in jeans. So much for an American's expectations about English propriety and grandeur!) Examining the Minute Book and attempting to reconcile it with various other

reports, I concluded that the Clerk of the house had made an error in recording Justice Nares's opinion on the matter of the common law right. I decided that Nares must have said, as William Woodfall had reported in the *Morning Chronicle*, that the common law right was NOT taken away by the passage of the statute. At one point I was even certain that I understood exactly why the Clerk had been confused, but then my certainty evaporated and the best I could do was to report that keeping track of the judges' votes on the five questions was difficult. But Tomás has examined and collated a formidable number of contemporary sources, including manuscript notes on surviving copies of the lawyers' printed cases in *Donaldson*, and he has concluded that, despite his reputation as a prodigy of memory, William Woodfall was in error and the clerk's record was correct. I accept Tomás's finding on this matter with gratitude.

But where does this leave us? The majority of the judges, if we now count Nares vote as reported by the clerk, had advised that the statute took away or abridged the common law right. But the votes of the judges were not determinative only advisory and in any case some peers, if they were keeping tabs, may have silently supplied Lord Mansfield's vote, even if he chose not to speak. The outcome of the case was clear: the injunction against Donaldson was dissolved. But upon precisely what theory was the injunction dissolved? Did the Lords endorse the idea – famously held by Justice Yates who dissented from the majority decision in *Millar v. Taylor* – that there was no common law right of literary property? Or did they find that there was such a right but that it was impeached and taken away by the Statute of Anne? This is the point, as I understand it, at which Tomás dissents from Ronan's proposition that the House of Lords affirmed that the purpose of copyright was for the encouragement of learning and the benefit of society and rejected outright the existence of the common law right.

Ronan's suggestion that in voting as they did the Lords were asserting their supremacy over the judges must now be yielded. The Lords were *not* voting against the majority opinion of the judges. But I think it is important to say again that Ronan's proposition about reaffirmation of enlightenment goals does not depend on the precise tally of the speaking judges. The key point here is that the house did vote to dissolve. At issue is not the decision but the logic behind the decision. But what if there is *no* logic to be discovered? As Tomás's analysis has shown, the decision of the House of Lords in *Donaldson v. Becket* is a kind of judicial black hole – my metaphor, not his – from which no light emerges. Neither the judges' answers nor the speeches of Lord Camden, Lord Chancellor Apsley and the others

can be understood as presenting the reasoning of the Lords as a body. We cannot say that the Lords held that there never was a common law right of literary property. But neither can we say that the Lords held that there was such a right until it was taken away by the statute. All we can say is that the Lords dissolved the injunction and in so doing left the statute and its provisions as the governing law with respect to literary property.

But black holes are not very satisfactory objects in the universe of the law. The struggles to develop an understanding of the meaning of the *Donaldson* decision continued through the nineteenth century. Ronan traces these struggles in two excellent chapters of his *Rethinking Copyright* study in which, among other things, speaking of 'the constitutive power of legal writing,' he studies the contributions of the treatise writers beginning with Montefiore in 1802. Here he shows how the processes of legal reasoning led to the idea that there really was a common law copyright and that *Donaldson* confirmed its existence at the same time as it determined that copyright expired at the end of the statutory term.

I am a historian and a literary scholar, not a lawyer. Therefore I am less interested in ascertaining what the law really *is*, or even in thinking about what the law really *should* be, than I am in thinking about history. In this case the question of whether the *Donaldson* decision revealed the antecedent common law right – that is the right before it was circumscribed by the statute – to be a fact or a fiction seems to me undecidable. The decision itself is, as I say, a kind of black hole. John Whicher called Clio a coy muse. But history is not always coy because it is hiding a secret. And I personally do not think there is any great secret hidden within the *Donaldson* decision, only a frustrating, tantalizing, impenetrable opaqueness.

Why then should one study copyright history? What possible consequence can the study of history have? Controversialists will of course muster historical arguments to bolster their positions. As Adrian Johns has shown in *The Nature of the Book* seventeenth-century partisans constructed various histories of the invention and spread of printing to support the positions in which they held personal stakes. One side maintained that printing was introduced to England by the Crown and therefore was Crown property; the other that printing was introduced privately and therefore was common property. And today in matters such as the recent *Eldred v. Ashcroft* controversy over the extension of the term of copyright in the United States, historical arguments were brought forward to establish that it was the

Framers' view that patents and copyrights should be strictly limited in term and therefore that the legislative extension should be rejected as unconstitutional.

Copyright history can of course be brought to bear on the practical controversies of the day, but I would resist any narrowing of the interest of copyright history to merely pragmatic purposes. The purpose of copyright history is, it seems to me, not substantially different from that of history of any other kind, not different from that of history generally. The goal, of course, is not simply *use* but *understanding*. We study history to understand the past better and more accurately and thereby to understand ourselves better and more accurately. But since we are immersed in history, since we are part of the very same phenomenon that we are studying, the questions we ask of the past will themselves grow and change in time. Beyond any narrow 'consequential' purposes, the study of copyright history is important because knowing the 'truth' is important, even when truth itself is understand to be a dynamic, evolving quality.

Tomás has made at least one truth about the *Donaldson* decision clear: Justice Nares' opinion was *not* misreported by the clerk of the court, as I and others had believed. As a historian I want to emphasize that Tomás is an extraordinary archival researcher. His patience, persistence, and sleuthing instincts are marvelous. I keep on my reference shelf a printout of Tomás's index of several hundred copyright suits and actions from 1560 to 1800, many of which are not discussed in any literature I know. Simply as a list of Chancery and other matters and of the documents available in the National Archives this index is invaluable. Moreover, I believe that Tomás has photographs of many documents he lists and that these could be transcribed. I have long thought that if Tomás could put together a reference work that consisted of general descriptions of each of these cases together with transcriptions of the documents that he has found it would be an invaluable historical resource that would stand for a very long time. But that of course is another project and I hope to be around some time – perhaps even in Glasgow – to celebrate its completion.

Personal Comments on a Policy Perspective

Charlotte Waelde

Professor Tomás Gómez-Arostegui has presented us with an excellent account of *Donaldson v Becket* in which he has sought to counter recent works asserting that the decision was that there was no common law copyright. The argument is made against the backdrop of the re-examination of copyright law in the US in respect of which, Professor Arostegui tells us, parties on both sides of the debate over the proper scope of copyright have turned to the original purpose of copyright to buttress their arguments. Was it principally to protect authors, or to benefit the public?

While I will leave others to ponder the nuances of the judgment and of the attendant arguments, my contribution will reflect on the realities of the process of policy making via the UK Intellectual Property Office (IPO) and the evidence that is taken into account, and consider the extent to which arguments around *Donaldson* may influence or have a role to play in the debate. My comments and observations come from my experience as the Chair of the UK Intellectual Property Office Copyright Research Expert Advisory Group 2011-2014 and of the Unregistered Rights Research Expert Advisory Group (UREAG) 2014-. My comments are purely my own and not those of the IPO.

The role of the Unregistered Research Expert Advisory Group (UREAG)

The UREAG (there is also a Registered Rights Research Expert Advisory Group (RREAG)) works within a set of terms of reference that were produced by the IPO, discussed in open forum with the members of UREAG, and finalised in 2015.[77] While it is notable that policy debate is explicitly outside of the remit of the UREAG,[78] it is a function of the group to provide a forum for a broad range of stakeholders to come together with the IPO for the purposes of helping to develop new research themes and research specifications, to peer review existing research and to champion the research programme.[79]

In terms of what research priorities actually find their way on to the list, while the views of the UREAG members are canvassed on areas proffered by the IPO, and UREAG members are asked for their ideas on what should be included in the list, what actually emerges as

[77] The ToR is reproduced below in the Appendix to this Working Paper.
[78] Para 1.3.1.
[79] Para 1.

themes to be pursued results from the most pressing political imperatives of the time. Over recent years there has been a great deal of IPO time and resource devoted to the copyright agenda as recommendations primarily from the Hargreaves Review have been implemented. Current priorities lie elsewhere, and at least at present focus is on IP enforcement; IP and finance; and IP and the '8 great technologies' although copyright licensing and efficient markets are also on the agenda. This may of course change after the forthcoming election.[80]

The role of evidence in copyright policy making

The IPO has produced a Guide to Evidence for Policy Update 2013.[81] This is a document that the organisation had been working on for a number of years and in respect of which the opinion of the REAGs (the groups that existed prior to the RREAG and UREAG) was canvassed. The Guide states that evidence should be clear, verifiable and capable of being peer reviewed. The first iterations of the Guide focused on economic evidence. After listening to the REAGs and others, the Guide now make it clear that social research and case study work are relevant in addition to economic evidence.

> 'Policy evaluation often depends on all three, especially where economic costs and benefits need to be weighed against social impacts and effects on behaviour.'

A glance at some of the submissions made during the course of the most recent changes to copyright law, together with such documents as the House of Commons Report on the Hargreaves Review of Intellectual Property: Where next?[82] and the breadth of evidence that is proffered by a wide range of stakeholders becomes obvious.

The role of Donaldson

In my time as chair of CREAG and now UREAG *Donaldson* has not been mentioned. In discussing the case with the IPO, at least one employee responsible for aspects of gathering and analysing evidence submitted to consultation exercises, had not seen the case discussed. An historical analysis might be given in evidence, but that tends to be to contextualise the

[80] The current agenda is laid out below in the Appendix to this Working Paper.

[81] Available at http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/consult-2011-copyright-evidence.pdf

[82] First Report of Session 2012-13, vols I and II. http://www.publications.parliament.uk/pa/cm201213/cmselect/cmbis/367/367.pdf

submission, rather than as the argument.

One might argue that the 'sides' that are represented in readings of *Donaldson*, that of the author and of the public interest, find expression in both the UREAG and in evidence given to policy consultations. As noted, the members of UREAG are drawn from a range of stakeholders, and policy consultations always draw a wide spectrum of views in response. While policy matters are not within the remit of UREAG, *Donaldson* has not been a part of the conversation. As with the consultation returns and the discussions and investigations that accompany reforms through the legislative processes, 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.

A Reply to my Colleagues Regarding *Donaldson v Becket*

H Tomás Gómez-Arostegui

Once again, I would like to thank my colleagues for participating in this conference and for taking the time to memorialize their responses in writing. I want to thank especially my friends Howard Abrams, Ronan Deazley, and Mark Rose, whose work I critique, for being so receptive and gracious. Additionally, the University of Glasgow, and in particular the staff of CREATe, were incredible hosts. I am sure I speak for everyone when I say that Elena Cooper, Martin Kretschmer, and Diane McGrattan made our stay a very pleasant one. Lastly, I appreciate that many colleagues and friends travelled to Glasgow for the conference.

Having read all of the conference participants' published responses, I found myself agreeing with their remarks, with the exception of some of those proffered by my colleague Howard.[83] This reply presents my thoughts on that score, and it assumes that the reader has already read my article,[84] along with the work of Howard, Ronan, and Mark on the subject.

Howard made two principal arguments in his 1983 article. First, he argued that the House of Lords had held in *Donaldson v Becket* (1774) that there never was a common-law right in published works. Second, he argued more broadly that regardless of *Donaldson*, the historical record before 1769 demonstrates that in England there never was a common-law right in published works: it was only when the King's Bench in *Millar v Taylor* (1769) recognized the right that it came into being, and that was only for a few years until *Donaldson* overruled *Millar* on that particular point. Combining both arguments, he ultimately concluded: 'There is no historical justification whatsoever for the claim that copyright was recognized as a common law right of an author.'[85]

In his response to my article, Howard reasserts these two arguments.

Common-law copyright before 1769

I will address his second argument first. My article does not take up whether there actually was a common-law right in published works before *Millar* or, more specifically, before the

[83] I also disagree with much of what Lionel Bently has to say in his published response, but the decision to include his essay in this collection was not made until after I had already written my reply and just before this Working Paper went to 'press', so to speak. I therefore, unfortunately, have been unable to respond to it, let alone with the attention that it deserves.

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

[85] Abrams, *The Myth of Common Law Copyright*, 1128.

Statute of Anne in 1710. As interesting as the pre-1769 record is – and I say this with a genuine interest in the period[86] – it is not relevant to *this* debate.[87] My article addresses Howard's first argument: what was the actual holding in *Donaldson*? Or, as Howard later stated the issue: 'So what did the House of Lords actually decide?'[88] This is where his article (in combination with Ronan's work) has held the most sway, particularly in the United States. The decision in *Donaldson*, along with the decision in *Millar*, occurred in the years before the adoption of the Copyright Clause of the US Constitution in 1787 and the first federal Copyright Act of 1790. The two cases therefore offer contemporaneous evidence of what the Framers and First Congress may have known and intended in those two instruments. This is why US commentators (rightly or wrongly) pay so much attention to those two cases, and why I felt it was important to focus in this article on the state of English law during the period after *Millar* and *Donaldson*. In any event, because the pre-1769 record does not help us determine what *Donaldson* actually decided, I will say no more about it here.

The holding in Donaldson v Becket

Returning now to Howard's first argument, he asserted two points in his 1983 article. First, he argued that readers of the case have mistakenly read *Donaldson* to directly hold in favour of – or indirectly support in combination with *Millar*[89] – a post-publication right in authors because readers have misunderstood how the House of Lords operated in 1774. According to Howard, the speeches of the five Lords who spoke during the debate constituted the sole reasoning of the case, and because the majority of the speaking Lords rejected a common-law right in published works, that meant that the House as a whole had also held against it. In keeping with that view, Howard asserted that we must disregard the advice offered by the various judges and the fact that many other Lords potentially voted on the appeal (as many as 84 attended the debate). Second, Howard argued that the misreporting of the views of Justice Nares caused further misunderstanding by leading readers of the case to believe that the House simply adopted the views of the judges who had advised it.

[86] I have, for far too many years, been working on an article on the pre-1710 history.

[87] I should also note that Howard's pre-1769 arguments are effectively baked into the decisions in *Millar* and *Donaldson* because Howard has not, as far as I recall, presented any arguments or uncovered any primary sources that were not already considered by the various judges and Lords in those two cases.

[88] H.B. Abrams, *Finding Copyright Theory's Future in its Past: Two Books by Ronan Deazley* (2008) 3 J. Intell. Prop. L. & Practice 409, 414.

[89] This particular component of his argument was implicit.

In his response, Howard continues to press the first point. But he appears to concede that the premise of the second – that Nares was misreported – no longer holds.

Some preliminary matters

Clarifying our areas of disagreement

Before proceeding further, I do need to point out that my friend has, in framing his response, misstated my central argument. He begins his section on *Donaldson* by representing that I had argued in my article that the judges in *Donaldson* decided the case, not the Lords. Howard states: 'Here is where I must part company from Tomás. It is the Lords, not the judges, who decided the case. This cannot be overemphasized.' Later he states that I had argued that it was the opinions of the judges alone 'that should be read as stating the common law.' And when I argued that a majority of the eleven judges favoured reversing the decree, Howard states that I also maintained that the judges provided the 'more definitive statement of the common law of copyright in 1774 and thus the grounds for decision of the case.' I also purportedly 'conclude[d] that this proves the House of Lords was in fact endorsing the existence of a perpetual common law copyright but holding that it had been preempted'.

Regrettably, this inaccurately reflects my views. I state several times in my article that the House of Lords as a body decided the case and that the judges' opinions were merely advisory.[90] I also stated that the reasoning of the House 'cannot be determined' in *Donaldson*.[91] 'In advising the House,' I argued, 'a number of judges and Lords offered their own views of the matter, but none of them singly or in combination establishes why the House ruled as it did.'[92] Lastly, I praised Howard for correctly pointing out 'that many modern scholars ha[d] misread the decision' as 'affirmatively h[olding] that there was an antecedent right' because those scholars had incorrectly, albeit understandably, surmised that the judges constituted the House.[93]

The true place where I part ways with Howard is as follows. First, I argue that the Lords' speeches were advisory to the rest of the House, just as the opinions of the judges were. Howard argues that the speeches bound the rest of the House and thus constituted the holding of the House of Lords. Second, I argue that the opinions of the judges potentially offer insight

[90] Gómez-Arostegui, *Copyright at Common Law*, 13-14, 35, 36-37, 45-46.
[91] *Ibid*, 45. See also, 5-6.
[92] *Ibid*, 45.
[93] *Ibid*, 46.

into the reasoning of the House as a whole – just as the speeches of the Lords do – while Howard argues that the opinions are irrelevant. Third, I do not consider the advice of the speaking Lords to be superior to the advice of the judges. Howard, on the other hand, states that we 'should . . . give priority to the statements made by the Lords'. Owing to the fact the speeches and opinions were advisory, that there were several grounds on which the House could have reversed the decree, that strictly by the numbers a majority of the judges (and even a bare majority of the judges and speaking Lords combined) opined or allowed that authors held a common-law right in published works,[94] and that the House as a whole did not articulate the reasons for its decision, I argued that it is incorrect to assert that the House affirmatively ruled against a common-law right. I did not then argue, as Howard believes, that the House ruled on pre-emption grounds. The marked diversity of expressed viewpoints makes such an assumption impossible. Instead, I concluded that the only holding one can discern with any confidence is very narrow: the House of Lords held that copyrights in published works were subject to the durational terms of the Statute of Anne.[95] This was my principal argument, and I thus devoted most of my article to proving it.

Lastly, I made a claim about the state of English law after *Donaldson*. Because the decision did not determine the origin of copyright, I noted that we are essentially left with 'the individual views of the judges and law Lords in *Donaldson*, along with those in *Millar*, as the principal guidance on the subject in England and America before 1800.'[96] The decision in *Millar* remained relevant because *Donaldson* had not squarely rejected its ruling recognizing common-law rights in published works, though to some observers *Donaldson* did cast a cloud over it.[97] The reasoning of the judges' opinions and law Lords' speeches from both decisions, deprived of whatever binding effect they otherwise would have had in the late 18th century,[98] amounted to potentially persuasive expressions on whether the common law recognized a

[94] For: Ashurst, Aston, Blackstone, Gould, Lord Lyttelton, Nares, Smythe, and Willes. Against: Adams, Lord Apsley, Bishop of Carlisle, Lord Camden, De Grey, Eyre, and Perrot. The majority does not shift even if one adds Lord Mansfield (for) and Justice Yates (against) to the mix. Howard and I agree that, as far as we know, the Earl of Effingham did not discuss the underlying right.

[95] Gómez-Arostegui, *Copyright at Common Law*, 5, 23, 24, 33-38, 45-46. Lysander Spooner offers another way to describe the case: 'The decision, therefore, does not stand as a decision that an author had *not* a perpetual copyright *at common law*; but only as a decision that, *if* he had such a right at common law, that right had been taken away by the statute.' L. Spooner, *The Law of Intellectual Property*, Vol.1 (Boston, 1855), 212-13. Notably, Spooner did not argue that the House had ruled on preemption grounds. Like me, he believed that the reasoning of the decision was indiscernible. *Ibid*, 212, 238.

[96] Gómez-Arostegui, *Copyright at Common Law,* 5-6.

[97] *Ibid*, 42.

[98] On the doctrine of *stare decisis* in the mid-to-late 18th century, see J. Oldham, 'Lord Mansfield, *Stare Decisis*, and the *Ratio Decidendi* 1756 to 1788', in W.H. Bryson and S. Dauchy (eds), *Ratio Decidendi: Guiding Principles of Judicial Decisions* (Duncker & Humbolt, 2006), 137.

right in literary property. On the whole, those jurists favoured a right in published works, and it was thus common for observers in England in the late 18th century and beyond to combine the cases as predominating in favour of an antecedent right in authors.[99] In the end, when one looks back and asks whether England recognized a common-law right in published works at the end of the 18th century, the answer 'yes' is more consistent with the record, than 'no'. As I stated in my article, the view that 'authors held a natural or customary property right, protected at common law[,] certainly finds support in the late 18th century.'[100]

I want to stress that my position is deliberately nuanced. I do not argue that the law on published works at the end of the 18th century was certain or undisputed. Rather my claim regarding the state of the law after *Donaldson* is, as Oren Bracha notes in his response, a construct based on probabilities. But it is a construct that I did not build on my own; rather, it is one that contemporaries partook in as well. Apart from looking at the jurists' views in *Millar* and *Donaldson*, I also endeavoured to discover how contemporary lawyers, judges, booksellers, and authors understood the law after 1774. I did so by reviewing a number of different types of documentary evidence, some of which I cited in my article but some that I did not because the evidence I found was either not very illuminating or it duplicated evidence I had already cited. My search for references and allusions to *Donaldson* included, among other things, examining published law reports (both nominate reports and newspapers) from 1774 to 1875 in England, Scotland, and Ireland; numerous unpublished manuscript law reports, pleadings, memorials, and orders from printing disputes filed in England and Scotland from 1774 to 1820; [101] numerous published and manuscript volumes of correspondence between various booksellers and authors from 1774 to 1800; numerous petitions, bills, and reports on UK copyright legislation from 1774 to 1878; and nearly every catalogued collection of printed or manuscript opinion letters of counsel, along with loose letters of counsel, from 1774 to 1800 in search of lawyers advising clients on common-law copyright or how *Donaldson* might affect other issues, such as printing patents.

[99] Gómez-Arostegui, *Copyright at Common Law,* 23-25, 41-46. This viewpoint became so common in England that Ronan and I have labeled it the 'orthodox' view of the origin of copyright. I have also called it the 'conventional' view. See *ibid*, 4, 6, 24-25, 46; R. Deazley, *Rethinking Copyright: History, Theory, Language* (Edward Elgar Publishing, 2006), 6-7, 169.

[100] Gómez-Arostegui, *Copyright at Common Law,* 46.

[101] Nearly all official court records from Ireland were destroyed in 1922 during the Irish Civil War.

The speeches

In the preliminary remarks of his response, Howard spends time summarizing the views of the Lords who spoke. This is an area where we agree more than we disagree, but there are a few points that require a reply. Howard argues that his 'central contention was and is that the statements made by the Lords clearly demonstrate that they were of the opinion that the common law did not recognize perpetual copyright.' He goes on to say that it is 'simply impossible to read the reports of their statements and conclude otherwise.' On this point I agree with Howard. The majority of the five Lords *who spoke* opined that a common-law right in published works never existed. More specifically, three clearly opposed it; it is unclear whether a fourth did; and only one of the speakers opined in favour of a common-law right that persisted independent of the Statute of Anne. Additionally, at least two of the five, including Lord Camden, opined in the alternative that the statute 'took away any right at Common Law for an author's exclusively multiplying copies if any such right existed.'[102]

Howard reads my article as possibly stating that the Bishop of Carlisle – one of the five speaking Lords – had conceded that a post-publication right existed. That was not my intention. My article noted that the Bishop 'could not resist stating that he had little faith in an antecedent right' and that he had 'previously expressed his views on the subject and argued against a common-law right in published works.'[103] The point I was making was that the Bishop did not want his fellow Lords to spend a lot of time (if any) deliberating on the question of whether there was a common-law right. The Bishop was, as I recount in my piece, 'desirous of having all such [arguments] waved.'[104] He instead urged his colleagues to limit their deliberation to the question of statutory pre-emption, which he likely felt was the easier issue and correctly noted was enough to 'decid[e] the whole controversy.'[105] Whether the other Lords followed this suggestion, we do not know. But it certainly is possible that some or many of them did. Howard suggests that my logic here is faulty and that I am ignoring the fact that Lords Camden and Apsley advocated against an antecedent right. In essence, Howard does not believe that the Bishop of Carlisle could have influenced any of his colleagues to vote on pre-emption grounds alone. But why not? The other Lords were free to ignore the advice of Lords Camden and Apsley, in whole or in part, and decide solely on pre-

[102] *Ibid*, 21, quoting Morning Chronicle, 23 Feb. 1774, 3 (Lord Camden).
[103] *Ibid*, 22 & fn 105.
[104] *Ibid*, 22, quoting Morning Chronicle, 26 Feb. 1774, 2 (Bishop of Carlisle).
[105] *Ibid*.

emption grounds.[106] Even Lord Camden himself opined that the statute pre-empted any pre-existing right. Moreover, strictly by the numbers, seven of the eleven judges had advised the Lords that a common-law right existed, while another cohort of six to five opined that the Statute of Anne pre-empted any such right. Thus, it is entirely possible that a number of Lords, perhaps even a majority of them, voted to reverse solely on the issue of pre-emption. But again, we do not know. I raised the Bishop's statements in my article simply to help demonstrate how complicated and opaque the reasoning behind the decision actually was.[107]

Howard also has something to say about Lord Lyttelton, who was the only Lord who spoke in support of a common-law right that persisted in perpetuity despite the Statute of Anne. Perhaps in an effort to dilute that support, Howard argues that Lord Lyttelton was not concerned 'with a natural rights theory which could justify a perpetual common law copyright, but with the more utilitarian notion that the lack of such a perpetual right . . . would discourage production' of books. It is true that Lord Lyttelton spoke of the utility in recognizing a perpetual copyright, but this does not mean that he did not also believe in a natural-rights or property basis for copyright. There certainly is nothing in the reports of his speech that excludes the possibility. Indeed, the printed reports would seem to support it. Omitted from Howard's response is the following sentiment attributed to Lord Lyttelton:

> . . . [I]t was sufficient for him, that it was allowed such a property did exist. Authors, he presumed, would not be denied a free participation of the common rights of mankind, and their property was surely as sacred, and as deserving of protection, as that of any other subjects.[108]

According to other reports, Lord Lyttelton also stated that the 'science of literature, tho' not tangible, was nevertheless property',[109] and he relied 'upon the basis of an equitable and just right'.[110] In light of the foregoing accounts, Howard's characterization seems inappropriate.

Howard's principal arguments

With these preliminaries out of the way, Howard turns in earnest to rebutting my arguments. He begins by reiterating the view that we must conclude that the non-speaking Lords adopted the reasoning of the Lords who spoke, and did not instead adopt the reasoning of the majority

[106] *Ibid*, 13-14, 35.
[107] *Ibid*, 34.
[108] Morning Chronicle, 26 Feb. 1774, 2.
[109] London Evening Post, 24 Feb. 1774, 1.
[110] General Evening Post, 10 Mar. 1774, 4.

of the judges, some combination of the reasoning of the judges and speaking Lords, or their own reasoning. In his 1983 article, Howard implied that some rule in 1774 dictated that the speeches of the Lords, when made on the winning side, always constituted the reasons of the House as a whole, even in cases where the judges were summoned for their advice and offered alternative reasoning. Effectively, the speaking Lords alone decided the case, not the House as a whole, and, thus, we must disregard the advice offered by the judges and the fact that many other Lords potentially voted on the appeal. Howard cited no apposite authority for this purported rule in his 1983 article.[111] In his response to my article, he still cites no authority to support it, nor does he address any of the primary sources that contradict it.

Instead, Howard writes that it is 'far more reasonable to believe that the majority of non-speakers were silent because of agreement with the speak[ing] [Lords] and not the other way around.' Howard does not explain precisely what he means by this statement. Perhaps he is rejecting the categorical rule described in the preceding paragraph and adopting a rule for interpreting decisions that depends on the circumstances of each appeal. If so, I imagine Howard's argument, taken through its logical course, would be that lawyers in the late 18th century, when looking at the case, would presume that the House as a whole had adopted the reasoning of the majority of the speaking Lords. I do not object to this as a general working principle. Presumptions can be and sometimes were part of the deductive process in interpreting decisions.[112] But Howard does not explain why it is not just as sensible to assume that the majority of the House followed the reasoning of the majority of the judges, particularly in light of statistics suggesting that the House nearly always followed the judges.[113] *Donaldson* is a complicated case in part because it involves a clash of presumptions. Later in his response, Howard proffers the following rule to reconcile the competing presumptions: '[W]here, as in *Donaldson*, there is a strongly expressed viewpoint stated by all the Lords who spoke on the matter, which is directly opposed to the position expressed by [the] judges, the statements of the Lords must be treated as the authoritative and thus the holding of the case.' As before, however, he cites no authority for this rule.[114]

[111] See Gómez-Arostegui, *Copyright at Common Law,* 38, citing Abrams, *The Myth of Common Law Copyright*, 1160 fn 175, 1169.

[112] See *ibid*, 34, 36-37. See also my discussion of this point further along in my reply.

[113] *Ibid*, 36-37. See also *Cogan v Lyon* (1830) 4 W. & S. 391 (H.L.) 397 (Brougham LC) (noting that the advisory opinions of the twelve judges are 'hardly ever deviated from').

[114] Even putting aside the lack of 18th-century authority, and engaging this rule directly, the following hypothetical seems to impugn it. Imagine that the twelve judges of the common-law courts, when called for their advice, unanimously answered that a common-law right existed but that the Statute of Anne preempted it. Next imagine that the only Lords' speech at the debate was that of the Bishop of Carlisle, and that he advised strongly

Rather than investigating 18th-century procedure, my colleague draws on analogies to modern practice. Several times, Howard compares the practice of the House of Lords in 1774 to 'our modern appellate courts'. He begins by arguing that the debate of the Lords, in which the Lords offer their speeches, is much like the conference appellate judges engage in today in the United States, among themselves after oral argument and before issuing their opinions, and that those conferences are 'far more revealing' of the state of the law than the 'more formal opinion' of those same judges. With this analogy, Howard seeks to equate the speeches of the Lords with 'judicial opinion[s] rendered as part of a final judgment.' Respectfully, even if one assumes *arguendo* that the debates are analogous, I must demur. I do not think that practitioners today would agree that the colloquies of the judges during their private conferences are far more revealing of the state of the law than the written opinions that issue afterward. Although notes of conferences are sometimes available today, practitioners do not treat them as representing the law. This is not surprising given how relatively inaccessible, fragmentary, and potentially unreliable the notes are.[115] What is said at conference is subject to change in light of draft opinions that circulate afterward and is also often unenlightening, as frequently conferences are no more than vote-counting exercises with the sole purpose being to determine which judge will draft the majority opinion.[116] As for porting this premise back to the 18th century, I would only point out that lawyers did not have the option of a formal opinion articulating the reasons of the House of Lords as a whole. I suspect that if that option had been available, practitioners would have preferred it.[117]

Howard next finds a modern parallel to the House of Lords' practice of asking for the views of the sitting judges of the common-law courts of England – usually twelve judges total from the courts of King's Bench, Common Pleas, and Exchequer. He says that this is not unlike the practice of the US Supreme Court inviting the Solicitor General to 'address the Court on an issue'. With this analogy, Howard seeks to downgrade the influence that the judges had on

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that there never was a right and, even if there were, the statute preempted it. If the House of Lords reverses, must we conclude that the House rejected a common-law right? Howard, it seems, would say 'yes'.

[115] See L.M. Seidman, *Eavesdropping on the Justices* (2001) 5 Green Bag 117, 126; S. Wermiel, *Using the Papers of U.S. Supreme Court Justices: A Reflection* (2013) 57 N.Y. Law Sch. L. Rev. 499, 512-13.

[116] See P.M. Wald, *Some Real-Life Observations about Judging* (1992) 26 Indiana L. Rev. 173, 177-78; D. Dickson, *The Supreme Court in Conference (1940-1985)* (OUP, 2001), 119-20; W.H. Rehnquist, *The Supreme Court* (Alfred A Knopf, 2001), 254-59, 263; L. Epstein, W.M. Landes and R.A. Posner, *The Behavior of Federal Judges* (Harvard UP, 2013), 62, 271, 306-7.

[117] Cf E. Sugden, *A Treatise on the Law of Property, as Administered by the House of Lords* (London, 1849), 42 (writing at a time when the law Lords decided appeals without the rest of the House, Sugden stated that 'it would add greatly to the weight of the decision if the law Lords would, when they agree, pronounce one judgment through the Lord Chancellor as their mouth-piece. Nothing is more dangerous to the law, as a science, than a *debate* in the Lords on a rule of law.').

the House of Lords. With respect, I do not see the resemblance or any value in the comparison. For those who are unfamiliar with the procedure, the Supreme Court can call for the views of the Solicitor General in cases where the United States is not a party. This usually occurs when the United States has an interest in the case, such as where a federal statute or issue is at stake. The standard language of a 'CVSG' is: 'The Solicitor General is invited to file a brief in this case expressing the views of the United States.' Invitations usually occur on a petition for a writ of certiorari, which is when the Supreme Court is deciding whether to hear a case, and often continue through the merits stage.[118] Apart from the obvious differences, the two forms of advice that Howard compares – the Solicitor General's in 2015 and the judges' in 1774 – are treated very differently. Today, when a lawyer hopes to discern the reasoning of a Supreme Court decision, perhaps in an effort to cite it to a court, she does not rely upon and cite the Solicitor General's *amicus* brief from that decision. This is because the decision articulates the reasoning of the justices in one or more formal opinions. In stark contrast, when citing 18th-century cases from the House of Lords, litigants and judges universally refer to the views of the judges (at least in cases in which the House requested their advice). Indeed, the answers of the judges were thought important enough that the journal of the House of Lords regularly published them after circa 1740. Howard would have been closer to the mark if he had envisioned a non-existent modern practice: the United States Senate sitting as the highest appellate tribunal in the land and inviting all the chief judges of the thirteen US Courts of Appeals to offer their views on how to decide an appeal.

This brings me to his next analogy. In my article, I noted that the Lords spoke before the vote, not after, because the speeches served to explain why a Lord planned to vote a particular way and to urge the other Lords to do the same. I used this point to argue that the speeches were just as advisory as the opinions of the judges.[119] Taking this as his point of departure, Howard states that 'the [appellate] procedure – a motion to reverse a decree, followed by statements of positions preceding a vote – was legislative . . . beyond doubt.' He then argues that this legislative-like procedure by no means leads to the conclusion that the statements of the Lords should lose the binding authority that he assigns to them elsewhere in his work. Howard writes: 'Do we not pay close attention to Parliamentary or Congressional

[118] See S.A. Lepore, *The Development of the Supreme Court Practice of Calling for the Views of the Solicitor General* (2010) 35 J. Supreme Court Hist. 35; S.M. Shapiro and others, *Supreme Court Practice*, 10th ed (Bloomberg BNA, 2013), s.6.41.

[119] Gómez-Arostegui, *Copyright at Common Law*, 35-36.

debates when we try to discern the meaning of a statute? In fact, we value these statements more because they came before than we would if they were post hoc.'

I have at least three concerns with his statement. The first is that it is dangerous to equate the legislative and appellate procedures of the House of Lords. On the whole, the legislative side was more complicated,[120] thus making it *less* likely that individual speeches would be seen as dispositive or probative. Second, the statement slightly misleads as to current practice in the United Kingdom and United States. Although admissible, the statements of individual legislators from the floor remain a controversial form of legislative history; indeed, some stakeholders regard speeches as among the least reliable indicators of legislative intent.[121] Third, and most importantly, this argument, like the ones before it, is anachronistic. Modern practice in this regard does not necessarily tell us anything about statutory interpretation in the late 18th century. Indeed, it appears that in England, in the late 18th century, courts did not consider legislative speeches as probative, let alone dispositive, of what Parliament as a whole (or even one House) intended when it enacted legislation. Rather, it appears that speeches were inadmissible as aids in statutory interpretation. Eighteenth-century authorities are admittedly hard to come by, but *Millar v Taylor* offers indirect support for the proposition[122] and 19th-century English treatises are unanimous on this point.[123] This is an area where I would have liked to first consult 18th-century manuscript reports, but I will have to content myself in this reply with the aforementioned authorities and the following 18th-century source from the United States:

[120] See S. Lambert, *Bills & Acts: Legislative Procedure in Eighteenth-Century England* (CUP, 1971).

[121] See The Law Commission and Scottish Law Commission, *The Interpretation of Statutes* (HMSO, 1969), 32-37; J.J. Brudney, *Below the Surface: Comparing Legislative History Usage by the House of Lords and the Supreme Court* (2007) 85 Wash. Univ. L. Rev. 1, 4, 16-28, 49-50; A. Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (Hart Publishing, 2013), 262-63; A.R. Gluck and L. Schultz Bressman, *Statutory Interpretation from the Inside – An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I* (2013) 65 Stan. L. Rev. 901, 976-78; N. Singer and S. Singer, *Sutherland Statutes and Statutory Construction*, 7th ed (Thomson, 2014), s.48:13.

[122] *Millar v Taylor* (1769) 4 Burr. 2303 (K.B.) 2332 (Willes J). See also T. Wood, *An Institute of the Laws of England*, 3rd ed (Savoy, 1724), 8-9 (describing canons of statutory interpretation but failing to mention Parliamentary speeches as a source of legislative intent); W. Blackstone, *Commentaries on the Laws of England*, Vol.1 (Oxford, 1765), 59-62, 87-91 (same); *Mitchell v Torup* (1766) Parker 227 (Exch.) 233 (same); J. Oldham, *From Blackstone to Bentham: Common Law Versus Legislation in Eighteenth-Century Britain* (1991) 89 Mich. L. Rev. 1637, 1647 ('Formal legislative history, to the extent it existed, would not have been brought out.').

[123] See e.g. H. Hardcastle, *A Treatise on the Rules which Govern the Construction and Effect of Statutory Law* (London, 1879) 56; E. Wilberforce, *Statute Law: The Principles which Govern the Construction and Operation of Statutes* (London, 1881), 105-7; E. Beal, *Cardinal Rules of Legal Interpretation*, 2nd ed (London, 1908), 288–90. See also F. Dwarris, *A General Treatise on Statutes*, 2nd ed (London, 1848), 560-693.

> [T]he universal practice of the courts of law [was] . . . , when called on to expound an act of the legislature, [to] never resort[] to the debates which preceded it, to the opinions of members about its signification, but [to] inspect[] the act itself, and decide[] by its own evidence.[124]

The US Supreme Court reiterated the point one hundred years later, and in the process offered the following explanation:

> There is, too, a general acquiescence in the doctrine that debates in congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body. . . . [¶] The reason is that it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did, and those who spoke might differ from each other . . . .[125]

Whether the above reason also formed a basis for the prohibition in England, I have yet to discover. Other factors may have played a role, such as the general prohibition on publishing Parliamentary debates.[126] In any case, for all the reasons stated above, resorting to modern canons of statutory construction does not actually advance Howard's argument on 18th-century appellate practice.

Lastly, Howard suggests that, taken to its logical conclusion, my view of 18th-century procedure in the House of Lords would effectively render its decisions meaningless. He writes that 'the grounds for a decision' would be indeterminable 'unless a majority of the deciding judges [ie, Lords] actually not only concur [ie, vote on the same side as the speakers] but expressly opine in agreement with the articulated position of the . . . speakers.' But I did not go so far. Records from the 18th and 19th centuries demonstrate that discerning the grounds of a determination was treated as a pragmatic exercise, with lawyers, judges, and commentators willing in some cases to infer the grounds of an uncomplicated decision, such as where the judges (if summoned) and speaking Lords were unanimous or nearly so, even

[124] *Debates in the House of Representatives of the United States* (Philadelphia, 1796), 41.

[125] *US v Trans-Missouri Freight Ass'n* 166 U.S. 290, 318 (1897). See also *People v Utica Ins Co* 15 Johns 358, 380, 394-95 (N.Y. 1818); *Mitchell v Great Works Mill & Mfg Co* 17 F. Cas. 496, 498-99 (C.C. D. Maine 1843) (Story J); *Aldridge v Williams* 44 U.S. 9, 24 (1845); *Cumberland Co v Boyd* 113 Pa. 52, 57 (1886).

[126] See P.D.G. Thomas, *The House of Commons in the Eighteenth Century* (Clarendon Press, 1971), 216-17; *Pepper v Hart* [1993] A.C. 593 (H.L. 1992) 623-24 (Lord Browne-Wilkinson).

though the views of all the voting Lords were not known and could not be known.[127] Observers (particularly neutral ones) were not as able or willing to do so, however, with intricate disputes or disputes where the records were wanting, because in those instances deductions could not be made confidently. To spin a complex decision in one's favour at argument would likely lead to push back. *Donaldson*, unfortunately, is a convoluted case. The judgment contained no reasoning; numerous Lords attended the appeal and potentially voted on the day of judgment; the House could have reversed on one or more of three possible grounds; and, most importantly, the House had summoned the judges for their advice and the advice it received to reverse differed in some respects from that offered by the speaking Lords.

Justice Nares and the other judges

Howard also discusses the reporting of Justice Nares's views. Until John Whicher wrote his article in 1961,[128] readers of *Donaldson* had always relied upon the summaries contained in the official journal of the House of Lords or in the *Burrow* and *Brown* reports, both of which expressly drew from the journal. Those accounts all stated that Justice Nares had opined that there was a common-law right but that the Statute of Anne had 'taken it away'. Whicher was the first to argue that those accounts were wrong and that Justice Nares had actually opined that the statute did not pre-empt the right. In his 1983 article, Howard cited the purported misreporting as an important reason why people have misunderstood the holding in *Donaldson*.[129] But as I argued in my article, and as my friend now appears to acknowledge, newly discovered evidence demonstrates that the official account was correct.

Howard raises one other argument regarding the positions of the eleven judges. With apologies to my colleague, I found it difficult to follow, partly because a few factual errors have crept into it. Howard starts his argument with the following premise: five judges opined that a common-law copyright in published works existed and that the Statute of Anne did not pre-empt it; three judges opined that a common-law copyright in published works existed but that the statute did pre-empt it; and three judges opined that there never was a common-law right in published works. He then goes on to say: 'thus half [ie, three] of the judges who

[127] Gómez-Arostegui, *Copyright at Common Law*, 34-37; see e.g. *Latless v Holmes* (1792) 4 T.R. 660 (K.B.) 661, citing the unanimous opinion of the judges in *Panter v Attorney General* (1772) 6 Bro. P.C. (1st ed) 553 (H.L.) 558.

[128] J.F. Whicher, *The Ghost of Donaldson v. Becket: An Inquiry into the Constitutional Distribution of Powers over the Law of Literary Property in the United States* (1961) 9 Bulletin Copyright Soc'y 102.

[129] Abrams, *The Myth of Common Law Copyright*, 1164 fn 189, 1164-70, 1188 fn (d).

voted[130] as part of the six to five majority on the third and fifth questions were of the opinion that no common-law right ever existed.'[131] The factual errors are in the premise. His first count is correct, but the second and third are not. Two (not three) judges believed that the statute pre-empted a common-law right, and four (not three) judges believed that there never was a common-law right in published works. Thus, Howard probably meant to say that of the six judges who opined that the statute pre-empted any real or hypothetical common-law right in published works, four of them believed that there was no right in the first instance. Howard intimates that this is an important point, but without explaining why. I assume he would not deny that a different cohort opined seven to four that there was an antecedent right in published works. I will not speculate further as to his object, but I thought it important to correct the factual record.

Concluding thoughts

> 'The largest difficulty in legal history is precisely that we look at past evidence in the light of later assumptions, including our own assumptions about the nature and working of law itself.'
>
> SFC Milsom[132]

To our modern eyes, it appears odd that the House of Lords, the highest court in the land, could decide cases in a manner that made it difficult (if not impossible) to discern why the court ruled as it did. In his 1983 article, and in his response to my article, Howard proffers interpretative rules to add clarity and certainty to the reasoning of *Donaldson*, and presumably other cases decided in the House in the 18th century. He was the first scholar to do so. But the rules he proposes are not grounded in 18th-century practice. They seem, instead, to stem from instincts honed by modern experience and an expectation that decisions of the House could not possibly be so difficult to determine. The truth of the matter, however, is that the appellate jurisdiction of the House of Lords, before the major reforms of the mid-to-late 19th century, was in a 'sorry state.'[133] One had to determine the views of a court that permitted all of its members to vote on appeals, sometimes summoned the advice of other

[130] I should note that the judges did not 'vote' in the House, they only answered and opined on the questions that were put to them. This was an accidental slip on Howard's part, as he has previously recognized that it is incorrect to call the judges' participation a 'vote'. Abrams, *Finding Copyright Theory's Future,* 415 fn 59.

[131] The third and fifth questions effectively asked the judges the following question: if a common-law right exists, or hypothetically exists, did the Statute of Anne 'take it away'?

[132] S.F.C. Milsom, *A Natural History of the Common Law* (Columbia UP, 2003), xvi.

[133] L. Blom-Cooper and G. Drewry, *Final Appeal: A Study of the House of Lords in its Judicial Capacity* (Clarendon Press, 1972), 23.

judges, ruled without articulating reasons of the House, and restricted the publication of its own proceedings. The reasoning of a decision of the House of Lords was as much a question of fact, as one of law. It is not surprising, then, that in 1849, Edward Sugden, a practitioner in the House of Lords in the 1820s, former Lord Chancellor of Ireland, and later Lord Chancellor of Great Britain, lamented as follows: '[T]here is no authority which hitherto has so slowly found its way into the body of the law as the decisions of the House of Lords'.[134]

[134] Sugden, *A Treatise on the Law of Property*, 40-41. For other scholars who have made similar observations, see T.F.T. Plucknett, *A Concise History of the Common Law*, 5th ed (Little, Brown and Co., 1956), 202-3; C.K. Allen, *Law in the Making*, 7th ed (Clarendon Press, 1964), 220-21; W. Cornish and others, *The Oxford History of the Laws of England*, Vol.11 (OUP, 2010), 48.

Excerpts from the Symposium

Elena Cooper and Ronan Deazley (eds)

This section is an edited record of discussion prompted by a presentation of Copyright at Common Law in 1774 by Tomás Gómez-Arostegui at CREATe, Glasgow, in March 2015. This includes comments made in a question and answer session immediately following the presentation, in addition to the more general debate chaired by Hector MacQueen, following responses to Gómez-Arostegui's work by panellists Howard Abrams, Lionel Bently, Oren Bracha, Mark Rose and Charlotte Waelde.

Martin Kretschmer, Glasgow University:

Were there any signs in the market after the decision as to whether a common law copyright persisted or not, for example, the nature of damages, the nature of remedies?

Tomás Gómez-Arostegui:

Yes there were signs. Of course after the decision, even if one interpreted it as recognising or at least indirectly endorsing a common law right, the decision would then also be read to say that the right was taken away. So going forward everyone knew that the copyrights that they held had either already expired or would expire after the statutory term. So the reaction of the market was to actually seek a new statute, which was sought by the booksellers of London in particular; it ended up being a request for 14 additional years but when they first asked for it they did not say how long they wanted. So that was one market reaction.

Martin Kretschmer:

I assume that over time a particular view of the persistence of a common law copyright would resurface?

Tomás Gómez-Arostegui:

If you look at the late 18th century there were a few more cases that touched on the common law right. One of them concerns remedies. So, for example, can you get, after the Statute of Anne, a common law ordinary damages remedy; the Statute of Anne just had penalties and forfeitures, it did not provide for the usual common law remedy of ordinary damages. There was a decision from the King's Bench that ultimately said 'yes, you can get common law damages' (*Beckford* v *Hood* (1798) 7 D&E 620). That decision did discuss *Donaldson*; Chief

Justice Kenyon basically adopted the conventional view that the law had settled now, that there previously had been a common law copyright but that the Statute of Anne had taken away some of those rights. Ultimately, though, they found that the statutory remedies (penalties and forfeitures) were actually inadequate (which seems a little bit weird given that the booksellers had specifically requested penalties in 1710; but the judges did offer some reasons to explain themselves) and so that is one of the reasons they allowed a common law damages remedy. Now, Ronan Deazley in his book (*Rethinking Copyright: History, Theory, Language*, Elgar Publishing, 2006), spends a lot more time than I do in my article expressly getting into developments that occurred after the year 1800; there were lots of cases that were reported dealing with various forms of copyright and there were lots of treatises on copyright that were written. At least the treatise writers, according to Ronan Deazley, adopted the view that there was a common law right. As far as I recall, no treatise author was saying that it was absolutely authoritative, and many of you in this room probably know that in 1854 the House of Lords revisited this issue and basically said there is no common law copyright (*Jeffreys v Boosey* (1854) 4 HLC 815). But that is many years past the window that I am focusing on, which is what the state of English law was in the late 18th century.

Lionel Bently, Cambridge University:

Thank you, Tomás, for a brilliant paper. My question is prompted by us being in Scotland. I wondered whether you had any thoughts about whether the House of Lords decision could be read as saying anything about common law copyright in Scotland, given that *Hinton v Donaldson* ((1773) Mor. 8307) had decided there was no common law copyright in Scotland just in 1773?

Tomás Gómez-Arostegui:

That is a question that I asked Hector MacQueen back in August, because I wondered the same thing. I do not want to misrepresent Hector's position, but my recollection was that he said, and I agreed, that it would not affect Scots law. So if the House of Lords had actually affirmed the Court of Chancery in *Donaldson v Becket* and therefore recognised that there was a perpetual common law right in England, that ruling would not have reversed or overturned *Hinton v Donaldson*. It would require a case being appealed, another case later, from Scotland to the House of Lords, in order for that Scots common law to effectively be overturned. Statutory law differs; the statutory interpretation from a case appealed to the House of Lords from England would apply equally in England and Scotland, but in terms of

Scots common law we would have to wait for a decision to come up from the Court of Session to the House.

Lionel Bently, Cambridge University:

Given what had gone before, the House of Lords might well have been conscious that their decision would be read as both a ruling on the relationship of the Statute of Anne to Scottish common law, as well to English common law. The narrow holding that the Statute of Anne pre-empted whatever rights might have existed at 'common law' can thus be seen as one that judiciously avoided ruling that English and Scottish common law had been very different.

Hector MacQueen, Edinburgh University:

Thanks very much Tomás. A very interesting paper and I think the thing that I particularly welcome in it is the clarifications about procedure, which I think is very important; we are looking at things in a different world from the one in which we inhabit now. The thing that I want to ask today is whether this investigation – this in depth investigation of procedure in the Lords – is something that can also be applied to other aspects of this whole question. I have a sense that the literature has not really explored the common law/equity divide in English law at this time and, in particular, it has not been clear exactly what we mean, and what may have been meant in the past, by the phrase 'common law copyright' especially given that it was in equity that this common law copyright was first, in some sense, recognised, and therefore it was not really common law at all. The really significant thing about *Millar v Taylor* as far as I can see from my north of the border position, where we do not divide common law and equity in this sort of way, is that that was the case where the common law came in and said 'yes, there is a right here', though there was a lot of divided opinion. It is not just a matter of equity putting straight a few things that are slightly wrong as a result of this statute; there is actually a definitive common law right which is capable of protection, not only by the equitable remedies of injunction and so on, but also by the common law remedy of damages if that is appropriate. And what I am really trying to get at here is, what exactly is the underlying notion of the relationship of common law to equity and vice versa and how does it apply in this particular context? It struck me when I was doing my research on *Hinton v Donaldson* that the notion of common law and equity in Scotland was vital to understanding what was happening in the decision of the Scottish judges. That is why I also take the view that you expressed perfectly accurately a few minutes ago, that I do not think the decision in *Donaldson v. Becket* would have been seen as decisive on any

common law question; it would have been seen as decisive only on a Statute of Anne question because the Statute of Anne was a statute as applicable in Scotland as it was in England. The common law on which the Statute sat were different common laws, with a different notion of equity in Scotland as somehow imbued in the law rather than as something separate from the law.

Tomás Gómez-Arostegui:

The common law/equity divide played a central role in *Millar v Taylor*. So for those of you who are not familiar with the background, after the Statute of Anne was enacted in 1710, there came a point starting about 1731 where a number of lawsuits were being filed for copyright infringement in the Court of Chancery. Of course, the Court of Chancery is a court of equity. So the very earliest cases that were based on a common law copyright were brought in the Court of Chancery, and the Court of Chancery granted interlocutory injunctions on those very early on. Fast-forward to *Millar v Taylor* in 1769, one of the questions that the judges argued about, and were very divided about, is what worth should we assign to those decisions in equity? Are they conclusive of the common law? Are they potentially probative or are they completely irrelevant? The same issue arose in *Donaldson v Becket*. All the judges who are reported to have spoken on the issue in both cases recognised that these equity decisions could be probative in some form, but disagreed on their weight. It is interesting because the judges disagreed on the standard required for granting one of those injunctions. Some of the judges said that when the Chancellors granted those interlocutory injunctions back in the 1730s, they were doing it only because they thought that there was a reasonable pretence of title. So that was inconclusive; not a ton of weight to be given to the Chancery decisions. Other judges in *Millar v Taylor* and *Donaldson v Becket* had a different view of the standard under which the Court of Chancery grants these injunctions; Chancellors only grant injunctions when the title, the right, is indisputable or clear. So clearly if these judges, the Chancellors, had been granting injunctions back then, it was because they thought that there really *was* a common law right. So they go back and forth on this. Consequently, some judges, in *Millar v Taylor* and *Donaldson v Becket*, rely on those earlier Chancery decisions and other judges do not. One of the judges in *Millar v Taylor* (Justice Yates) also thought it strange to consult the prior decisions of the Court of Chancery when it was that court that had asked the King's Bench to inform it of the state of the common law. But this happened on a regular basis; it was not uncommon in the Court of King's Bench for counsel and even for judges to cite to decisions from the Court of Chancery when they were deciding

issues of common law. So there was this looking to the Court of Chancery, though it was not binding in any way, shape or form; it was something that they could consider. And, of course, that practice continued after *Millar v Taylor* and *Donaldson v Becket*.

Barbara Lauriat, King's College London:

I was wondering if through your research you had any speculation as to what Lord Mansfield was actually thinking when he refrained from voting in *Donaldson*?

Tomás Gómez-Arostegui:

I do not know. Right now I am inclined to agree with Mark Rose. Chief Justice Mansfield at the Court of King's Bench had presided over *Millar v Taylor* and so he was very much a proponent of a common law copyright that persisted after the Statute of Anne. When the case in *Donaldson v Becket* arose, there were 12 judges who would have been available to assist the House of Lords but only 11 judges participated at the hearing. The one judge who did not was Chief Justice Mansfield. So even though he, of course, could participate as a judge (still being the Chief Justice of the King's Bench) and he was also a Lord, he did not participate at all at the hearing. So there is this big mystery why he did not speak up. Now his views were already known because of his judgment in *Millar v Taylor*, so we can only speculate. As Mark pointed out in his book (*Authors and Owners: The Invention of Copyright*, HUP, 1993), there was some prior bad blood between Lord Mansfield and Lord Camden; essentially a nemesis relationship. Additionally, and one of the things I discovered in doing some of the archival research, which I did not know about before, was the fact that Lord Mansfield had effectively overruled Lord Camden in *Millar v Taylor*. Scholars have thought for a long time that some other Lord Chancellor handled all the proceedings in *Millar v Taylor*, but actually what happened is that Lord Camden did handle some of the proceedings in that case, including most crucially the decision to dissolve the injunction in *Millar* while the case was sent to the King's Bench. Thus, there was, I think, some additional bad blood, or tension between the two. I have seen lots of correspondence, most of it manuscript, where people talk about the fact that Lord Mansfield did not say anything at all. And the booksellers of London of course were incredibly upset because he had supported their cause in *Millar v Taylor*. They could not believe that he chose not to respond to Lord Camden in *Donaldson v Becket*.

Oren Bracha, University of Texas:

What do you think that *Donaldson v Becket* and indeed *Millar v Taylor* also tell us, if at all, about the question of whether there really was common law copyright prior to 1710 as a live practice, as opposed to the question of whether there was an invented tradition of common law copyright that came into life by the end of the 17th century and the beginning of the 18th century?

Tomás Gómez-Arostegui:

That is a great question. I will give a bit of background for the audience. When the judges in *Millar v Taylor* and *Donaldson v Becket* who supported an antecedent common law right, reached that conclusion, they did so without relying really on that many cases from before 1710. They cited some pre-1710 cases, relating to printing patents, and they relied on some of those, but they said numerous times that there were no other cases that had been filed before 1710 either at law or in equity; so it is true, when you look at the two decisions and what they had to work with in terms of the precedent they knew about, that they appear to be making it up. Now, it is what it is; they are saying that there is a common law copyright and there always was a common law copyright but when you look at it in terms of precedent they cite from before 1710 it appears there is not a lot there. Now, I actually agree with some of the things that the judges said about the value of the printing-patent cases (because I have seen additional manuscript reports of those patent cases) but it certainly looks like on its face, from what the judges cited in the reports of *Millar* and *Donaldson*, that it was more of an invented tradition than one that was actually supported by the cases before 1710. That having been said, I should add that I am working on another paper called *Copyright at Common Law before 1710*. It turns out that there are other pre-1710 cases that the judges did not know about. They are mostly in equity though. There are over 20 and they were filed during the various statutory interregna, or gaps, when there was no statutory support for copyright. So if you have a lawsuit that was filed during one of those gaps, it is going to have to be based on something other than a statute, including a common law copyright. It might be based on something else, for example, a by-law of the Company of Stationers or the custom of the City of London, but as it turns out, during the penultimate gap (1679 to 1685) and the last gap (1695 to 1710) prior to the passage of the Statute of Anne, booksellers were sometimes filing lawsuits and getting interlocutory injunctions in the Court of Chancery based on a common law copyright. Now, again to consider Hector MacQueen's point about the common law;

were the plaintiffs sometimes saying in their Chancery lawsuits that their claim was something that would be recognised in the common law courts? The answer to that would be 'yes'. The reason we can say 'yes' is because when they are filing some of these lawsuits they are saying 'I want an injunction now, here in Chancery, and I want some discovery because I am going to the King's Bench tomorrow to get my damages'; so litigants want a common law remedy at common law. So it is brought in Chancery for the equitable relief but it is based on a common law right. I also found a case in the Court of King's Bench plea rolls, filed during the statutory interregna, based on a common law copyright. It did not go to a judgment. Finding those cases at common law is very hard; it takes forever.

Mark Rose, University of California, Santa Barbara:

I believe that it was standard practice among the Stationers' Company booksellers in the 17th century, to collect conveyances from authors for their manuscripts, their books. Then those conveyances got used within the company as, in effect, title. Does that have anything to suggest about the existence of a presumption of something like a common law copyright or not?

Tomás Gómez-Arostegui:

It is an arguable point. Certainly you are correct. You have booksellers, and let us focus on the statutory interregna, that are acting as if they have a perpetual property right in their works. Whether it is based on the common law or the custom of the City of London, who knows, but they certainly are acting like that. Maybe they were mistaken, maybe they were just hopeful. That was one of the points that I think the judges addressed in *Millar v Taylor* is that people had been acting in the trade as if there was a perpetual copyright and so that adds some legitimacy to the argument that there had always been a right at common law or at least for some time. Of course there are problems with that argument. Not every argument was perfect on either side of the debate; you could poke holes on both sides.

Jose Bellido, University of Kent:

I commend Tomás on his work. It is amazing and it tells us a lot how legal history could be made and about the archives, the way in which there is so much to be said about events we thought that were already settled. My comment is that, in English legal history, there is an article called *Why the History of English Law has not been Written* (a lecture by Maitland delivered in 1888) and I think this appreciates the different sensibilities that historians and

legal scholars have: the logic of evidence and the logic of authority. I think in some of the responses, it was quite evident that some of the two different logics were compromised at some point. Lawyers are interested in authority and historians are interested in historical evidence; history and law are at odds in that sense.

My question is whether Tomás could reflect a little bit more on the transformation from records and law reports. I think something going on that is hidden in Tomás' paper is the emergence of law reporting as such. I think the way in which we receive law has changed; before, the law was recorded, then it became reported. The decision in *Donaldson v Becket* makes us appreciate that difference of transmission of law to us. So, my question is if Tomás could elaborate a little bit more on the procedural aspect: how law reporting has changed and to what extent that also appears in your argument. Thank you.

Tomás Gómez-Arostegui:

So José, your question relates to the emergence of law reporting and how the manner in which we receive the law changed over time. It did change, absolutely. I think one of the courts that was affected the most was the House of Lords because of the prohibitions on reporting its decisions that existed for so long there, and we did not, until 1814, start to get regular reporting at least of what the speeches were. The reports that existed before were essentially just reprints of the printed cases (i.e. the parties' briefs). They did not directly say anything at all about the reasoning behind a decision. So I think that fundamentally changed how that court was understood. Other courts, of course, had their own issues relating to law reporting. I cannot tell you how many times I have seen judges in copyright cases revisiting the exact same issue not knowing about a prior unreported case. On one issue, I think, I saw it happen three or four times, the exact same issue, and oftentimes they just do not know about a prior case that already decided it. So absolutely things got better, it really started, probably more in the mid-18th century certainly with some courts, like the Court of Chancery, King's Bench, and Common Pleas; the Exchequer took a bit longer. It changed a lot and naturally it plays a large part in the House of Lords and a large part in my argument because it affects how people understood and perceived decisions from the House.

Stefan van Gompel, University of Amsterdam:

What was the nature of common law copyright? I am from the European continent and for us common law copyright is not as such known. What is the nature of this right? Is it based on

custom? Is it based on tacit agreements between publishers? Is it more than that? Is it actually a law that is acknowledged by the courts on the basis of what might actually be customary law or based on agreements between the publishers? This ties in with the question that Mark Rose raised. He referred to the agreements between the London stationers, who of course had agreements that they respected each other's copyright, whatever that might be.

Tomás Gómez-Arostegui:

Stef, on your question about what was the nature of the common law right, what constituted the common law in the 18th century? I think the answer to the question is that it depends on who you ask. It is similar to asking a Justice of the US Supreme Court today, how does one interpret the Constitution? Well if you go down to one Justice's chambers he will tell you X and you go down to another one she will tell you Y. And it was the same thing in the King's Bench and in other courts as well. In fact *Millar v Taylor* is often cited as one of the key cases where that debate occurred because on the one hand you had Justice Mansfield and a number of other judges saying 'look, we can create common law' at least in part from reasons of policy and justice and natural rights. The judges on the other side like Justice Yates who dissented in *Millar v Taylor* and some of the Lords and judges in *Donaldson v Becket* who were against a common law copyright, they invoked a different theory of common law: it must be an immemorial custom. It has to be basically something that goes back to 1189, and they said 'you cannot prove that'. I will not go into the details of that, it is a little bit complicated, but in short the answer is it really depends, people had different ideas about what constituted the common law.

Hector MacQueen, University of Edinburgh:

I will just throw in an additional observation: the question that was raised by Lionel first, about the House of Lords as a court of appeal in Scotland, which happened after the Anglo-Scottish Union of 1707. That just happened; it did not develop as part of a master plan, although it may have been a covert one. There were actually far more Scottish appeals to the House of Lords by the middle of the 18th century than there were from the English courts, but there were never any reports of these Scottish appeals until the beginning of the 19th century. This ties in with a comment made earlier: the House of Lords is not there to be reported. The thought I have had relates to that: the notion of the peers as a whole as a sort of jury, guilty or not guilty, reversed or not reversed. This is possibly quite an important notion because it is quite clear, again from a Scottish background, the decision in *Donaldson v. Becket* was very

popular with the people, the plebs out there, at least in Edinburgh and I think also in Glasgow. I know certainly in Edinburgh, bonfires were being lit, fireworks let off, people marching, cheering through the streets and so on. So it was a very popular decision and one cannot help but wonder whether the peers, the lay peers as the jury of the nation, as it were, were aware that the judges were at odds really on the substantive legal point, and thought, well, actually we are free to decide this, as lay persons; it is for us to decide whether or not this decree should be reversed and we want there to be a greater circulation of books, which is what reversing this decree will entail. It is important to remember the battle was between booksellers. It was not some author, somewhere, maintaining copyright. It was the booksellers who were fighting amongst themselves; some wanted greater freedom, others did not, and it was the ones who wanted the greater freedom who succeeded.

I think the question too about custom or tacit agreement and so on, is very interesting. From conversations with some of the book historians present, I understand of course that there was a lot going on that perhaps did not have any particular tacit or explicit support from the law because it just simply did not come before the law. People got on with their business and it is a little bit like some of the things that happen in the City of London today. There are all sorts of instruments and so on which are used, and lots and lots of money hangs on them, and then suddenly the legal basis is tested for the first time in court and either it is upheld, in which case everyone cheers, at least in the City, or alternatively it is declared to be null and void and to have no meaning at all. A famous example in the 1990s was the swaps arrangements: the House of Lords decided in its wisdom that they were void (*Hazell v Hammersmith and Fulham Borough Council* [1992] 2 AC 1) and there ensued 10 years of exciting litigation on the consequences of all of that in the courts and the lawyers, as ever, were doing quite well. But the point really is there were these financial transactions, which had been going on for 20 or 30 years with no legal basis at all, as it turned out, and I think to a certain extent some of the things that were going on before 1774 in the book publishing world might be explicable on that footing. The contest was to see whether that freedom could carry on or not. The book historians may want to drop in a few thoughts on that.

Giles Bergel, Oxford University:

I am a book historian. I am interested in *Donaldson v Becket* because I am interested in how the market for books was made, not just by *Donaldson v Becket* but also its pre-history: legislation, decisions, practices within the trade, patents and privileges. There is a lot that

could be said about the behaviour of economic actors in the marketplace, how they respond to what their peers are doing, as well as how they respond to what the law says. I am just about to embark on an archival project on the market for copyright before and after *Donaldson v Becket* for which vast amounts of archival material survives. It is really very inspiring to hear the work Tomás has been doing in the archives. My own interest in getting hold of that evidence is to find out who published what books, what were the profitable genres, how the trade responded to these decisions. I am also wondering if the work that we book historians do might be of some help in this debate. Tomás points to the normative relevance of copyright history. Maybe there is a law and economics case to be made by looking at how the market for copyrights developed. By the way, the book trade continued to buy and sell works of Shakespeare, long established works, well into the late 18th and early 19th century. This is insufficiently understood and even known, even by book historians. I think there is a case for thinking that, not just what the law said made the market – that *Donaldson v Becket* decided the structure of the market – but I am also wondering, as Martin Kretschmer alluded to in his question, whether we can maybe get at the meaning of *Donaldson v Becket* by looking at what the market did. It is a way of almost polling the historical wisdom of the crowds: did the trade change its behaviour in any way? I would like to ask Tomás, as a legal scholar, whether he thinks our archival work might be of use in this debate? I cannot believe it cannot be. As Lionel Bently said, the material is just so rich. This debate is just so rich, and the quality of this engagement between disciplines and between scholars of different periods is just so interesting, so I cannot believe it is not relevant to the present, including policy.

Tomás Gómez-Arostegui:

Giles, absolutely, I would be fascinated to see how the book trade reacted, in terms of market practices and prices. That is to say, what they were doing before *Donaldson v Becket* and what they were doing after. I think the studies before would be most interesting because after *Donaldson v Becket* was decided the booksellers went to Parliament and said 'give us more time; the House of Lords has now decided that copyright is not perpetual, can we have another 14 years.' The reason they said that was because at least in the years between 1769 and 1774 everyone had been running around and buying copyrights on the basis that they were perpetual, so they were either buying copyrights that were really old, Shakespeare, which clearly had expired or they were buying copyrights in works that still were under statutory copyright but at prices that presumed that they would last forever. Is that true?

What were they actually paying between 1769 and 1774? I am sure you are already aware of this issue; there is a lot of literature, many tracts which were submitted as cases or evidence in the House of Commons and in the House of Lords where they tried to make that case and they talk about the prices that they paid and things like that. The reaction afterward: I do not think it would speak so much to what *Donaldson* actually held but nevertheless obviously I think it is still important, particularly as to the perception of the state of the law after *Donaldson*. You noted that they were continuing to operate an honorary perpetual copyright system for those really old copyrights, so I am not sure exactly what we could take from that in terms of the legal doctrine but absolutely that would be fascinating to read.

Oren Bracha, University of Texas:

All of this is incredibly interesting. I will make two quick comments. One of them is actually about the big question: common law and history. I will just make a quick plug for a recent work by my colleague, David Rabban, which is a book called *Law's History* (CUP, 2014), which basically says that the late 19th and early 20th century was actually a period of a turn to history in the law. It is about those big questions: what is the relationship between law and history? Is there necessarily a tension or can you use history within law and law within history, etc.? Certainly in the transatlantic culture, Britain and the United States, there was a turn to historical thinking about the law at that time. Maitland and Holmes are part of that trend. So how to think about history in the law is itself is a historical question. So, along those lines, to respond to Stefan van Gompel quickly, about the question of what is the common law anyway, I think the answer to that is historical. The meaning has changed. I am not going to give you the entire story, the whole century-long story. The short answer, I think, is that within the changing historical context, there were probably two elements within which you see different interplay and the mix changes. The two elements are basically, first, the common law as a natural or higher law. What is the common law? It is a reflection of some natural precepts of reason; the common law is found, not made. That is higher law thinking. Then, secondly, an understanding of the common law that is a positivist understanding. What is the common law? It is like any other law except that it is made by judges. Those two elements were mixed together throughout the centuries in different ways. As I said, in the 18th century, and to some extent early 19th century, the higher law element is pretty dominant. In modern thinking most of us tend to think about the common law in more positivist terms. What is custom? Again custom was an element of the mix all along. At some point in the 19th century, custom was being used as a means of trying to basically

reduce the dissonance, reduce the tension, perhaps obscure it. What is it? Between higher law and positivist law, custom was a sort of mediation means. Certainly in the United States, I think also in Britain as well, it was a way of *not* answering the question because custom allowed you to obscure it. It is not exactly that judges are making the law. There is a source out there but you really can see it is not the precepts of reason. Custom was somewhere in between. At least in the US, towards the end of the 19th century, that collapses and there is a shift to a positivist conception of the common law. But the answer to what it is, or what it was, is historical again.

Howard Abrams, University of Detroit Mercy:

To add a little footnote to what Oren said and I thoroughly agree with. One of the things that is constantly preached to us was that the role of the lawyer to advise clients means that it is good to have certainty when you need a definitive answer. The reason why you respect precedent, that is, what was done before, is to give transactions predictability. Pushing legal positivist views a few steps further into what has come to be called legal realism explains is why we respect precedent, i.e., a judge made decision on a point of law that may be quite old is to be continued, unless there are compelling reasons to change. In this view, predictability is a very good thing.

Barbara Lauriat, King's College London:

Following on from the last two comments, I was just thinking about the question we are asking today, what is the point of copyright history? I might rephrase it as what is the significance of copyright history? Actually in the discussions it seems that we are thinking about three different questions: what is the significance of copyright history?, what *should be* the significance of copyright history?, and then also as historians we are quite interested in the issue of what *was* the significance of copyright history? The fact remains that even if we decide that the outcome of *Donaldson v Becket* should have no significance now, or it does have no significance now, it *did* have significance, it *has had* significance, and the fact that we are still talking about it today demonstrates that it has had significance. It is worth separating these questions, even if we do ultimately come to the conclusion that actually we should not be giving too much weight to the result of *Donaldson*.

Isabella Alexander, University of Technology, Sydney:

My first reaction to the way that Tomas framed his article, by focussing on the detailed legal procedures and doctrinal issues in play, is that we should be grateful to him because now that he has done that, the rest of us are free to focus on the other things about the case! It is really important to know how the procedures and the processes and all of that background ended up influencing what people said, when they said it and why they said it. So now, while the debate might go on between Tomás and Howard Abrams, perhaps the rest of us can draw a line under it.

Howard Abrams, University of Detroit Mercy:

Regarding the argument that Tomás is making, I am not, at this point, at all disputing that the documents he refers to said X or did not say X. That is not in dispute. I think one of the things that is missing is the linchpin of the argument that the common law right was sustained notwithstanding the reversal of the decree, is this notion (and absolutely conceding for purposes of argument he was right about Justice Nares, that there was a 6 to 5 vote in favour of the Statute of Anne and displacing/pre-empting/ abrogating/impeaching/whatever term you care to use, the common law) that a correctly compiled 6 to 5 vote breaks down the six judge majority who voted against the claim of a perpetual common law copyright into three judges who believed the claimed right was "impeached" the Statute of Anne and three of whom believed the common law never existed while the other five judges believed the claimed right survived the Statutes of Anne. You go back to his 'no' count on the first question, which shows at least three judges said it never existed, so presumably those three judges got to that final question and said, if it did exist, then it would have been pre-empted. I find it hard to read much more into their statements than this. More importantly, this has to be taken into account if we are looking at what was the state of the law in 1774 and we are relying on the judges' opinion rather than the statements of the Lords, then the fact that the judges were less than unanimous, even on the a priori existence of a common law right, shows that the question at least to the judges in 1774 was an open issue and that the 6 to 5 majority on 'did the Statute of Anne in effect get rid of the common law right after the end of the statutory period' has to be taken with that in mind; that maybe at least half of those judges were really of the opinion it did not exist and when they said the statute pre-empted it, they were in their minds at least answering a hypothetical. So I think this is a problem that has to be addressed somewhere in the dialogue.

Isabella Alexander, University of Technology, Sydney:

What I think is interesting about the case, which goes back to the point about the framing of it, which I think other people have touched on as well, is what it tells the broader legal history community about how the common law is made and developed. Sometimes copyright historians get ghetto-ised in the legal history community, but you could flip this work around and say here is a case study of the common law in action: so, Oren's point about what is said when people go to see a lawyer, the book historians' point of how are booksellers dealing with it, and how do all these things form together to make the law? And it is a live issue today: we see it with things like swaps or format rights, so people are trading in them, dealing with them as though there is a property right. Kathy Bowrey and Michael Handler have done work on this, and that is something that property theorists are interested in; how property rights get made and how the common law works. So I think you can flip this around and frame it in another way which has contemporary relevance.

Hector MacQueen, University of Edinburgh:

I think, on that point, what Oren said is very important. The common law is not, at least in some perceptions, at the relevant time, just a matter of what the judges of the common law of England said it was or even the jurists: it was something above and beyond, something that you looked for. Otherwise how can you explain how the judges identify it in the first place? So these are interesting questions that tie into continental thinking at an earlier period; that is, in 1774, we are still at pre-codification on the Continent. Where did the law of the various jurisdictions in the European continent come from before codification? There are interesting questions there, which I think have never really been fully addressed and it is a mixture of ideas of natural law, custom and all the rest of it, which it seems to me at least, does at least raise interesting issues about English exceptionalism. US exceptionalism was mentioned, and maybe there is something to be discussed there as well, but the critical point is that there is some sort of common European understanding of what is law in the first place, which is something that applies equally in England as elsewhere.

Oren Bracha, University of Texas:

A very quick sentence about the history of the significance of the history of common law copyright; as you might have guessed what I want to do is to historicise that. So there is an absolutely fascinating story there. I think you can see the trajectory, both in Britain and the

United States; it is pretty similar although the United States has ended up somewhat differently. You can just pinpoint the process of how this history goes from being a live issue, that no doubt has very strong ideological aspects, but it is alive in real cases about real issues and in the early treatises in the chapters about real copyright law. Then it goes to being completely ideological in the sense that you find it in the prefaces and starting big chapters in the treatises. It is all about ideology there. Then, to being a footnote; at some point it drops to being a footnote. You can really sketch the history of the history.

Howard Abrams, University of Detroit Mercy:

Footnotes in the sands of time.

Hector MacQueen, University of Edinburgh:

Mark, would you like to say anything about this, coming at it as a literary scholar?

Mark Rose, University of California, Santa Barbara:

I agree with Oren. From my point of view, everything comes back to history. 'What is the point of copyright history?' was, I think, the title for this session. I was a little fearful, in some way, that it might turn pragmatic; the purpose of history being to bolster one point of view or another point of view on concrete issues today. From my point of view, the purpose of history is the advancement of knowledge or advancement of understanding. It is much deeper. It has its own validation in it. We can understand better and that understanding is itself a historical process that goes on and changes. I want to resist simple utilitarian uses of copyright history and all other kinds of history.

Hector MacQueen, Edinburgh University:

But you would not object to utilitarian use of history, would you? In the sense that people want to use history for a particular purpose, that is an entirely legitimate thing for them to do?

Mark Rose, University of California, Santa Barbara:

You cannot escape that, yes. But I still want to resist such uses. This comes from being a humanist, a literary scholar and historian in the university today, where I see the university, and the kind of stuff that I do, under pressure to be more utilitarian, to be more concretely results based, to have 'impact,' and that feels to me to be a great impoverishment and I resist it. So on a micro-level, I resist it for copyright history too. Copyright history has its own

justification like any history has it is own justification; what the results will be, you just do not know.

Mira Sundara Rajan, University of Glasgow:

I have a question about the natural rights or natural law aspect in all of this. I am a Professor of Intellectual Property Law here at CREATe Glasgow and I have done some work on the moral rights of authors and artists. I was very interested when I turned to *Millar v Taylor* and found that Lord Mansfield, in a large paragraph, describes something that looks very much like what is protected as moral rights of authors today in many jurisdictions of the world, including my home jurisdiction of Canada. I am wondering if this debate about the common law relationship between the common law and natural rights has relevance for moral rights. I will give you one example. Oren, you talked about perpetual property rights. What about the possibility of perpetual protection for non-property interests? In fact perpetual moral rights is recognised in the law of a number of countries today, including France and India. What is interesting about those two examples is that, in France, about three years ago there was a case where the notion of perpetual moral rights was re-examined and the judges actually did something very unusual in French law: they got into a balancing exercise, where they looked at the possibility that maybe even perpetual rights would be limited in practice, because a lot of time has gone by, which to me sounds like, in reality, those rights are not perpetually protected any more (*Société Plon c Hugo, Cour de cass. 2007*). On the other hand you have India, which just in its most recent round of copyright reform re-introduced the possibility of perpetual moral rights (in particular, in relation to the moral right of integrity). Indian law had them originally – very strange again, in a way for a common law jurisdiction – and then they got rid of them, and then brought them back. I cannot resist asking what your thoughts might be about this non-property element of natural rights in the common law.

Oren Bracha, University of Texas:

Can you say something about the paragraph by Mansfield you mentioned?

Mira Sundara Rajan, University of Glasgow:

It is a paragraph where he talks about the nature of the interests of authors in their work, and he says that an author would want to be named, that he would want to be able to prevent the distortion or destruction of his ideas, that he might want to withdraw opinions that he had expressed, of which he had been ashamed. I am sure there must be people in this room who

can quote actual parts of this paragraph, but it just reads like a classic statement of the rights of attribution, integrity and, potentially even, withdrawal.

Martin Kretschmer, University of Glasgow:

I have got it in front of me: 'because it is just, that an author should reap the pecuniary profits of his own ingenuity and labour. It is just, that another should not use his name, without his consent. It is fit that he should judge when to publish, or whether he ever will publish. It is fit he should not only choose the time, but the manner of publication; how many; what volume; what print. It is fit, he should choose to whose care he will trust the accuracy and correctness of the impression; in whose honesty he will confide, not to foist in additions: with other reasonings of the same effect …' (*Millar v Taylor* (1769) 98 E.R. 201, 252).

Mark Rose, University of California, Santa Barbara:

That is exactly it. A footnote to that passage: Mansfield was Alexander Pope's attorney; his personal attorney, some 30 to 35 years before making that statement. He is echoing a statement that Pope made in the introduction to a collection of his letters and there are word for word type echoes there. He is remembering it. Pope was to him a semi-god and he was incredibly impressed that he, William Murray, was a friend and was being patronised by the great Alexander Pope. It comes from an author there. So, it certainly is a mingling of something like a personal right, and that is what Pope v Curl ((1741) 2 Atk. 342) is all about in a way. It completely conflates the issues of the property rights and the personality rights/the personal rights.

Mira Sundara Rajan, University of Glasgow:

So in a way it is even more unusual than I thought because it is the expression of an author's advocacy point of view in a major copyright case, of which we seem to have very few.

Tomás Gómez-Arostegui:

Mira, you asked about Lord Mansfield in *Millar v Taylor* and the suggestion that perhaps he was recognising a form of moral right. If you read Lyman Ray Patterson's book (*Copyright in Historical Perspective*, Vanderbilt University Press, 1968), I think that is basically the argument that he makes; that there is a moral rights component in *Millar v Taylor* that people have not looked at that closely. Simon Stern has written an article, 'From Author's Right to

Property Right,' in the *University of Toronto Law Journal* (Vol. 62, 2012, 29-91) and he traces some of the more dignitary rights that were being argued around that time.

Martin Kretschmer, University of Glasgow:

I have a thought in relation to Mira's: what is the nature of the common law and is it necessary that it takes a proprietary shape? Ian [Gadd], you have done some work on the 17th century, and you claim, I think, that a transaction is always involved in some way. It seems to me that it does not necessarily have to be the case. If you look at Kant's essay *On the Injustice of Reprinting Books* from 1785, he rejects the property approach, I assume, because of its Roman law implications (requiring 'possession' that authors cannot exercise over their published works) and he builds his account instead on the premise – usual in business – that you cannot trade in somebody else's name. So that is the customary norm into which he locates his argument. Therefore we do not need a statute. That is the norm we use and concede what the author does: the trade of the author is speaking to the public. Using this general business norm, the author can then contract: he is entitled to authorise somebody else to speak in his/her name. So that is the construction, and I think that seems to be relevant to debate here. We do not need to see the world through the lens we have been offered. There are other lenses available and it would be interesting to see also how *Donaldson* may have influenced what Kant wrote; I think that is quite possible.

Friedemann Kawohl, Bournemouth University:

I might add a detail. I did some work on the original Primary Sources project, editing the German texts. There is, in the 1830s, the *historische Rechtsschule* (the lawyers who were arguing that lawyers should go to the sources of the law) and they were influential in the German tradition, and at the same time, the Hegelian school was also influential; and both groups of lawyers had views on copyright. These lawyers, who belonged to *historische Rechtsschule,* did a lot of work on early historical legal texts. They were by and large anti-republicans and anti-constitutionalist and they tried to derive the 'true law' from then tradition. We might say their legal theory was based on common law. When they gave their comment on the copyright statute, they were very restrictive and they thought that both authors and publishers should not have many rights. On the other hand, the lawyers among the Hegel scholars, who were republicans and constitutionalists, were struggling for strong rights for authors, modelled after the French laws.

Hector MacQueen, University of Edinburgh:

Charlotte, would you like to say anything? I was trying to persuade you of the benefits of history, so you could take it to your Unregistered Research Group (the UK Intellectual Property Office's Unregistered Rights Research Expert Advisory Group, UREAG).

Charlotte Waelde, University of Exeter:

I think the bit that has struck me has been the debate around impact, and your comments, Mark, about being pushed by various external forces to have some sort of relevance. It would be interesting to see how this plays out in giving some of these debates more potential, encouraging scholars to feed into policy processes. Lionel, I know you do not necessarily want to do that but whether external forces will push others towards doing this, I do not know, but I find it an interesting environment with the debates around history and historical enquiry and how, and the extent to which, it can be relevant to contemporary society.

Lionel Bently, University of Cambridge:

There are many forms of historical work that one can imagine having a potential 'impact'. If you combined an analysis of *Donaldson* with the data that Giles is going to compile, you would be able to attempt an analysis as to how behaviour changed from a time when publishers believed that they controlled a printing right in perpetuity and when they understood the term as limited (to a maximum of 28 years). You could examine how that change affected markets and incentives and payments to authors and so on. There is historical work of this type, perhaps best exemplified by New York Professor of Economic History, Petra Moser, that has real evidential importance for policy makers, not least because it examines the effects of legal changes on real, as opposed to theoretical, practices. While acknowledging, then, that doing history can have 'impact', what I think we should avoid is requiring work that enhances understanding of legal change into a model that makes it look as if it has policy relevance. Scholars such as Moser may do the work that draws out the policy implications, but they depend on work that offers accurate accounts of legal change.

Alison Brimelow:

I chair the Programme Advisory Board at CREATe and have run a couple of patent offices (formerly Chief Executive of the UK Patent Office and President of the European Patent Office). I thought I was going to have to come in more strongly on the doubts expressed.

Actually Lionel's last remark I strongly agree with. But what strikes me as a relatively recently retired policy-maker is that we are drifting. We talk about wanting evidence in policy but then we are drifting more and more to policy mantras and I do think it is very, very helpful for those who have ears to hear, to have available serious grounded research work to which they can refer to try and improve their understanding of long term context and what short term mantra based options might be helpful. It is not that out of the work that is done in CREATe or anywhere else you will get fantastic solutions to pressing political problems and see off assorted lobbyists forever, but the work will help to improve the general level of understanding and out of that may come one or two slightly better outcomes than might otherwise have been the case. So keep going is my view and just make sure that occasionally policy makers come to events like this.

Hector MacQueen, University of Edinburgh:

One of my favourite stories, which will probably only mean anything to those of a certain age and who have experience of UK politics, is the arrival in 1979, I think at whatever the Department of Trade and Industry was then called, of Sir Keith Joseph who, it was often said, was the ideologist behind Thatcherism. That may be a very unfair characterisation of Sir Keith Joseph but that is another story. The interesting thing about Sir Keith Joseph is that he was a serious intellectual and the first thing he did when he went into his department, I have been told, in 1979 was to insist that all his senior officials read Adam Smith's *Wealth of Nations*. I would also have liked it if he got them to read *The Theory of Moral Sentiments*, but that too is another story.

Tomás Gómez-Arostegui:

To respond to questions as to why this really matters: in the US for better or worse when it comes to doctrine we are actually citing *Donaldson v Becket*, it is in the cases, we are actually citing *Millar v Taylor*. Now it is not every day because the vast majority of the cases are decided on the statute – the Copyright Act of 1976 (as amended) – and by citing other federal court opinions, but when it comes to some big issues our US Supreme Court loves to go back in time. Again we could have a whole discussion whether they should do that. Personally I am not sure. My judicial philosophy is that judges ordinarily should not be making policy and so I need to find some other grounding for interpretation. So I like to go back and use the common law as a backdrop because that offers some constraint, but the thing that pulls me in the other direction is that oftentimes that is very hard to do properly. When you think about

lawyers who are not historians or have not spent any time actually doing any historical work, trying to actually read these old cases, even published cases, it is sometimes very difficult for them to understand; it can be very difficult for me to understand. So there are not a lot of resources for them, and even the Justices of the Supreme Court have gotten things wrong in other areas of the law.

In terms of the normative relevance, it is hard to tell. I mean, I do not know in the United States whether this is actually going to make a difference, these policy papers and so forth that people are submitting. I have been asked to write a policy paper based on this article to submit to members of Congress on the grounds that they are not going to read my article, but will they read a four page synopsis of my article? Sure. They will read something like that, or some member of their staff will, and through that osmosis maybe it ends up affecting a legislator. I do not know. There have been some interesting policy battles between lobbyists on things like this. I do not expect anyone here except for Oren and Howard to remember this, but in November 2012 the Republican Study Committee (a caucus of conservative members of the House of Representatives) issued a policy paper on the purposes and goals of copyright and they took the position that copyright was purely utilitarian and that there was no notion of an inherent authorial right. Some people freaked out, especially because this was coming from a more conservative leaning perspective, which traditionally believes strongly in property rights. And that policy paper was quickly withdrawn as having been issued without proper review. One month later came a policy paper written by the former Solicitor General of the United States and his law firm – on behalf of a conservative think tank (the Center for Individual Freedom) – which went the other way, towing a property basis. I don't believe that was a coincidence. In the end, is this actually going to affect what legislators do? I have no idea, but people do think it is important enough to spend money and spill ink on it.

Lastly, I should note that I do not state or argue in my article that my thesis necessarily would or should have any effect on current UK copyright law or policy. As Ronan Deazley and Elena Cooper correctly note in their Introduction, when it comes to contemporary relevance, my article speaks solely of the United States. So I do not doubt Charlotte's statement that when it comes to setting policy in the UK, the holding in *Donaldson v Becket*, or the state of the law in the late 18th century just after *Donaldson*, does not matter whatsoever.

APPENDIX

Documents referred to in Chapter 6 by Charlotte Waelde.

Research Expert Advisory Groups (Registered and Unregistered)

Terms of Reference

1. Purpose of the Expert Advisory Groups

1.1. The overarching purpose of the Research Expert Advisory Groups (REAGs) is to provide a forum for IPO and a broad range of representatives from industry, academia, Government and Non Governmental Organisations to peer review existing IPO commissioned research; to help in the development of new research specifications; to identify potential new research themes; and to champion the IPO's research programme where possible.

1.2. The REAGs will neither replace nor substitute for other mechanisms that the IPO employs for ensuring engagement with all stakeholders, including formal consultations, ad-hoc meetings, peer review events, social media (including blogs) and the publication of research.

1.3. The objectives of the REAGs are to provide a regular forum in which the IPO and representatives will:

1.3.1. provide independent peer review and commentary on research specifications, methodologies, and research at both interim and pre-publication. Their role is not to discuss policy;

1.3.2. share information about relevant existing and new evidence and research nationally and internationally; and

1.3.3. identify potential new research partners and opportunities for research collaboration.

2. Composition of panel

2.1. Members are selected based on their individual expertise in their respective IP field and their ability to provide constructive peer review both from an economic and legal perspective.

2.2. The REAGs are not lobby groups and the IPO retains the final decision over membership. Membership is for an initial period of two years and is not fixed, nor remunerated. The IPO can change or bring in new representatives depending upon the topic being discussed. The REAGs will last no longer than two years from the inaugural conference.

2.3. In the event that members are unable to attend a meeting they will be able to provide written comments in advance.

3. Ways of working

3.1. Each REAG is expected to meet a maximum of 4 times per year for up to 2 hours. Meeting dates will be dependent upon the timing of the IPO's research priorities.

3.2. The REAGs will be chaired by Roger Burt (Registered) and Charlotte Waelde (Unregistered). The chairs of the REAGs will liaise with each other and the IPO to ensure consistency between the research projects and to exploit synergy between the REAGs. All papers will be circulated to both REAGs for comment. The IPO will provide a secretariat.

3.3. A draft agenda will be circulated to the members approximately 10 working days before each meeting, with a call for additional agenda topics; the final agenda and any discussion papers will be issued 5 days before the meeting.

3.4. Members are encouraged to participate fully in discussion at the Group meetings, to provide their personal views and opinions, as well as to represent the views of all parts of the sector about which they have expertise. Members are requested not just to represent the views of the particular organisation to whom they are affiliated, and where they feel compelled to do so should inform the Group. This is without prejudice to member's rights to respond to a formal consultation or formal policy statement from the Government from the viewpoint of the organisation that they represent.

3.5. Members will be allowed to bid for IPO research projects, but will need to declare their membership of the REAG in advance of their bid. Bidders will then be excluded from any substantive discussions at REAG's on specifications and tenders.

4. Outcomes

4.1. The purpose of the REAGs is to advise the IPO as set out in sections 1.3.1–1.3.4. As with all research development, the IPO will consider information from a number of sources before making final recommendations to the authors in advance of publication. Whilst the IPO is fully committed to taking the advice of the REAGs, the final decisions on research specifications, methodologies, research reports and the research and evaluation programme rests exclusively with the IPO.

5. Transparency

5.1. The terms of reference of the REAGs and membership list will be available on request.

5.2. A minute of each REAG meeting will be taken by the secretariat and will be circulated to the members following the meeting. Minutes will be made available on request, and the IPO is content for partner organisations to share.

6. Review

6.1. All arrangements for the REAGs operation, including membership, will be reviewed within 2 years or earlier.

Intellectual Property Office (IPO) Research and Evaluation Priorities 2014/15

Enforcement and Infringement

Research into costs of infringement and use and proportionality of sanctions including:

• _An International Comparison of online copyright infringement;

• _Measuring Design Infringement;

• _The economic impact of Social Media – Opportunities and Threats ; and

• _An overall review of criminal sanctions available for copyright infringement.

Patent developments in emerging markets

Assess the impact of patent treatment, including exceptions and compulsory licensing, in emerging markets for the long term competitiveness of IP based industries in UK.

Trade Mark demand

A comparison of Trade Mark Fees structure building on work by the Office for Harmonization in the Internal Market (OHIM) and analysis of how fees affect demand for trademarks at national and OHIM levels.

Developing better understanding of why trade mark applications are increasing and forecasting future demand.

IP and Enterprise

To undertake a review / evaluation of existing Intellectual Property trading platforms, in support of IPO initiatives on IP enabled investment finance.

How Intellectual Property is integrated into current university courses. This will build on current research by the University Alliance and the Design Council looking at IP and university courses.

8 great technologies

How does the UK's Intellectual Property framework support:

• _the big data revolution and energy-efficient computing;

• _satellites and commercial applications of space;

• _robotics and autonomous systems;

• _life sciences, genomics and synthetic biology;

• _regenerative medicine;

• _agri-science;

• _advanced materials and nano-technology; and

• _energy and its storage.

Copyright Markets

Copyright Markets, how can the licensing of copyright material be improved and made more effective?

Evaluation

A full evaluation strategy is being developed for the introduction of the Hargreaves and other reforms. The strategy will set out the activities that will be undertaken in order to evaluate the policy and plan for Post Implementation Review, drawing on management information, as well as research commissioned in order to measure benefits.

RCUK Centre for Copyright and
New Business Models in the
Creative Economy

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