

CHAPTER I

MONOPOLY AND “PIRACY” OF BOOKS

The Edinburgh bookseller Alexander Donaldson operated a bookshop in London from around 1763 through 1788, in the first ten years with his brother John (1730?–1780?) as partner and later on, by himself. In the *Dictionary of the Printers and Booksellers Who Were at Work in England, Scotland and Ireland from 1726 to 1775* (hereafter, *Booksellers Dictionary*) his name was associated with “cheap reprints of books which were in his opinion out of copyright, disregarding the courtesy copyright observed between members of the trade.” His prices, he boasted, were 30 to 50 percent less than the longer-established London booksellers.¹

Today the book industry displays considerable division of labor, with production, printing, distribution, and retail sales taken care of by separate enterprises. In the eighteenth century, “booksellers” did everything, from working with authors in the planning of books, to their typesetting and printing, as well as their distribution and sales. Booksellers were, therefore, much more than the bookshops of today; they were the general producers of publishing culture.

There is no record of Alexander Donaldson’s childhood. His father James (1694?–1754) was a linen manufacturer who the record says became a citizen of Edinburgh on 25 March 1724 and who served as treasurer for the city 1726–1727. That is about all that is known about James, the elder. Alexander became a citizen of Edinburgh in 1750, the year he became a bookseller. He married a woman named Anna Marshal (?–1792) in 1751, with whom he had three sons. The younger two sons, Marshal and Andrew, both died of smallpox at age four.² His eldest son, who was named James after his grandfather, was born that same year. James later accompanied his father in the court battle over perpetual copyright and succeeded to the business after his father’s retirement.

The Donaldson bookshop in Edinburgh stood on the south side of the high street linking Edinburgh Castle and the Palace of Holyroodhouse. Nearby was the St. Giles’ Cathedral, which was the headquarters of the Scotland Presbyterian church. The Donaldson printing workshop was located in a place called West Bow, down the hill to the south of Edinburgh Castle. Alexander printed a newspaper called the *Edinburgh Advertiser* in West Bow, and that is also where his son James was born. Even today the

1 *Booksellers Dictionary*, pp. 77–78.

2 Skinner 1928, pp. 3–8.

area is called Donaldson's Close after these enterprising residents. Further down the hill from where the printing workshop stood is the Grassmarket Square, where in those days there was an execution ground. The Donaldsons worked, therefore, not far from the screams of the condemned and the bustle of the marketplace. Known to this day as a place where ghosts and specters appear, West Bow was the home of infamous Thomas Weir (1599–1670). Weir was a former army officer convicted of witchcraft and other nefarious acts who was condemned to be strangled and burned at the stake. An officer who moved into the former Weir house in the 1770s is said to have been so frightened by phantoms of Weir riding Satan's carriage that he moved out after one night.³ The place the Donaldsons called home and the center of their enterprise was this rather spooky corner of Edinburgh.

Virtually no record survives that might shed light on Alexander Donaldson's character or disposition. Based on the way he entered the legal fray against the London booksellers, he seems at least to have been a man of determination. He had a chivalrous side as well: he was unwilling to give in to the London booksellers, with their convenient interpretations of the law and their duplicity, boasting of defending the rights of authors while in actuality exploiting those rights for their own profit.

Donaldson appeared to be driven by the simple purpose of making useful books widely available at reasonable prices. Above all a businessman, he was serious about the court case precisely because there was profit to be had. His temperament reminds us of the well-known merchants of the Ōmi area (near Kyoto) famous in Japan's mercantile history. The Ōmi merchants were guided by the principles of "good in three directions" (*sanpō yoshi*), meaning "good for the seller" by affording a fair profit, "good for the buyer" with products that make customers happy, and "good for the world" by business that contributes to culture and society. By making the books in Edinburgh, where they could be produced cheaply, Donaldson could increase the profit margin, which was "good for the seller." The merits of his approach were further that books could be sold cheaply, which was "good for the buyer," and that, by allowing knowledge to spread widely, it was "good for the world" as well.

In Edinburgh, Donaldson could sell books for which the London booksellers held the copyright with impunity. The laws of England and Scotland were separate and the "Statute of Anne," which represented English copyright law, was not in effect in Scotland. The books that the Donaldsons sold in London were all those for which the periods of statutory protection had expired. They were not, in other words, breaking the law. Even at that time, Donaldson's books could not accurately have been called "pirate editions."

From 1751 to 1758, Donaldson had a tie-up with a well-known Edinburgh bookseller named Alexander Kincaid (1711–1777) and together they published mainly books

³ Buchan 2003, p. 344.

of philosophy and medicine by Scottish authors. Donaldson is listed as the publisher for important works of philosopher David Hume (1711–1776) that came out between 1753 and 1784. In 1763 Donaldson opened a shop in London between Norfolk and Arundel Street in the bustling business district of the Strand. The shop and printing house in Edinburgh continued to operate even in the absence of the owner.

In London, while the business was at the Arundel Street address, Alexander relied on his brother John for help with printing. The record shows, however, that their partnership was suddenly dissolved on 24 June 1773. Alexander moved to 48 St. Paul’s Churchyard, and John did not accompany him. The breakup of the partnership took place the year before the *Donaldson v. Becket* case in the House of Lords. We read the cryptic account that, on 24th December that year “John advertises the fact that he never intended to remove, nor had he ‘any concern in any other shop.’”⁴ The real intention of this Christmas Eve advertisement is not known. But considering that Alexander chose to move to a location in the very midst of the London booksellers and boldly proceeded to sell books that had been branded with the term “pirate edition,” John, by declaring no “concern in any other shop,” was perhaps making clear that he had nothing to do with Alexander’s reckless challenge to the establishment. But there is practically no record about the brothers’ relationship and little more is known.

Donaldson’s Catalogs

The National Library of Scotland in Edinburgh preserves copies of the catalogs of Donaldson’s Edinburgh shop. These copies for 1758, 1760, 1762, and 1765 are valuable records of the books sold in Edinburgh around the time Donaldson left for London. The catalog indicates that his shop sold some 1,500 titles. In the year just prior to the

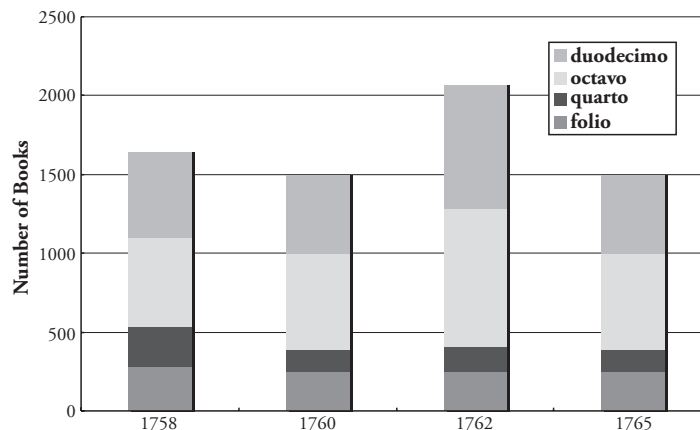


Figure 1. Breakdown of books in Donaldson shop catalog by size. Compiled by the author.

⁴ Skinner 1928, pp. 3–4.

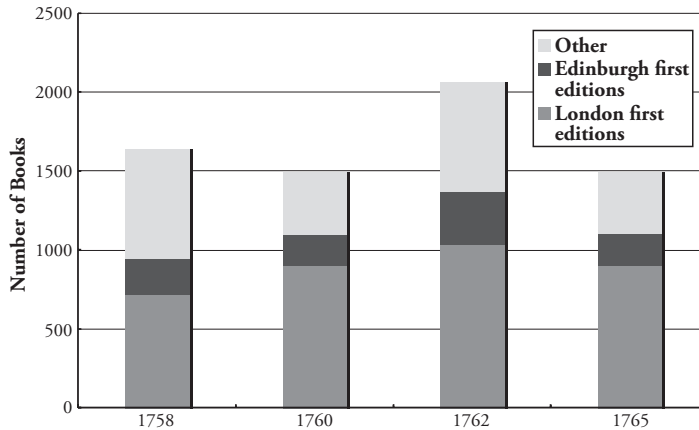


Figure 2. Breakdown of books in Donaldson shop catalog by place of publication.
Compiled by the author.

opening of the London shop, however, the number rose to more than 2,000 titles. That year (1762), the number of small-sized, cheap editions (octavos and duodecimo editions) was large, raising the total number of titles (Figure 1).

Figure 2 shows the proportion of books sold in Donaldson’s Edinburgh shop by the location of their first editions. This chart shows how the number of titles first printed in London increased between 1758 and 1762. Looking at the proportion of reprints of books first printed in London and Edinburgh, we can see that the bulk of Donaldson’s business was reprints of London first editions. The titles included under “Other,” I might note, were those first printed in Glasgow, Cambridge, Amsterdam, and Paris. The four catalogs were headed with the note: “The books are in good condition, all complete, many of them new; and being priced very low, will be sold only for ready money.” But there was no way that Donaldson could purchase books from the London booksellers, ship them to Edinburgh, and then sell them cheaply there. Presumably, the London first editions listed in Donaldson’s Edinburgh shop catalog were almost all “pirate editions.”

The crucial issue, however, is the titles of the books. Looking at the titles in the catalog related to this study, we come across such titles as John Milton’s (1608–1674) *Paradise Lost* (1667), works by John Locke (1632–1704) and David Hume, a collection of poetry by Allan Ramsay (1686?–1758), Samuel Johnson’s (1709–1784) *Dictionary of the English Language* (1755), and the newspaper, *The Spectator*. The 1762 catalog advertises 24 new books, among them the following:

Fingal, From the Gaulic of Ossian
The Death of Abel, from the German
A New Treatise of Agriculture

*The Practical Husbandman, Being a Collection of Miscellaneous Papers on Husbandry,
by Robert Maxwell of Arkland, Esq*
Buchanan’s History of Scotland, a New Editon
Livy’s Roman History, from the Foundation of Rome
D. Hume’s History of England, from Julius Caesar to Henry VII
Dean Swift’s Whole Works, a New and Complete Edition
*Ramsay’s Ever-green, Being a Collection of Scottish Poems, Wrote by the Ingenious before
the Year 1600, with a Glossary, or Dictionary of Scots Words*
Dr. Whitby’s Paraphrase and Commentary on the New Testament, a New and Neat Edition
Dr. Doddridge’s Rise and Progress of Religion, a New Edition
Dr. Doddridge’s Sermons to Young People
Goguet’s Origin of Laws, Arts, and Sciences
Instructions for a Young Lady
Thomson’s Seasons, a Neat Edition
Ramsay’s Tea-table Miscellany: a Collection of Choice Songs, Scots and English
M. D’Arnay’s Private Life of the Romans

A title like *Instructions for a Young Lady* is rather intriguing, but most are rather dry books dealing with classics or religion. Significantly, we find in the list Thomson’s *The Seasons*, the work regarding which the *Donaldson v. Becket* case was argued. Donaldson’s *The Seasons* edition may already be found in his 1760 catalog. As we shall see below, considering that the *Millar v. Taylor* case over the copyright to *The Seasons* was in full swing at that time, we can surmise that Donaldson had hatched his plan to challenge the booksellers of London long before the case came to court.

The 1765 catalog contents, with its advertisement below, attest to the fact that booksellers also sold such scientific equipment as globes and telescopes:

ALSO, at said SHOP of A. DONALDSON, May be had GLOBES, of Nine and Twelve Inches Diameter, made by Benjamin Martin, Author of the Dictionary of Arts and Sciences; with TELESCOPES made by the same Hand, from Seven Shillings to Five Guineas Price, and of all Sizes.

In Scotland during the Enlightenment, the humanities and sciences were not as clearly separated as they are today; booksellers sold various kinds of goods for people in search of knowledge, and these things give us a good idea of the role played by booksellers in those days. The Edinburgh shop also sold tickets to university lectures. University students were supposed to pay for classes on the first day, but they could also pay for separate lectures with tickets that could be procured at booksellers. University lecturers made their living by the number of students who gathered at their lectures and there

were arrangements for the booksellers to gather this tuition and pass it on to the lecturers. These arrangements, too, give a sense of the diverse roles played by bookstores in eighteenth-century Edinburgh.

On 3 January 1764, not long after setting up shop in London, Donaldson launched the *Edinburgh Advertiser* newspaper. It was published semiweekly on Tuesdays and Fridays in London and Edinburgh. Until 31 December 1773, just before the hearing of the case against Becket began in the House of Lords, Alexander edited the newspaper himself. After that his son James took over, and it continued to come out until James retired in 1820.

Overland transport in the British Isles was quite good by the eighteenth century. As Adam Smith (1723–1790) wrote in 1776, “A broad-wheeled waggon, attended by two men, and drawn by eight horses, in about six weeks time, carries and brings back between London and Edinburgh near four ton weight of goods.”⁵ A network of turnpikes (toll roads) was built over fifty years starting in 1720 that lowered the travel time between London and Edinburgh from 256 hours in 1700 to 150 hours in 1750 and 60 hours in 1800.⁶ Heavy things like books were generally transported by ship. Two hundred tons of goods could be shipped by sea from the port of Leith near Edinburgh to London in about three weeks.⁷ In other words, books printed in Edinburgh could be put on sale in London shops within one month. Donaldson’s shop in London sold books printed in Edinburgh, most of them cheap reprints of books that had been first printed in London. These were what the London booksellers decried as “pirate editions.”

Now, let us consider this term “pirate edition” a little more carefully. Scotland had been united with England in 1707. There was one king, one parliament, and their foreign affairs were handled together. The laws of England and Scotland, however, remained separate, and in Scotland at that time, there was no concept of copyright. Under the laws of Scotland it was not a crime to reprint books that had been published in London and then sell them in Scotland. The Edinburgh editions of London-made books were therefore not “pirate editions” per se. The London booksellers did not really make much of a fuss over these publications because Edinburgh was far away and the market there was in any case quite small compared to London.

When Donaldson and others began to bring cheaply made Edinburgh editions and sell them in London right under the noses of the London booksellers, however, the flap was considerable. The books were 30 to 50 percent lower in price. Among Donaldson’s reprints there were books that would have been quite literally pirate editions if sold in London. Noting that the London booksellers sued Donaldson only for the out-of-copyright title *The Seasons*, we may surmise that he was scrupulous not to stock reprints for which the copyright had yet to expire in his London shop.

⁵ Smith 2009 (1776), pp. 14–15.

⁶ Porter 1991 (1982), p. 192.

⁷ Smith 2009 (1776), p. 15.

Printing technology in Edinburgh was as good as that in London, and Donaldson was able to sell books for lower prices for two main reasons. One was that prices were lower in Edinburgh, keeping his printing costs down. The other was that the regulations imposed by the Stationers’ Company, the venerable guild of printers and booksellers in London, kept the price of books unnaturally high there. According to Donaldson, London book prices were two to three times higher than they should have been because of the Stationers’ Company grip on the industry. Donaldson’s own prices, meanwhile, were 30 to 50 percent lower than the usual London prices. What this means is that Donaldson was selling books for prices higher than what he himself thought they should be. He was clearly a shrewd businessman.

The Reputation of the Monopolist Publisher Millar

To understand what was under contention in the House of Lords in 1774, let us look at the background.⁸ The plaintiffs in the case were Alexander Donaldson and his son James and the defendants were fifteen London booksellers led by Thomas Becket. As explained in the introduction above, the case between Donaldson and Becket et al. was over the copyright to Scotland-born poet Thomson’s *The Seasons*. The volume was made up of previously published anthologies by Thomson, *Winter* (1726), *Summer* (1727), *Spring* (1728), and *Autumn* (1730), as well as the previously unpublished “Hymn to Nature.” A leading collection of English poetry in the eighteenth century, *The Seasons* is a work widely read and recognized even today. Thomson was born in the country town of Ednam near the Scotland-England border. He studied at the University of Edinburgh and, at the age of 25, went to London, where he worked as a tutor while writing poetry.

I would call your attention to the fact that Thomson was a Scotsman. The feeling of people in Scotland was no doubt that Thomson’s work was part of “our literature.” On 16 January 1729, Thomson sold the publishing rights to *Spring* and his play *Sophonisba* to Andrew Millar (1707–1768). Millar paid Thomson 137 pounds 10 shillings (1 pound = 20 shillings) for the rights.⁹ Thomas Becket worked for Millar. After Millar’s death, Becket obtained the rights to *The Seasons* by auction.

Millar was known for his publication of a number of major works of eighteenth-century literature and he is a very important figure in following the legal battles fought over perpetual copyright, so I would like to introduce him here in detail.¹⁰ Millar was a kingpin in the aforementioned Stationers’ Company that had long established control of the rights to copy books in England. Some researchers see Donaldson as having

⁸ *Cases of the Appellants; Parliamentary History of England*, vol. 17; *English Reports*, vol. 1, pp. 837–49.

⁹ The fact that this was a time when a young man of good family could live in London with a 200-pound annual allowance from his parents gives us an idea of the value of 137 pounds. Picard 2001 (2000), p. 298.

¹⁰ *Booksellers Dictionary*, pp. 171–73.

realized that bookselling could be a fresh and profitable business and deliberately challenged the monopolistic organization of the London booksellers.¹¹ But when we probe a little deeper into Millar's background, we cannot help but find such descriptions inadequate. For one thing, Millar also turns out to have been born in Scotland. This fact, which studies of publishing and copyright history thus far seem to have neglected to note, suggests that there is more to the eighteenth-century struggles over copyright than simply a clash between Edinburgh and London. It looks, rather, like a struggle between Scotsmen who got into the bookselling business in London at an early stage and their own countrymen, like Donaldson, who came along later in the game—the clash of those who had staked their claims early and newcomers aiming to get in on the action.

In his youth, Millar had been apprenticed to the bookseller James McEuen (d.u.) of Edinburgh. The compilers of the *Booksellers Dictionary* conjecture that Millar was acquainted with Thomson in Edinburgh. Thomson left the University of Edinburgh in 1725, and so his student days would just about coincide with the time Millar was a booksellers' apprentice. In those days, Edinburgh was a compact city centered on the mile-long High Street stretching east and west between the castle and the Holyroodhouse Palace. It would not be surprising if the student and the bookstore clerk, seven years apart in age, had known each other.

Millar went to London at the age of 21 in 1728 and opened a shop on the Strand. The Strand at that time was a shopping district lined with shops selling goods in the latest fashions; and of course there were many bookstores. It was the year after opening the shop that Millar purchased the publishing rights to *Spring* and *Sophonisba* from his compatriot Thomson. It was that purchase that transformed Millar into one of the monopolistic booksellers. In the same 1729–1730 period when Thomson sold the rights to *Spring* to Millar, he also sold the copyright to *Summer, Autumn, Winter*, and “Hymn to Nature” to another London bookseller, John Millan (1704–1784), for 105 pounds. Later, on 16 June 1738, Millar purchased those copyrights from Millan. The price was the same 105 pounds that Millan had paid to Thomson. Millar then held the rights to the series of works and began to sell a volume including all of them entitled *The Seasons*.

One source for learning more about Millar is Boswell's *The Life of Samuel Johnson* (1791). This biography by the Edinburgh-born lawyer and diarist James Boswell (1740–1795) portrays not only Johnson's personality but a lively account of the society of his times. We know that from the time Boswell was in his twenties he was a regular customer at Donaldson's Edinburgh bookstore.¹² The shop was a kind of salon where young men could fully satisfy their intellectual appetites with cheaply priced “pirate editions.”

¹¹ Rose 1993, p. 92.

¹² Skinner 1928, pp. 30–36; Rose 1993, p. 93.

Millar was the one who undertook to publish the Johnson’s famous *Dictionary of the English Language*, which went on to become the standard dictionary of the English language for more than 100 years thereafter. Boswell’s biography incorporates various passages of what is essentially gossip, but providing various pieces of information about Millar. We learn, for example, how Johnson’s repeated delays sorely tried the bookseller’s patience, who had to constantly goad the lexicographer to hand over parts of his manuscript, the work for which he had been paid in advance, and that

It is remarkable that those with whom Johnson chiefly contracted for his literary labours were Scotchmen, Mr. Millar and Mr. Strahan. Millar, though himself no great judge of literature, had good sense enough to have for his friends very able men to give him their opinion and advice in the purchase of copy-right; the consequence of which was his acquiring a very large fortune, with great liberality. Johnson said of him, ‘I respect Millar, Sir; he has raised the price of literature.’¹³

This passage tells us a great deal about the relationship between authors and booksellers in those days. Even before a book was completely written, the bookseller paid the author for it in installments. It also demonstrates the bookseller’s attitude of being “done with” an author once the manuscript is in hand. In other words, a bookseller appears to have viewed a piece of writing, once bought, as his own property, to do with as he wished, and no matter how much money the bookseller might make from that manuscript, there was apparently no promise of any further recompense going to the author.

The London booksellers invested generously in books they thought would sell, including dictionaries and encyclopedias. The copyright to Johnson’s *Dictionary* did not belong to its author, but to Millar and other booksellers, among them Thomas Longman (1699–1755), founder of the well-known Longman company. Johnson’s remark that Millar “has raised the price of literature” reflects the way Miller was involved in raising the price of books by monopolistic business practices. In fact, Millar made massive profit from the *Dictionary*. The profit accrued by Longman, too, established the basis of the company that is still a mainstay of the dictionary industry today. Johnson, meanwhile, was not adequately paid, as we can gather from the following passage:

In 1756 Johnson found that the great fame of his *Dictionary* had not set him above the necessity of ‘making provision for the day that was passing over him.’ ... He had spent, during the progress of the work, the money for which he had contracted to write his *Dictionary*. We have seen that the reward of his labour was only fifteen hundred and seventy-five pounds; and when the expence [sic] of amanuenses and

13 Boswell 1998 (1791), pp. 205–206.

paper, and other articles are deducted, his clear profit was very inconsiderable. I once said to him, ‘I am sorry, Sir, you did not get more for your *Dictionary*.’ His answer was, ‘I am sorry, too. But it was very well. The booksellers are generous, liberal-minded men.’ He, upon all occasions, did ample justice to their character in this respect. He considered them as the patrons of literature; and, indeed, although they have eventually been considerable gainers by his *Dictionary*, it is to them that we owe its having been undertaken and carried through at the risk of great expence, for they were not absolutely sure of being indemnified.¹⁴

What a generous soul was Johnson. If Millar had not assumed the burden of risk should the book not sell, it might never have been published. So, even if his reward was not sufficient, he had the satisfaction of the work he had done. He is a classic example of the man of literature. So what was the value of “fifteen hundred and seventy-five pounds” at the time? We know, for example, that the annual salary of the First Commissioner to the Admiralty was about 3,000 pounds, so the payment Johnson received for the manuscript was about half of the annual salary of a high-ranking official in the government.¹⁵ It might be fairly high for the annual income of an ordinary citizen then, but considering the several years he spent compiling the dictionary, he must have been somewhat dissatisfied.

Millar seems to have been fairly unscrupulous in his business dealings, and Johnson was not his only prey. One example is the story of *The History of Great Britain*.

Edinburgh booksellers not only made “pirate editions” of books sold in London but sought to sell the outstanding books of Scotland’s authors in London. For example, Gavin Hamilton (d.u.), his son-in-law apprentice John Balfour (?–1795), and Patric Neill (d.u.), three Scotsmen who had themselves published David Hume’s *The History of Great Britain*, sought to put it in the London market. They asked their fellow Scotsman Millar to sell it in 1754. Millar, however, made no effort to publicize or market the book, waiting to see whether Hamilton and his cohorts would give up in their venture. Volume one of *The History* sold barely 45 copies in the first year in London, and this setback put Hamilton’s and his cohorts’ business in the red. The following year they were forced to sell the copyright to *The History of Great Britain* to Millar and withdraw from the London market.¹⁶ Devastated by the lack of interest in his work, Hume considered changing his name and spending the rest of his life in France (only the outbreak of the Seven Years’ War, 1756–1763, made him change his mind).¹⁷

The Millar edition of *The History of Great Britain*, completed in 3 volumes in 1761,

14 Boswell 1998 (1791), pp. 216–17.

15 Picard 2001 (2000), p. 298.

16 Shirata 1998, pp. 173–74.

17 Knight 1865, p. 220.

however, sold extremely well. Hume did fine in the end, writing in later years, “the copy-money given me by the booksellers much exceeded anything formerly known in England. I was become not only independent but opulent.”¹⁸ Millar’s approach ended up very much to the profit of Hume as the author. Hamilton and other booksellers from Scotland, meanwhile, suffered many hardships as Millar deftly defended his territory against these latecomers from his native Scotland who might seek to carve out a share of the London book-market pie.

Even when authors tried to hang on to their rights to a work, the London booksellers had various methods for obtaining them. Bookseller James Lackington’s (1746–1815) memoirs observe as follows:

. . . in general where authors keep their own copy-right they do not succeed, and many books have been consigned to oblivion, through the inattention and mismanagement of publishers, as most of them are envious of the success of such works as do not turn to their own account; very many just complaints are made on this head, so that I am fully of opinion that for authors to succeed well they should sell their copy-rights, or be previously well acquainted with the characters of their publishers.¹⁹

Thus, it was apparently quite common for booksellers to conveniently neglect the titles for which authors would not hand over the copyright, waiting until the author became so discouraged about sales that he would sell the copyright; then, knowing the sales would “turn to their own account,” they would begin to actively market the book and rake in the resulting profits. This seems to have been a consistent pattern among the London booksellers.

The Eighteenth-Century English Judicial System

Now we have some idea of the background of the Donaldsons and of Becket’s boss Millar, who had bought the rights to *The Seasons*. Here, to better understand the *Donaldson v. Becket* case, let us consider the legal system of the time. The following provides a basic background for understanding the judicial system of eighteenth-century England.

Common law, an essential part of England’s judicial system, is uncodified rules. While not part of written or statute law, such rules are nevertheless binding. Laws that are fixed in the form of text are known as statute law. Common law existed from long before statute law came into being. Practices that “have always been decided that way”

18 Knight 1865, p. 220.

19 Lackington 1762, p. 358.

are common law, although no one knows when they were so decided in the beginning. Very similar to common law is “natural law.” This is universal law that governs humankind, transcending time and national boundaries. Rights that are based on natural law are called natural rights—rights that human beings possess inherently by birth. The ideas of “natural law” and “natural right” were developed by English thinkers such as Thomas Hobbes (1588–1679) and John Locke and had become quite widely understood in England by the eighteenth century. The source of “human rights” is this principle of “natural right.” In France, Germany, and Japan, it is often argued that because a work of art or literature is an expression of the personality of the author, the protection of copyright is equivalent to the protection of human rights. This reflects the concept of natural rights. In the series of court disputes discussed in this book, one of the important points in debate was whether copyright could be interpreted as a “natural right.”

Disputes sometimes occur even though no one has broken the law. Settlement of the dispute by examining the assertions of both sides and weighing the principles of fairness and justice is called “equities.” Equities have the role of supplementing common law and statute law. In England, the Court of King’s Bench would weigh complaints in light of common law and make decisions. Common law cases were also handled by the Court of Common Pleas, which was responsible for hearing civil suits, and the Court of the Exchequer, which exercised judicial power regarding royal revenues.

The Court of Chancery, meanwhile, dealt with complaints from the viewpoint of equities. The head of the Court of Chancery was the lord chancellor, a most honorable post and the most eminent of all England’s lawyers. The lord chancellor, moreover, was the speaker of the House of Lords. In other words, the head of the judiciary also presided over the House of Lords, which was Britain’s highest court. In the mid-eighteenth century, examination of appeals and decisions on private cases of divorce, property, etc. were entrusted to the House of Lords. The business of the House of Lords was thus largely concerned with judicial affairs, and when it was in session the chief justice of the Court of King’s Bench and other judges were always present there and barristers were frequently summoned to appear.²⁰ Another important post was attorney general. The attorney general was the adviser to the king and prime minister on matters of law, and he was assisted by the solicitor general. Those with the highest aspirations in the field of law sought to establish their credentials as barristers and win the post of solicitor general and then the post of attorney general; their next target was the post of chief justice either on the Court of the King’s Bench or the Court of Common Pleas. In the meantime they would be made members of the aristocracy and obtain a seat in the House of Lords, and within that body could maneuver to gain the post of lord chancellor.²¹

20 Matsusono 1999, pp. 85–86.

21 Matsusono 1999, pp. 102–103.



Figure 3. Westminster Hall in 1745. (Phillips 1964: 20)

In the eighteenth century, the Court of King’s Bench, the Court of Common Pleas, and the Court of Chancery were convened in Westminster Hall, the edifice known today for the Tower of Big Ben and Parliament. Most of what is now Westminster Palace was built after a fire in 1834, but this hall is preserved exactly as it was in the middle ages. A print from 1745 shows three courtrooms of around 25 square feet enclosed by screens (Figure 3). The Court of Chancery met in the southwest corner (the right side at the far end), the Court of King’s Bench in the southeast corner (the left side at the far end) and the Court of Common Pleas in a narrow space along the west (right) wall. Along the side-walls were stalls selling books and other merchandise. On the floor of the hall are depicted lawyers handing over cash to witnesses whose statements they have procured. Intended perhaps as a satire on the customs of the times, it presents quite a surprisingly different image from the rigidly formal features of the courts we are familiar with today.

Both Sides Present Their Case

Let us consider the cases presented by both sides in *Donaldson v. Becket*, starting with Donaldson's assertions (for the original wording of the case presented, see Appendix A: Donaldson's Assertions).

Donaldson began by explaining how he and his company had compiled the "Poems, called The Seasons, and the said Hymn on the Succession of the Seasons, each Copy being bound up in a single Volume, and entitled, The Seasons, by *James Thomson*" and published it in Edinburgh. Complaints were then lodged, he alleges, by Becket and his cohorts, "who claimed to themselves the whole Profit arising from the Publication and Sale of the same."

It is true, he admits, that he had published *The Seasons*, but argues that twenty-eight years have elapsed since the first publication, so that, under the Statute of Anne, the period during which any party can exercise monopoly on its copyright has passed. Can those who only purchased some 100–500 copies from the author fairly assert that they have the right to possession of the work? This is the question Donaldson asks the court to consider.

Donaldson then considers the tangible and intangible qualities of books—"the material Part, namely, the Paper, Print, and Binding, which is a Manufacture; and the immaterial Part, namely, the Doctrine contained in it, which is the Facture of the Mind"—and argues that books in their material aspect may be debated and dealt with under the law but that the immaterial aspect belongs to the author. As reasons for this, he presents five assertions for the consideration of the court, which may be explained in plain language as follows:

I. "The object" that Becket et al. claim to be theirs is too elusive to be defined, and yet it is called "property" or, more precisely, "literary property." The word "property" has various meanings. Philosophically, the *qualities* inherent in a subject or thing are called properties. In the ordinary, everyday sense, property is corporeal or incorporeal. Corporeal property is the possession of some substance, and is accompanied by the power to enjoy and dispose of it. The matter in contention, however, is not corporeal property.

Incorporeal property is of two kinds. The first is the "Right relating to some Substance," such as the right to the profits of land, without having possession or title to that land. The second is the right to exercise some "Faculty" or do something in order to obtain profit. The word property is thus equivocal: it is sometimes used to mean the right relating to a substance and at other times the profit resulting from that right. Such use is equivalent to speaking of both "land" and of the "right to the land" as "property."

If "the object" that Becket et al. claimed is incorporeal right, it is merely the right to do some particular thing for profit, namely "multiplying of Copies of Books."

To claim the sole right to multiply copies is to claim the sole right to exercise a natural faculty, which would obviously be a most extraordinary privilege. Becket et al. claim that this privilege and sole right are their “property” according to the tenets of common law. But such a privilege and sole right did not, and cannot exist, we submit, in common law.

II. Rights in common law must be founded on the principles of conscience and natural justice. Conscience and natural justice are not limited to England. Natural justice is the same in Athens or Rome, in France, Spain, or Italy. Books have been copied in all ages and have multiplied, but the exclusive privilege, or the sole right of anyone to multiply copies, was never dictated by natural justice in any age or country. Giving the sole right to distribute copies to one party cannot exist in “common Right, which gives an equal Benefit to all.”

III. The attempt to monopolize the exercise of a natural faculty infringes human rights. A natural faculty is different from the performance of “an office.” In the work of “an office,” one does not encroach upon the domain of others but simply performs a task. But if that which should be free to all is to be confined to any one person or group of persons, then the natural liberty of the rest of society is constrained. Constraint on the liberty of many for the sake of one person was never established as justice based on conscience and reason.

IV. In common law, public utility is regarded as the mother of justice and equity. Diffusion of the products of the mind as widely as possible best serves the public utility, so common law could not possibly limit the production of copies. When common law emerged in England, literature stood at the same stage as that of ancient Greece and Rome, when copying could only be done by writing by hand. Every individual held the right to transcribe or copy out a book. There was no other way to propagate knowledge. So common law never placed any checks on the natural freedom to transcribe books.

V. Common law has been in use since time immemorial. If there was a time when the privilege and monopoly asserted by Becket et al. existed, it was not according to common law. The time no privilege or monopoly existed by common law extends from the beginning of our history down to the era of printing, and printing (which is only a more efficient method of copying) could not change the principle of right and wrong.²²

²² *Cases of the Appellants*, pp. 4–6.

The assertions presented by Becket et al., on the other hand, began by declaring how Donaldson had ignored the fact that they had purchased the copyright to Thomson's poem anthology and gone ahead in compiling the poems "called *Spring, Summer, Autumn, and Winter*, and the said *Hymn on the Succession of the Seasons*, in a Volume entitled, *The Seasons, by James Thomson; Edinburgh, printed by A. Donaldson, 1768*," and printing, publishing, and selling several thousand copies to great profit, causing them (Becket et al.) "great Loss and Prejudice."²³

The complaint goes on to say that, although they tried to get Donaldson to stop selling the anthology and hymns and to get him to pay them for the number of copies sold, Donaldson had not stopped the sales nor handed over any of the money they considered due, so on 21 January 1771, they had filed suit with a "Bill in Chancery," recording their claims, demanding payment, and requesting an "Injunction of the Court [restraining him] from publishing the said Poems and Hymn," etc.²⁴

On 16 November 1772, the case was heard before the lord chancellor, who decreed that the injunction supporting the claims of Becket et al. should be upheld and that Donaldson should pay what was due to the booksellers. The court allowed that the case could be appealed, and Donaldson did petition the court for reconsideration, asking that the decision be reversed. Becket et al. in turn claimed that the 1772 decree of the lord chancellor was "just and equitable" and ought to be affirmed. Becket's side presented the reasons their case should be supported.²⁵

It is only reasonable and natural, said Becket, that authors should wish to claim the sole and exclusive rights to printing and publishing their own works. It is just and equitable that those who are devoted to the advancement of knowledge, and who communicate their ideas in written form intended for public consumption should be compensated. In order to maintain a suitable livelihood, authors, upon publishing their works, have the right to print copies of their own work. Considering the nature of printing, "there is an *implied Agreement*, on the Sale of each particular Copy, that the Purchaser shall not invade the beneficial Right of multiplying Copies intended to be reserved by the Author."

Becket et al. went on to argue that since the "Introduction of the Art of Printing into England, this peculiar Species of Property has been known by the expressive Name of *Copy-right*" and copyrights have always been protected by means of sale, gifts, and inheritance.

Becket calls attention to the fact that the right to copy proclamations and other documents of a public nature is held by the king "on Account of his peculiar Interest . . . in all Publications and Acts of State flowing from himself, or Parliament," showing

²³ *Cases of the Appellants*, p. 15.

²⁴ *Cases of the Appellants*, p. 16.

²⁵ *Cases of the Appellants*, p. 17.

how “an *Interest* or *Property* similar to that claimed by Authors, *may* subsist at *Common Law*,” etc.

The Statute of Anne, declare Becket et al., in no way infringes on the author’s interest in his works or right to them as property. Its purpose was to keep Literary Property safe from “Piracy and Invasion” by imposing penalties. Since the Statute of Anne, the Court of Chancery has granted many injunctions to restrain copyright invasion “notwithstanding the Expiration of the Term during which *only* the Statute gives a Protection by Penalties.”

Believing in the protections that have been provided to literary property independently of the Statute of Anne, great sums of money have been invested in the purchase of copies, so if such protection should be withdrawn, many families would lose their estates and come to ruin.²⁶

There is no evidence that Donaldson and Becket directly confronted each other in the courtroom, but there remains a record of questions anticipated with the answers to be given that was prepared by the Donaldson side before the hearing.²⁷ Naturally, this hypothetical debate is weighted in favor of the Donaldson side. If the two had argued according to this scenario, no doubt the exchange would have been something like this, here abridged from the original record:

Objection [Becket]. It is said on the Part of the Respondents, that the Name “*Copy of a Book*,” has been a Term for *Ages*, to signify the *sole Right* of *printing, publishing, and selling*, and that this *Species of Property* has existed in *Usage* as long as the Name.

Answer [Donaldson]. It is admitted on the Part of the Respondents, that there is no Bye-Law or Ordinance relative to Copies till after the Year 1640. The Usage, whatever it be, is therefore not immemorial.

Objection. From the Erection of the Stationers Company, *Copies* were entered as *Property*, and *Pirating* was punished.

Answer. The Common Law, according to this, begins with the Stationers Company.

Objection. The Stationers Company was empowered to make Bye-Laws.

Answer. They were; and those Bye-Laws might create a *relative Right* among the Members of the Company. In 1681, a Bye-Law declares, that where a Book was entered to any Member, such Person, *by the antient Usage of the Company*, was *reputed* and *taken* to be the Proprietor. By antient *Usage of the Realm* had been more conductive to the Point. But it was not competent to the Stationers Company to make Laws for the rest of the Kingdom; and, if it had, it would not be *Common Law*.

Objection. The Decrees of a Star Chamber have been cited as strong Authorities in Support of the Bye-Laws and Customs of the Stationers Company.

²⁶ *Cases of the Appellants*, pp. 15–18.

²⁷ *Cases of the Appellants*, pp. 7–14.

Answer. The Star Chamber was a *criminal Court*, and had not constitutional Authority to determine *civil Rights*. The Court has been long since abolished, without Regret, and it is the Happiness of the Subject, that the *Common Law* has flowed through *purser Channels*.

Objection. It has been said, that in those Times *Copies* were protected by a much speedier and more effectual Remedy than *Actions at Law*, or *Bills in Equity*.

Answer. One successful *Action at Law* would have been a better Proof of the Right, than a thousand Instances of *arbitrary Power*.

Objection. The Licensing Act has been called in Aid by the Respondents, and they observe, that the printing of any Book without Consent of the Owner is forbid by that Act.

Answer. The Ownership was created by *Patent, Order, Bye-Laws* of the Stationers, &c. and if that Act recognized a *Right so created*, it was an Act of the Legislature; but the Act, with all the other Encroachment upon Liberty, has long since gone to Rest, to revive no more. The Statute of Queen Anne was not *declaratory* of the Common Law, but *introductive* of a new Law, to *give* learned Men a Property which they *had not before*.

Objection. It has been contended on the Part of Respondents, that the Act of Queen Anne is an accumulative Statute, declaring *the Common Law*, and giving *additional Penalties*.

Answer. If the Right was *antecedent* to the Act, How did the Legislature *vest* the Property in Authors?

If the Legislature had the faintest Idea of a *pre-existing Property*, why was the *sole Right* of reprinting Books, which had been *previously* published, restrained to twenty-one Years, and *no more*? A strange Way of *encouraging Learning*, by abridging *ancient Rights*!

If the *Act of Queen Anne* intended merely to give *additional Penalties*, by Way of new Fences to a *common Law Right*, Why give those Penalties for fourteen Years only? If the Property is *perpetual*, Why should not the Remedy be *coextensive*?

If the "Copy" be understood a *perpetual Property*, the Author who sold his Copy under the Idea of a Transfer *for fourteen Years only*, may be told by an *artful Bookseller*, that *more was meant than meets the Ear*, and that a *Sale of his Copy* imports a Sale for ever. The Consequence will be, that, instead of encouraging Learning, a Snare has been *unwittingly* spread for Men of Genius and Industry, and the *Clause* of the Statute, which gives a Reversion to the Author at the End of fourteen Years, *if he live so long*, will be eluded by the Craft, and, as Milton phrases it, by the *Sophisms of Merchandize*.

If the Book, at the End of fourteen Years, reverts to the Author, his Interest is served: If it does not, the Legislature, by such a Construction, has extended *no Benefit to learned Men*.

The Notion of "a perpetual Privilege and Monopoly," hath been within these few Years, hatched among the Booksellers; who now come with *glossing Colours, and, under a Pretence of serving the Cause of Literature*, but mean really and only to get the *Fruits of Genius* into their own Hands, for ever. The Consequences of this new Doctrine (were it established) would be fatal to the *Interest of Letters*, and the *Fame* of every valuable Author.

Books may be held up at too high a Price. Notes and Illustrations may be wanted, and generally are, in thirty or forty Years; not only the *Manners*, but even *Science* itself changes in the Progress of Time. *Moral Philosophy*, and *Mathematics* should keep pace with the Vicissitudes of the World. Useful Commentaries upon valuable Works cannot be made without the Licence of the Bookseller, who has purchased the Copy: His *Avarice*, his *Tumidity*, or his *Want of Sense* may tell even the original Author, that he shall not re-print his own Book with further Improvements. If the Author should happily be permitted to do it, it must be upon the Bookseller's Terms; but more probably the Frugality of the Bookseller will grudge an additional Expence, and taking upon him to *pronounce upon Wit*, he may say, that he likes the Book as it is.

In the Case of a *perpetual Privilege and Monopoly*, the Bookseller becomes the Author's Leave-giver: Many a Jaunt may be made that his new Insertions may be viewed, and at length he may sit down with the Melancholy and Vexation of leaving his Book worse than he could make it.

Should the Work, pursuant to the Statute of Queen Anne, *revert* to the Author in fourteen Years, he will become the Guardian of his own Fame; and, in Consequence, *learned and industrious Men will be enabled to reap not only the Fame, but the Profits of their Labours, to the Honour and Advantage of themselves and their Families.*

Objection. It has been colourably said, that for a *perpetual Property* Authors may raise in their Demand, and gain a much larger Sum for the *Copy*; or they may publish upon their own Account, and feel the Pulse of the Public before they dispose of the Copy.

Answer. Except one or two very modern Instances, a competent Price has not been given. If Booksellers have hitherto been dealing under an Idea of a perpetual Monopoly, they have not paid an adequate Compensation for it, and the same Phlegm will govern their future Transactions. It is a melancholy Consideration, that even a Writer or Mr. Thompson's Merit does not appear to have received one Hundred Pounds for Poems of the Seasons.

A Period of fourteen Years is a sure Test of every Book. If, after that Time, it be worth reprinting, the Authors accuratest Thoughts may be interwoven, and the *Fame* and *Profit* will accrue to the Man of Labour and Invention.

But if a perpetual Privilege and Monopoly are to interrupt his Hopes, the Purchasers of the *Copy* will be enriched.

While it is unfair to present such a “story” only for one side of the case, unfortunately the Becket side left no such scenario. Since it was Donaldson who ultimately won the day, it is quite likely that the line of reasoning the House of Lords accepted was something like the above.

Now, having read through the assertions of both sides, we may summarize the points at issue briefly as follows:

First, what is “literary property”? Becket claims that there are rights to literary property, while Donaldson says that such is not the case.

Second, is “copyright” determined by common law? According to the Becket side, copyright is a perpetual right based on common law that has existed since before the Statute of Anne came into being. The Donaldson side, meanwhile, argues that the notion of “copyright” began with the appearance of printing technology and was developed through the Statute of Anne, which established a period after which it expires.

Third, what is the source of copyright? According to the Becket side, the source of copyright is the first owner of the literary work, namely the author. When booksellers purchase the rights to that ownership from the authors, those rights are thereafter in their sole ownership. Donaldson counters that even if there is such a thing as “literary property,” how is it possible to determine that the bookseller has purchased it from the author? Donaldson asserts that it is an infringement on human rights to monopolize the fruits of the author’s talent.

Donaldson and Becket were not the only ones engaged in this battle over the question of perpetual copyright. Many booksellers and lawyers and judges were involved. The following chapter will look into the personalities connected with the case and how they were related.