## Chapter 2

# Rivals for the Treasures of Copyright

Donaldson's suit against the London booksellers took place against the backdrop of the spread of moveable-type printing across the British Isles and the subsequent development of the book publishing industry. Adding to the drama of the times was the increase in the literacy rate and the literary ferment of the Scotland Renaissance. The stage was set also by the chartering, in 1557, of the Stationers' Company, which served both to control freedom of speech and resolve disputes among members of the book publishing industry, and in response to calls from the Company, promulgation of the Statute of Anne in 1710.[28] In the 1730s, after the fourteen or twenty-eight-year term of protection provided for under the Statute of Anne came to an end, the Stationers' Company was active in demanding further protections for their business, and this led eventually to the battle among booksellers over the question of "perpetual copyright."

Up to that time, as Adam Smith later wrote in *The Wealth of Nations*, the main occupation of writers had been teaching or other ways of "communicating to other people the curious and useful knowledge" they had acquired.[29] Major changes took place for their profession after the emergence of printing technology. Smith observed that "[b]efore the invention of the art of printing, a scholar and a beggar seem to have been terms very nearly synonymous. The different governors of the universities, before that time, appear to have often granted licenses to their scholars to beg."[30]

Apparently it was thought that printing technology had to be controlled so that writers and scholars would not be reduced to beggars, and that meant restricting the copying of works by printing technology and preventing them from circulating too freely. Restriction of the flow of information and the commercialization of knowledge, meanwhile, qualitatively changed the work of writers engaged in making useful knowledge widely available to others. They began to provide information not just to anyone who might seek it, but only to those who would and could buy their books.

The first printing press was built at Westminster in 1476 by William Caxton (1422–1491), a translator from French. Printing technology was free and unrestricted for about fifty years until, in due course, it became technology made available by the king

28 Here I refer primarily to Ransom 1956; Patterson 1968; Rose 1993; Shirata 1998; and Deazley 2004 which provide detailed studies of the Statute of Anne.

29 Smith 2009 (1776), p. 100.

30 Smith 2009 (1776), p. 101.

and certain others such as the governors of the universities, only to people privileged to use it.

The reason the ruling class restricted freedom of printing technology was quite simple. If people are to be controlled, the media through which information is circulated must be kept under restraint. Meanwhile, the need among those in the publishing industry themselves for a means of suppressing the activities of "pirate" publishers brought them into a symbiotic relationship with the rulers of the country.

Associations of merchants or craftsmen in medieval Europe were called guilds. England had its guild of stationers even before printing technology arrived from the continent. At the time printing began in England, those who were doing the printing were not members of the stationers' guild. Most of them were foreign artisans living in outlying areas.[31]

In 1533, during the reign of Henry VIII (1491–1547, r. 1509–1547), the "Act for Printers and Binders of Books" was issued and these printers were gathered together in London. As the printers were absorbed into the stationers' guild, printers in other parts of the country were suppressed and gradually disappeared. At the time, however, England and Scotland were different countries, so the printers of Edinburgh were not controlled under this Act.

In 1557, during the reign of Mary I (1516–1558; r. 1553–1558), the stationers' guild was incorporated as the Stationers' Company by royal charter under which it was endowed with a monopoly on printing and the authority to police against "pirate" publishing.

Why was the guild accorded legal status and given strong powers during this period? The booksellers had ample economic motives for seeking such powers. Another factor was Mary I's faith.[32] Her father, Henry VIII, had rejected the Catholic faith and created the Church of England, motivated largely by his desire to remarry. Married at a young age to Catherine of Aragon (daughter of the king of Spain and mother of Mary I; 1485–1536), he had made up his mind to separate from her and wed Anne Boleyn (1507?–1536). The Catholic Church under which his marriage had taken place, however, prohibited divorce. So Henry, not one to allow such a rule to stand in his way, set about to separate the Church of England from the Roman Catholic Church, and to make England a Protestant nation. He was assisted in this endeavor, known as the English Reformation, by Thomas Cranmer (1489–1556; Archbishop of Canterbury), who also engineered Henry VIII's legal separation from Catherine.

After Henry VIII's death, the throne fell to his first daughter, Mary I. A fervent Catholic, Mary burned with resentment over the way her father had abandoned her mother, and she is remembered as "Bloody Mary" for her vengeful imprisonment and

31 Feather 2006, pp. 17–18.

32 Shirata 1998, pp. 229–35.

execution of countless religious reformers. Cranmer was among those she had arrested and burned at the stake. By granting a charter to the Stationers' Company Mary I accorded it tremendous power. Control of publishing was just part of her campaign to suppress Protestantism.

And thus, fueled by economic motives and Mary I's support, the major booksellers of London came to monopolize publishing. Medium and small booksellers continued to challenge the monopoly with their own editions. The Stationers' Company then sought even greater powers against what they called pirate editions, and the government, which wanted to control publishing, responded in 1586 with a Star Chamber decree stating that printing presses could not be set up without reporting to the authorities. Printing shops could only be established in London and in the two university towns of Oxford and Cambridge. The prerogatives of the Stationers' Company increased, allowing it to confiscate printing presses and printed books it deemed illegal. It also limited the number of apprentices who were taught the printing trade in order to keep the number of printers under control.

This rigid control by the Stationers' Company continued into the early seventeenth century. A second Star Chamber decree was issued in 1637, during the tyrannical rule of Charles I (1600–1649; r. 1625–1649). Its purpose was to control freedom of speech, prohibiting the printing, sale, or import of books opposing the king's rule. Concerning the monopoly on printing, the decree included a prohibition against the printing or import of books whose titles were registered with the Stationers' Company.

Following the English Civil War (1642–1648) in which the Parliamentarians led by the Cavaliers and Oliver Cromwell (1599–1658) fought the forces of Charles I, the king was tried for high treason and executed. Control of publishing had been based on royal prerogative, so for a time, the powers of the Stationers' Company were without a legal basis. Cromwell, himself, however, was quick to issue a law to control publishing, and at this time even accorded the Company the power of search and seizure. After Cromwell died, Charles II (1630–1685; r. 1660–1685) restored the authority of the throne (1660).

The next landmark law for the publishing industry, issued in 1662, was the Licensing Act. In large part an extension of the 1637 Star Chamber decree, this law provided for the appointment of a new post of licenser to supervise publishing, thereby somewhat weakening the censorship powers of the Stationers' Company. The law did separate censorship and the book publishing monopoly but continued to support the Stationers' Company interests.

Becket and the other London booksellers, in their argument claiming the prerogative to "perpetual copyright," invoked John Locke's theory of property as a natural right. Locke himself did not think his theory of natural right applied to their monopoly and was deeply opposed to the Licensing Act, as we can see in a letter dated 2 January 1692[–3] he addressed to House of Lords member Edward Clarke (1649[51]–1710):

> I wish you would have some care of book-buyers as well as all of booksellers and the company of stationers, who having got a patent for all or most of the ancient Latin authors (by what right or pretence I know not) claim the text to be theirs, and so will not suffer fairer or more correct editions than any they print here, or with new comments to be imported without compounding with them, whereby these most useful books are excessively dear to scholars, and a monopoly is put into the hands of ignorant and lazy stationers.[33]

Locke expresses his ire at the grip the booksellers have placed on the content of books. People have a natural right to property, he declared. Citing his ideas for their own case, the booksellers asserted their "natural right" to the literary property they had purchased from the authors. Apparently, however, Locke himself did not see author's rights as a "natural right," but as property rights provided for by law,[34] so he must have been dismayed to see his own theory being used to validate something that he opposed. Locke appealed to Clarke over and over, and no doubt partly as a result of their efforts, in 1695, the Licensing Act went out of force, formally separating the book monopoly from censorship under the law.

As the seventeenth century drew to a close, the powers the Stationers' Company had been accorded to monopolize the printing of books and as agent of government censorship were taken away, forcing it to find a different cause with which to justify its monopoly. That cause, the Company now asserted, was "encouragement of learning." To encourage learning, it held, authors must be allowed to profit from books. Rampant book piracy would undermine the share due those with legal rights to profit from books, and authors' incentive to write would be lost. Therefore, their argument now went, the property rights to content of books had to be defended. This reasoning, which continues to be used today, first emerged in the late seventeenth century.

As recorded in Boswell's *Life of Johnson*, however, "encouragement of learning" was a pretext, indeed merely a device, to preserve the monopoly of the Stationers' Company.[35] In practice, the bookseller would purchase from the author the manuscript together with the rights to its use, and then, no matter how the bookseller might profit from the sale of the work, there was no guarantee what share of the profits, if any, would return to the author.

Nevertheless, the Stationers' Company petitioned Parliament to create a law on "literary property." Its efforts resulted in the passage in 1710 of what has come to be known as the world's first law on copyright, the Statute of Anne.

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33 Rand 1975 (1927), p. 366.
34 Shirata 1998, p. 123.
35 Boswell 1998 (1791), pp. 205–206.

## The Content of the "Statute of Anne"

Now let us look at the main items of interest among the eleven articles of the law.[36]

Article 1

The author of a book as well as the "Assigns" the author has permitted to publish the book hold "sole Liberty of Printing and Reprinting" the book. That right to copy was to be protected for twenty-one years from 10 April 1710 for books already published and fourteen years from the time of publication for books henceforth to be published.

Article 2

Those who sought protection under the act had to register a book prior to its publication with the Stationers' Company.

Article 5

Nine copies of all books published from the time this law came into force were to be donated to designated libraries.

Article 6

Any party to "incur the Penalties contained in this Act" in Scotland, their justice would be examined in Scotland's Court of Session.

Article 9

"Provided, That nothing in this Act contained shall extend, or be construed to extend, either to Prejudice or Confirm any Right that the said Universities, or any of them, or any Person or Persons have, or claim to have, to the Printing or Re-printing any Book or Copy already Printed, or hereafter to be Printed."[37]

Article 11

If, upon the expiration of the fourteen-year period of protection of the right to print copies, an author was still living, the sole printing rights would return to the author, and another term of fourteen years (in total twenty-eight years).

In addition to the maximum limit of twenty-eight years for protection of copyright, a number of other stipulations were notable in this law. Article 2 required that books be registered with the Stationers' Company in order for their copyright to be protected. In other words, only those who were associated with the Stationers' Company could expect protection for their books.

In most cases, the publishing rights to a book were given over to the bookseller at the time of publication. As determined in Article 11, after fourteen years had passed, however, those rights would return to the author. At that time, it was up to the author whether to change publishers or revise or update the book. Also, thanks to Article 5,

36 For the entire Statute of Anne, see Appendix B.

37 Original text quoted from Appendix B.

copies of all books published from the eighteenth century onward are preserved in the British Library and in Britain's old university libraries, a tremendous boon to scholars of later ages.

Three years before the Statute of Anne was enacted, in 1707, England and Scotland had become one country, but their legal systems had yet to be unified. Article 6 reflects the situation that prevailed for a few years after the union of the two countries. Scotland, however, did not have the history of struggle over publishing that occurred in England and there was nothing resembling copyright. In other words, a dispute over copyright might be brought into Scotland, but there was no tradition of debate on the subject. As we shall see later, Donaldson made adroit use of this article to swing things to his advantage in his suit against the London booksellers.

Article 9 is rather dangerously worded. It appears to have been designed to protect certain vested interests, but depending on how it was interpreted, could have taken the teeth out of the statute altogether. In fact, interpretation of this passage of the law did become an issue in the *Donaldson v. Becket* case.

The Statute of Anne was a law of England, and did not apply in Scotland or Ireland. No matter how many "pirate" editions might be printed in Scotland, they could not be seized and destroyed under the Statute of Anne. Donaldson entered the book trade from Scotland, a region not covered by the statute's net.

It should be pointed out that the Statute of Anne does not use the word "copyright." According to the *Oxford English Dictionary*, "copyright" was first used on 6 May 1735 in a record of the proceedings of the House of Lords. In that sense, it may be difficult to speak of the Statute of Anne, as is so often done, as the world's first law on copyright.

What the Statute of Anne was actually protecting was the rights to the *printing* of books. But printing is not something that has form; the feature of moveable type was that the blocks of type formed to print a book could be taken apart and the type reused. Thus, when using moveable type, the blocks of type for a particular book were not preserved in exact form, as they would be in woodblock printing. The difficulty of resolving the issue being argued was that it dealt with rights to something that did not have durable physical form. The monopolistic booksellers held that with the purchase of a manuscript from the author came the right to print it. They claimed the right to go on printing it, in perpetuity.

It was one thing if the printer/bookseller was working from an original manuscript purchased from a living author, but in many cases they were printing classical works for which there was no "original manuscript." Many booksellers were thus selling books for which they had not, in the strict sense, purchased anything in the way of printing rights. Why should certain booksellers be able to monopolize the printing rights to such classical works? It was difficult to present a convincing argument because of the lack—when it came to moveable type printing—of an enduring physical form of the type that had

been set. From 1731, when the twenty-one-year term of protection under the Statute of Anne expired, this problem came to the surface.

From 1710 to 1731, England's publishing world was comparatively quiet, with the big booksellers of London supported by the Statute of Anne dominating the market. But in the 1730s, that situation began to change dramatically. There were two reasons. One was that protection of the Statute of Anne ended for many books, and the other was that, as Scotland and Ireland began to gain strength economically, their publishing industries advanced and books printed there began to flow into the London book market.

The London booksellers could not stand idly by as cheaper books from outside began to flow into their market. Claiming the great damages they were incurring because of "pirate" publishing, they called for the extension of period of protection under the Statute of Anne, petitioning Parliament over and over. The House of Lords, however, turned down all the booksellers' demands. Documents setting forth their reasons have not been found, but in any case the booksellers' zeal appeared to have received only the cold shoulder from the gentlemen of the House of Lords.

The booksellers' next recourse was to argue that "the right to copy" was a perpetual right confirmed under common law. Such copyright was the "author's right," they said, and it was a right accorded to all people as a universal rule; the perpetual right to their work was the inherent right of authors. This line of reasoning led to the conflating of two qualitatively different things—the natural right of authors to their works and "copyright" as the right of the booksellers to monopolize the industry.[38] The *Donaldson v. Becket* case was to demonstrate the error of such conflation, but as Locke's theory of natural right became established, the misunderstanding that "author's rights" and "copyright" were the same thing spread, and continues to be widespread even today.

Now let us look at the overall plot of the booksellers' battles over perpetual copyright.

## The Battles of the Booksellers

**The Midwinter case.** The battles began in 1743. A group of London booksellers including Daniel Midwinter (d.u.) appealed to the Court of Session in Scotland that Scottish booksellers were putting out "pirate editions" of *Cyclopaedia* (1728) by Ephraim Chambers (1680?–1740) among other works. The protection of the right to print *Cyclopaedia* had expired in 1742, but Midwinter and his side declared that the term of protection set by the Statute of Anne was merely the period under which violation of the copyright *could be fined* and insisted that their right to print had not expired. Ultimately, the Court of Session dismissed the complaint on the grounds that the *Cyclopaedia* had not been entered in the Stationers' Company registry. As noted above, the Statute of Anne

38 Shirata 1998, p. 156.

stipulated that protection was to be afforded to only those who had previously registered a work with the Company.[39]

The Chambers *Cyclopaedia*, needless to say, was the mother of all encyclopedias and influential in the creation of the famous *L'Encyclopédie* of France. After the protection expired, countless reprints were made—what the monopolistic booksellers called "pirate editions"—and it was widely sold throughout England by the end of the eighteenth century. What this suggests is that "pirate editions" were contributing to the education and enlightenment of the masses. Looking at just this one case demonstrates that "pirate editions" played an important role in the formation of modern society.

**The *Millar v. Kincaid* case.** The first book-publishing case to be brought to the House of Lords was the *Millar v. Kincaid* case of 1750.[40] Millar and sixteen other London booksellers sued twenty Edinburgh-based and four Glasgow-based booksellers for publishing "pirate editions." All of the titles for which Millar et al. sued for damages resulting from "pirate publishing," however, were those for which protection under the Statute of Anne had already expired and which had not been registered with the Stationers' Company. In other words, Millar et al. sought in this suit to monopolize the printing even of books that did not fulfill the requirements for protection under the Statute of Anne.

Millar et al.'s first appeal to the Court of Session in Scotland over this issue took place in the same year as the Midwinter case, 1743, making these the first court cases dealing with copyright in Scotland. The decision, as in the Midwinter case, was ultimately that for books not registered with the Stationers' Company the London booksellers' monopoly could not be protected. Millar et al., unwilling to accept the Court of Session decision, in 1750 appealed their case to the higher court of the House of Lords. The House of Lords, however, would not recognize the Millar et al. charges of damages from the "pirate editions." Still determined, the booksellers sought to have the case reviewed, but the Lords would not be swayed, and the attempt to reassert the London monopoly was ultimately defeated.

Curiously enough, in 1748, even though this case remained unsettled, Millar appears to have been the London agent of the Kincaid bookstore. It is possible that, after the defeat of the suit in Scotland and during the period before the appeal was presented in the House of Lords, Millar and Kincaid sought to privately settle the matter between them.

It was in the same year the House of Lords decision was handed down, that Donaldson and Alexander Kincaid joined forces in opening a bookstore in Edinburgh, a store that presumably sold so-called pirate editions. Learning of the judgment in the *Millar v. Kincaid* case, Donaldson was confident that the business would be profitable.

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39 Feather 1994, p. 81.

40 *English Reports*, vol. 98, pp. 210–13.

## The Scheme to Wipe Out Pirate Publishing

The monopolist booksellers of London, after their failed attempts to press their cause against "pirate" publishing in the courts, undertook their own campaign aimed at forcing the outsider publishers out of business. In his exposé on this state of affairs published in 1764, *Some Thoughts on the State of Literary Property* (hereafter *Thoughts*), Alexander Donaldson printed three letters sent to booksellers in England, and condemned the conspiracy of the London booksellers.

The first letter was sent 23 April 1759 by London bookseller John Whiston (1711–1780) to John Merrill (1731?–1801), a Cambridge bookseller who sold books printed in Scotland. The letter begins as follows,

> We have a scheme now entered into, for totally preventing the sale of Scotch and Irish books, which were first printed in England; and near two thousand pounds is already subscribed for carrying it into immediate execution. And *every person in England*, *selling such books*, *will be proceeded against in Chancery*, *with the utmost severity*: and after May 1, *agents will be sent out to all parts of England, to detect such as have them in their shops, except classics,* (*Greek and Latin books*.)[41]

What the London booksellers had determined to do was to either buy, at cost, books printed in Scotland and Ireland being sold in England or replace them, at their own cost, with the same books printed in England. A most generous scheme it was. Whiston requested that Merrill send all the books printed in Scotland and Ireland in his store to a specified address, providing a list of twenty-four books and newspapers in particular, including *The Spectator*, Shakespeare, Swift's works, Thomson's *The Seasons*, Milton's poetical works, Hudibras, and others—and, he pressed in closing—"I beg you would not fail sending the Scotch and Irish books this week."[42]

Whiston sent the same letter to booksellers all over England selling "pirated" books. The booksellers' campaign was aimed at halting the circulation of any editions produced in Scotland or Ireland of the same titles they were publishing in London, and they were prepared to pay substantially to achieve their aim. Regarding that first letter, Donaldson observed as follows:

> We shall be glad to know what exclusive right the *London* booksellers have to these articles, some of them printed above one hundred years ago. ——Milton indeed sold his Paradise Lost to a *London* bookseller for fifteen pounds, from which purchase they draw an inference of perpetual monopoly to the trade in *London*: and it matters

41 Donaldson 1764, p. 11.
42 Donaldson 1764, p. 12.

> not whether there are now any descendents from that bookseller who paid Milton fifteen pounds; he that possessed that shop, or the nearest bookseller to the spot of ground where the shop stood, is now the proprietor of Milton's works, and he retails this illustrious author amongst his brethren at many hundreds of pounds; the public must purchase such editions only as they chuse to give, and pay whatever price is put upon them, and this to the end of time.[43]

As Donaldson states, the protection of the right to print afforded under the Statute of Anne had long ago expired for such works as those by Shakespeare and Milton. Donaldson argued the injustice of any attempt by particular booksellers to monopolize the publication of classical works.

The second letter was also penned by Whiston. Dated six days after the first letter, on 26 April, and without a specified addressee, it began as follows:

> Yesterday was a general meeting of all the considerable booksellers, and indeed almost the whole trade. The scheme was read and approved of, and an agreement was entered into, and signed by all present but one, (Worral in Bellyard). Wren signed, and Pottinger, and both subscribed 25 pound. Only a fifth of the money will be called for. The substance of the article agreed to, and signed by above sixty, near seventy booksellers present, are.[44]

The letter reconfirmed that the plan to suppress sales of books from Scotland and Ireland would be carried out beginning 1 May 1759. It also called on booksellers and printers learning of persons engaged in bringing "pirated editions" into England to promptly report such to the "committee." Those who infringed on the monopoly would be prosecuted and the costs of the litigation would be charged to the fund collected.

Notice of this agreement was circulated among booksellers throughout England. Those who did not sign the agreement and provide some donation would be barred from selling books. They would be expelled from the Stationers' Company. Those who went along with the plan were prohibited from doing business with violators. Violators would be fined five pounds and be banned from the book trade. The worth of "five pounds" may be understood when we are told that six pounds in those days was worth the "cost of a night out including supper, a bath and a fashionable courtesan; a 'full dressed' suit."[45] The letter thus threatened the termination of dealings from London with both "pirate" booksellers and those dealing with them.

One wonders what kind of person was Worral, the bookseller who apparently did

43 Donaldson 1764, p. 18.
44 Donaldson 1764, p. 13.
45 Picard 2001 (2000), p. 297.

not buy into this scheme. John Worral (d.u.) ran a bookstore specializing in books on law in Bellyard from 1736–1763. In 1763 Worral published *Introduction to the Laws of England*.[46] Although his reason for opposing the plan is not known, perhaps, as a publisher of books on law, he thought there was nothing to be gained from it. It is also possible that, because of his familiarity with law deriving from his business, he was able to see how shaky was the legal basis for the monopolists' plan and that, therefore, his conscience did not allow him to accept it. Whatever the reason, Worral was excluded from all book dealings because of his decision.[47] How that might be related to his going out of business in 1763 is also unknown.

A committee had been formed to administer the scheme consisting of Richard Tonson (d.u.), Andrew Millar, John Rivington (d.u.), William Johnston (d.u.), and three others. These were all persons who figured on the side of the rights holders in the litigation over copyright that unfolded between 1760 and 1774. To fund the scheme to wipe out the pirate publishers, a total of 3,150 pounds was collected, with Tonson contributing 500 pounds and Millar 300 pounds. Regarding the second letter, Donaldson observed as follows:

> Here this generous and disinterested scheme is brought to maturity, the agreement is now signed by near seventy of the brethren, and a sum of *L. 3150 Sterling* is subscribed, to oppress all the booksellers out of *London*; no *Scotch* or *Irish books* must be sold after the first of *May 1759*; every opposer of this scheme will be prosecuted out of the common fund, and penalties are also prepared for such as will not comply with them in this their unlawful combination. . . . So that here the reader will see the most tyrannical and barefaced combination that ever was set on foot in any country; and because they think themselves strong enough, they fully resolve to overturn all who stand in their way, in open defiance both of law and justice. If this be allowed in a free country, we will soon see many other branches of trade run away with, and monopolized by the wealthy, and all smaller dealers must fall a sacrifice to them.[48]

Whiston, the author of the first and second letters, was a famous bookseller specializing in works on theology. According to the *Booksellers Dictionary*, in 1759, the year he wrote these letters, someone had played "a practical joke" on him that apparently caused him enough psychological anguish that he was forced to withdraw from the bookselling business.[49] The record does not make clear from what sort of prank he suffered, but it may have been fallout from the London booksellers' scheme.

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46 *Booksellers Dictionary*, p. 272.
47 Walters 1974, p. 292.
48 Donaldson 1764, p. 19.
49 *Booksellers Dictionary*, p. 260.

The third letter was written by London bookseller John Wilkie (?–1785) by order of the committee and also sent to all the booksellers in England. It was dated about half a year after the second letter, on 2 November 1759, and reconfirmed the plan that had been put in motion six months earlier. It reiterated the call to hand over "pirate" editions to the committee, stating that they would be replaced by English editions of equivalent worth. It also stated that in accordance with the plan previously announced, a legal complaint was lodged against a number of bookstores. Donaldson's assessment of this letter was: "The style is a masterpiece of low cunning, interspersed with flatteries and threats. It had the desired effect upon many unwary country-dealers; — however, some there were who still stood out, and refused to comply with these unjust demands."[50]

The tie-up of Donaldson and Kincaid had been dissolved the year prior to these letters, in 1758. It is rather startling to find that, at the same time all this was going on in 1759, Millar, and his former apprentice Thomas Cadell (1742–1802) had again established a link with Kincaid for the publication first of Adam Smith's *The Theory of Moral Sentiments* (1759), and continuing with the printing of other titles by authors of books of enlightened thought such as Adam Ferguson (1723–1816) and David Hume. Some of these were printed by Millar's ally William Strahan (1715–1785). Millar seems to have put his suit of nine years earlier against Kincaid behind him, deciding that yesterday's foe was today's friend. In the late 1750s then, it appears that Millar and his ilk, while carrying out their scheme to suppress the booksellers selling "pirate" books, were at the same time building cooperative relationships with provincial booksellers willing to follow their lead. Seen in a certain perspective, these kinds of activities represented Millar's moves to gather provincial booksellers under his own umbrella. The provincial booksellers, for their part, could not ignore the strengths and the market advantages enjoyed by the big booksellers of London, so it was only natural that they would keep as close to them as possible.

## *Tonson v. Collins* First Trial

In their attempt to get perpetual copyright accepted as a common-law right, the monopolistic booksellers of London—in addition to the scheme revealed by Donaldson—adopted the surprising method of staging what turned out to be a trumped-up case against pirate publishing, the *Tonson v. Collins* case for which trials were held in 1760 and 1761.[51] Tonson had been publishing reprints of articles from the popular newspaper *The Spectator* launched in 1711–1712, and Donaldson had been selling "pirate editions" of *The Spectator* from Scotland.[52] But it was not Donaldson, but Benjamin Collins

50 Donaldson 1764, p. 20.
51 *English Reports*, vol. 96, pp. 169–74, 180–92.
52 Walters 1974, p. 293.

(1717–1785), a bookseller of Salisbury, about eighty miles southwest of London, whom Tonson sued, saying Collins had been selling copies of *Spectator* reprints from Scotland.

The case was brought to the Court of King's Bench, which, as the reader will recall, was the court that reviewed cases in view of common law (see Chapter 1). Tonson's strategy was to have the court recognize the sole right under common law to publish books even when the period of protection provided under the Statute of Anne had expired.

As it later came out, however, the whole case had been set up by Tonson, who had even agreed to pay Collins' court fees to induce him to cooperate in the plan. The truth came out toward the end of the trial, and ultimately no decision was handed down.

The main point under dispute in the *Tonson v. Collins* case was whether the "author's right" to a work was a common-law right or not. The monopolists sought to defend their prerogative to print books by declaring that the "author's right" to a work was a common-law right (i.e., not limited by the terms of the Statute of Anne). The "pirate" printers argued that "author's right" was *not* a common-law right but had been established only with the Statute. The details of debate in the case have been studied closely by Shirata Hideaki in his *Kopīraito no shiteki tenkai* [The Historical Development of Copyright][53] and by Ronan Deazley in *On the Origin of the Right to Copy*.[54] What I would like to examine here is the interpersonal relations between various men in Britain's legal profession. Key figures in the later *Donaldson v. Becket* case made their appearance in the *Tonson v. Collins* proceedings.

Standing for Tonson for the first trial in the case was Alexander Wedderburn (1733–1805), a Scotland-born lawyer. Collins' attorney was Edward Thurlow (1731–1806), born in Norfolk in the eastern part of England. So, the monopolist bookseller of London was being represented by a Scotland-born attorney and the Scottish marketer of so-called pirate editions was represented by an England-born attorney. Studying the history of eighteenth-century litigation over copyright, we come across many such ironies.

What kind of person was Wedderburn? Born into a family of lawyers of East Lothian, a town about seventeen miles east of Edinburgh, he had entered the University of Edinburgh at the age of fourteen. Later he polished his rhetorical skills by preaching in a local church by day and matching wits by night with members of the Scotland Renaissance in social gatherings in the city. By 1754, at the age of twenty-one, he appears to have been a lawyer with an independent practice.

In 1755, Wedderburn was involved in the founding of the *Edinburgh Review*.[55] His career in law in Edinburgh came to a sudden end in 1757, however, after he was

53 Shirata 1998, pp. 161–72.

54 Deazley 2004, pp. 149–63.

55 This journal ceased publication after only two issues, but the same title, revived in 1802 continued until 1929 as one of England's leading journals of literary criticism.

subjected to groundless insults he could not tolerate from others in the legal profession and decided to leave Edinburgh for London. The *Tonson v. Collins* case came along three years later, as Wedderburn was seeking to reestablish his career in London.

How did Wedderburn feel when he departed from Edinburgh? He was no doubt a great patriot as far as Scotland was concerned. The cultivation he received from his interchange with other enlightened men of his time was doubtless an asset that nourished him throughout his life. It would be understandable, however, if the resentment he felt toward the parochialism of Scotland that would not recognize his talents overwhelmed the value of what he had enjoyed there. Such mixed sentiments were probably related in some way to his reason for standing for the London booksellers' side in the litigation over copyright.

Soon after Wedderburn arrived in London, he resolved to get rid of his Scottish accent, realizing that he could not expect success in London if he did not acquire the smooth tones of accepted English speech. In this endeavor he studied under an Irish born actor and speech instructor named Thomas Sheridan (1719–1788) and others. In *Life of Johnson*, Boswell writes about this at some length:

> Mr. Macklin, indeed, shared with Mr. Sheridan the honour of instructing Mr. Wedderburn; and though it was too late in life for a Caledonian to acquire the genuine English cadence, yet so successful were Mr. Wedderburn's instructors, and his own unabating endeavours, that he got rid of the coarse part of his Scotch accent, retaining only as much of the 'native wood-note wild,' as to mark his country; which, if any Scotchman should affect to forget, I should heartily despise him. Notwithstanding the difficulties which are to be encountered by those who have not had the advantage of an English education, he by degrees formed a mode of speaking to which Englishmen do not deny the praise of elegance. Hence his distinguished oratory, which he exerted in his own country as an advocate in the Court of Session, and a ruling elder of the *Kirk*, has had its fame and ample reward, in much higher spheres. When I look back on this noble person at Edinburgh, in situations so unworthy of his brilliant powers, and behold Lord Loughborough [Wedderburn] at London, the change seems almost like one of the metamorphoses in *Ovid*; and as his two preceptors, by refining his utterance, gave currency to his talents, we may say in the words of that poet, '*Nam vos mutastis*.'[56]

After moving to London and while casting about in his attempt to make a living there, the man upon whom Wedderburn depended was William Strahan, another Scotsman from Edinburgh who had established himself in London by setting up a printing

56 Boswell 1998 (1791), pp. 273–74. Pages later in *Life of Johnson*, we read of the elderly Sheridan's complaints that after Wedderburn had established himself in London society, he neglected the benefactors who taught him how to speak, p. 718.

company. Wedderburn went to his countryman requesting to be allowed to be put in charge of a lawsuit. Once again, *Life of Johnson* sheds light on the situation at the time.

> When we had talked of the great consequence which a man acquired by being employed in his profession, I suggested a doubt of the justice of the general opinion, that it is improper in a lawyer to solicit employment; for why, I urged, should it not be equally allowable to solicit that as the means of consequence, as it is to solicit votes to be elected a member of Parliament? Mr. Strahan had told me that a countryman of his and mine, who had risen to eminence in the law, had, when first making his way, solicited him to get employed in city causes. Johnson. 'Sir, it is wrong to stir up law-suits; but when once it is certain that a law-suit is to go on, there is nothing wrong in a lawyer's endeavouring that he shall have the benefit, rather than another.' Boswell. 'You would not solicit employment, Sir, if you were a lawyer.' Johnson. 'No, Sir, but not because I should think it wrong, but because I should disdain it.' This was a good distinction, which will be felt by men of just pride. He proceeded: 'However, I would not have a lawyer to be wanting to himself in using fair means. I would have him to inject a little hint now and then, to prevent his being overlooked.'[57]

The reference to "a countryman . . . who had risen to eminence in the law" is to Wedderburn. Strahan had helped the younger man find work when he had left Edinburgh without having a firm position in London to go to, and this Strahan was a friend of Millar's. By this path of horizontal connections among contemporaries, it seems certain, Wedderburn ended up becoming attorney for the monopolist booksellers in *Tonson v. Collins*.

Samuel Johnson's estimation of Wedderburn does not seem to have been very favorable, as we can observe in Boswell's account quoted above. The *Edinburgh Review*, in the editing of which Wedderburn had been involved, had published a review critical of Johnson's *Dictionary* by Adam Smith. That may have had something to do with Johnson's irritation. He seems to have had more affinity for Thurlow, who had taken up Collins' defense, than for Wedderburn, as the following account in *Life of Johnson* testifies.

> 'It is wonderful, Sir, with how little real superiority of mind men can make an eminent figure in publick life.' He expressed himself to the same purpose concerning another law-Lord, who, it seems, once took a fancy to associate with the wits of London; but with so little success, that Foote said, 'What can he mean by coming among us? He is not only dull himself, but the cause of dullness in others.' Trying

57 Boswell 1998 (1791), p. 683.

> him by the test of his colloquial powers, Johnson had found him very defective. He once said to Sir Joshua Reynolds, 'This man now has been ten years about town, and has made nothing of it;' meaning as a companion. He said to me, 'I never heard any thing from him in company that was at all striking; and depend upon it, Sir, it is when you come close to a man in conversation, that you discover what his real abilities are; to make a speech in a publick assembly is a knock. Now I honour Thurlow, Sir; Thurlow is a fine fellow; he fairly puts his mind to yours.'[58]

"Another law-Lord" would be Wedderburn, and Johnson was not the only person to have remarked on the Scotsman's lack of refinement. Alexander Carlyle (1722–1805), too, described Wedderburn's conversation as "stiff and pompous."[59]

Wedderburn went on to be elected to the House of Commons from Yorkshire. Figures like him, who became members of Parliament from parts of the country to which they were not native, sharply increased from 1754 onward, until there were nearly sixty of them by 1790.[60] We do not know if all of them had made a point of removing their native accents or not, but it is likely that there were many Englishmen who took umbrage at the large number of people from Scotland serving in Parliament.

And what about Edward Thurlow? He attended Cambridge University, but left in 1751 and became a barrister in 1754. In 1762 he became a member of the King's Council, and in 1765 a member of the House of Commons. One might think, as a defender for the "pirate publishers," he would have been a liberalist, but in fact, he was quite the opposite. A conservative lawyer who supported George III (1738–1820; r. 1760–1820), Thurlow is known for having been a defender of the slave trade and Britain's control of the American colonies.

Physically, Thurlow was rather dark-complexioned with handsome, if not particularly refined, features. A man of great dignity, he had thick eyebrows and a piercing gaze. He was known more for his eloquence than for his knowledge of law, and his intellect was sharp enough to cause even Samuel Johnson to observe, "I would prepare myself for no man in England but Lord Thurlow. When I am to meet with him I should wish to know a day before."[61] So able and sharp could Thurlow be, that everyone around him had to be on guard.

Wedderburn and Thurlow seem to have competed for the same posts throughout their careers and to have been lifelong rivals. As it happened, Thurlow ended up assuming the posts of solicitor general, attorney general, and lord chancellor first, with Wedderburn invariably taking them up later.

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58 Boswell 1998 (1791), pp. 1204–1205.
59 *Oxford Dictionary of National Biography*.
60 Colley 2008, p. 126.
61 Boswell 1998 (1791), p. 1317.

Another key player in the *Tonson v. Collins* case who also figured large in the *Donaldson v. Becket* case was Lord Mansfield (William Murray, 1705–1793). Scotland born, he reigned supreme in England's judiciary as chief justice of the Court of King's Bench for more than three decades between 1756 and 1788. Highly admired even today as the leader of Britain's eighteenth-century legal profession, he invariably assumed a central role in the series of court cases involving the question of copyright. Lord Mansfield was described as a man with a "silver tongue," not only eloquent but full of passion, as so vividly portrayed by Johnson and Boswell: "So many bellows have blown the fire . . . And such bellows too. Lord Mansfield with his cheeks like to burst."[62]

Lord Mansfield was born in Scone, Scotland.[63] Scotland in the early eighteenth century was the scene of anti-England activism led by the Jacobites. Coming from a family of Jacobites, he was involved in the movement from a young age. Despite the glories of his later career, these beginnings were later to bring disaster. Apparently, after he became successful in London, Lord Mansfield was rarely in touch with his family in Scone. He seems not even to have bothered to inform his brothers of the various posts he assumed. He may have decided to give up ties to his family in order to distance himself from the connection with the Jacobite cause. Although born in Scotland, he was educated from high school at Westminster School and Oxford University, and the accents and cultivation of England he acquired from an early stage of his youth stood him in good stead. The elite of Scotland were all at great pains to erase or dilute their strong accents.[64]

In the course of his long career as chief justice of the Court of King's Bench, Lord Mansfield established countless precedents relating to promissory notes, contracts, bills of exchange, and other matters relating to mercantile affairs. He is famous in the history of law as having established the foundations of commercial law in England. He also had a liberal side, and was well known for his success in 1772 in preventing a slave from being detained in England for sale overseas in a judgment that is said to have contributed to the abolition of the slavery system.

Lord Mansfield is said to have been requested to serve as lord chancellor several times, but to have refused each time. He was apparently content to keep the relatively more stable position on the Court of King's Bench than take the loftier job of lord chancellor, from which he might be easily removed at the will of higher authorities.[65] Indeed, during the time he served on the King's Bench, the post of lord chancellor changed hands five times.

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62 Boswell 1998 (1791), p. 520.

63 For the life of Lord Mansfield, see Foss 1864; Fifoot 1936; Heward 1979; Oldham 1992; and Oldham 2004.

64 A remark—made in 1772—by Oxford University professor Robert Vansittart (1728–1789) about Mansfield set down by Boswell highlights the disdain the gentlemen of England felt toward men from Scotland: He would not allow Scotland to derive any credit from Lord Mansfield; for he was educated in England. 'Much (said he,) may be made of a Scotchman, if he be *caught* young.' Boswell 1998 (1791), p. 494.

65 Heward 1979, p. 89.

## *Tonson v. Collins* Second Trial

Chief Justice Mansfield was known as a man who believed in the principle of common-law copyright.[66] And yet he did not hand down a clear decision in the first trial of the *Tonson v. Collins* case. The deliberation on this suit of dubious origins was resumed in 1761 when the second trial took up where the previous trial left off.

In this trial, Wedderburn was replaced as attorney for Tonson by the London-born barrister William Blackstone (1723–1780). Immediately afterwards Blackstone published his monumental work *Commentaries on the Laws of England*,[67] which was to have a major influence on the profession of law in Britain and the United States. Blackstone's *Commentaries* includes a discussion of copyright, and among works on law it is this book that uses the term "copyright" for the first time.[68] Blackstone is one of the leaders in popularizing the concept.

As Shirata points out, Blackstone distinguished clearly between "author's right" and "copyright." Author's right, in Blackstone's view, was the property rights to an entity produced by an author through the exertion of his rational powers. This assertion was based not on common law but on Locke's theory of natural right, while "copyright," which was grounded in common law, was a property right concerning publishing.

Collins' attorney, too, changed from Thurlow to Joseph Yates (1722–1770). While Yates was willing to accept Blackstone's idea of "author's right," he objected to the notion of "copyright." Stating that to publish a work was to make it the common possession of the world, Yates argued that it was impossible to assert property rights, by way of "copyright," to something that by its nature could not be monopolized.

Chief Justice Mansfield did not hand down a judgment in this 1761 trial either, but passed it on to the Court of Exchequer for further debate. It was there that suspicions of collusion were revealed and the matter was shelved. The revelation that the case was contrived must have dealt quite a serious blow to the reputation of the leading booksellers of London.

## Donaldson Goes to London

Donaldson went to London and opened a store on the Strand in 1763, about two years after the *Tonson v. Collins* case. His premises were only about 440 yards away from Millar's store. To have a publisher from Edinburgh set up shop and start selling discount copies of books in their very midst was intolerable to the London booksellers. No sooner had he opened his doors than he became the target of the local booksellers' enmity. But Donaldson was not to be cowed. He sat down and wrote a book exposing the various

66 Deazley 2004, p. 130.
67 Blackstone 1765–1769.
68 Shirata 1998, p. 108.

ploys of the monopolist members of the trade. He prefaces *Some Thoughts on the State of Literary Property* with the following advertisement:

> As the booksellers of London have endeavoured of late to monopolize books of all kinds, to the hurt of all the other booksellers in England, Scotland, and Ireland in particular, and, in general, to the prejudice of all his Majesty's subjects in the three kingdoms, as well as in the British colonies; the following short state of literary property is made public, that the world may see how unjust their pretensions to an exclusive right are, and how oppressive, in these lands of liberty their monopolising schemes have been.
>
> It is therefore expected, that as this is an affair of public concern, persons of all ranks, into whose hands this short memorial falls, will take the trouble to read it over, and then judge for themselves, ——Brevity has been designedly studied, that the reader's patience might not be incroached [sic] on.[69]

The London booksellers asserted that because they had purchased the rights from the authors, they held a monopoly on the printing and publication of such books in perpetuity. But Donaldson believed that their assertions violated the spirit of the Statute of Anne. He was well informed of the many cases in which it was dubious as to whether the bookseller had in fact purchased rights from authors. Reading the preface above, one might conclude that his actions were inspired by righteous indignation. But Donaldson was basically a newcomer seeking to make a profit in the London book trade, so altruistic passions were surely not his only motive. Without the opportunity he saw for pecuniary gain represented by as large a market as London offered, would he really have committed himself so seriously to challenging the monopoly of the big booksellers?

*Thoughts* set forth two major questions. The first was: What is the law or logic upon which an author's ownership of printed and published books is based? The second was: How long does that exclusive and absolute right of possession remain with the author, his heir, or his assigns?

Donaldson recognized that authors needed to be encouraged, but he believed there was no legal basis for the notion that an author's ownership of a book, once published, lasted forever. An author was no different from the creator of a work of art or the discoverer of a secret of nature. Such a "discovery" was his own possession as long as he kept it to himself, but once the work or discovery was made public, unless some measure were instituted in the law, it was something from which all people should be able to freely seek profit.

In the case of a discovery or an invention, the law provided for patents giving protec-

69 Donaldson 1764, p. 2.

tion for a certain period of time. That implied a popular recognition that monopolistic rights were rightfully of limited term. Without that inventor or discoverer, someone else would eventually discover or invent more or less the same thing. It is also most likely that someone would produce something new using an older invention or discovery. In the same way, Donaldson claimed, it did not make sense for an author to cling perpetually to ownership of the content of a book once it was published.

One might think that, because a book is a direct reflection of the character or identity of its author, it is intrinsically different from an invention or a discovery. But that is quite a modern idea. In England in the latter half of the eighteenth century, the novel was a literary genre just in the process of being born. In that time at the dawn of modernity, it seems unlikely that there was anything like the modern view of literature as writing as the expression of identity. Moreover, "literary property" would consist not only of so-called "literary works," but would also encompass classical works of history and philosophy as well as books of a pragmatic nature. Donaldson argued that perpetual rights should not be allowed for the knowledge that is needed by society.

As Donaldson saw it, the Statute of Anne had been intended to prevent the monopoly on printing and publishing of books by booksellers from being extended without limit. During the time a book was protected, the Statute said that an author could demand penalties for "pirate" editions. But once that period of protection was over, it was evident that anyone should be free to reprint that book.

The London booksellers appealed repeatedly to the Court of Chancery to prevent other booksellers from reprinting books for which their rights had expired under the Statute of Anne. Until the collusion among booksellers demonstrated by the *Tonson v. Collins* case was exposed, the successive justices in the post of lord chancellor had been sympathetic to the pleas of the booksellers and issued injunctions to stop the publishing of the "pirates." Donaldson and the other booksellers of Scotland were deeply dissatisfied with such decisions.

In an appendix to *Thoughts*, Donaldson quoted the critic William Warburton (1698–1779) to support his ideas, as follows:[70]

> This author, after an inquiry into different kinds of property, puts a question, Whether at common law an author and his assignees have a perpetual and exclusive right of selling and vending his own works? This question he discusses with a great deal of precision; and finds, that copies are no more susceptible of property after publication than the elements of air and water, a refreshing breeze, or a beautiful prospect, which are for the common benefit of mankind. . . . After taking a view of the *Greek* and *Roman* authors, some of whom wrote for honour, and others for gain,

70 Parks 1974a.

> he [Warburton] says, "It is evident that neither the authors of *Greece* and *Rome* ever claimed an exclusive right in their copies after publication.[71]

Donaldson holds that it was unthought of in Greek and Roman times for authors to monopolize the copying of knowledge that had been made public. Since Greek and Roman times came long before the invention of printing in the West, he probably meant "publication" in the sense of the hand-copying of books.

Donaldson quotes the following section of Warburton's book:

> The property of an inventor in his machine, is in every respect similar to the exclusive right claimed by the author, in his copy. It is admitted, that, at common law, the inventor hath no property in the form of his machine; can the author claim any in his copy?[72]

Some explanation may be in order here. In the discourse leading up to the establishment of the Statute of Anne, the booksellers argued that literary property and patents for invention were similar. At a time when patents for inventions were recognized, they declared, it was irregular that authors' rights should not be. But what they overlooked was that an inventor's right to a patent on his invention was not one arising from common law, but a right accorded artificially under established law. Thus, patents had stipulated limits of term. After that limit expired, anyone was free to use the invention as he pleased. The "right to copy" that was established under the Statute of Anne, too, did not derive from common law but was an artificial right established under statute law. This is also the reason why the period of copyright protection was limited to fourteen years from the time of publication.

If the right to literary property were guaranteed in perpetuity, the benefits would overwhelmingly accrue only to the person holding the rights when it is published. A business attempting to profit from the reprinting of books that had already become classics, as was Donaldson's, would not be viable. Herein lies Donaldson's real motive. Just because a bookseller has made a copy of a book, does not mean that the original book has disappeared. As distinct from, for example, the possession of land, exclusive ownership of copying is difficult to establish. What Donaldson wanted to establish was that, even if one had a right to copy, it would be an artificial right, not an eternal right deriving from common law or natural rights. His *Thoughts* ends with a challenge:

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71 Donaldson 1764, pp. 21–22.

72 Donaldson 1764, p. 23.

> To the PUBLIC.
> This is to give notice, that Alex Donaldson, from *Edinburgh*, has now opened a shop for cheap books, two doors east from *Norfolk-street*, in the *Strand*, where they are sold from thirty to fifty *per cent*, under the usual *London* prices. —The *London* booksellers, by the aforementioned combination, having prevented their brethren from dealing with him, have forced him, in self-defence, to establish this shop. —Good allowance is made to merchants who buy for exportation, and to country booksellers.
>
> Catalogues, with the prices annexed to each article, may be had *gratis* at said sho[p].[73]

Now we know Donaldson's reason for establishing his shop in London. As observed in the three letters introduced above, the London booksellers had launched a scheme in 1759 calling on all members of the trade in England to boycott books published in Scotland. They sought to prevent the collapse of the mechanism that supported their monopoly on printing of specific titles by certain bookstores, thereby keeping the price of books high. Finding his efforts to export books from Edinburgh to London thwarted by the English boycott, Donaldson was unable to sell his books. So he decided that in order to defend his business he would go to London himself and there try to sell books cheaply that he had printed in Edinburgh.

Donaldson's challenge was driven by the fighting spirit of a latecomer's last-stand effort to protect his enterprise. He was not at all some sort of shining knight fighting bravely against the monopolization of knowledge.

## Victory for the Perpetual Copyright Camp

The London booksellers did not let Donaldson's challenge go unanswered. In 1765, they launched two suits in the Court of Chancery against him, one led by Millar and the other by Thomas Osborne (?–1767).

The *Millar v. Donaldson* and *Osborne v. Donaldson* cases. The *Booksellers Dictionary* describes Osborne as both "coarse, dull, and uneducated" and as "a very respectable man."[74] Perhaps he was the kind of man who had as many friends as he did foes.[75] In any case, any designs these vengeful booksellers may have had to put Donaldson in his place were thwarted. Then Lord Chancellor, the Earl of Northington (Robert Henley:

73 Donaldson 1764, p. 24.

74 *Booksellers Dictionary*, pp. 185–86.

75 At least Samuel Johnson was probably not among his friends, as suggested by Boswell's account included in *Life of Johnson*: "It has been confidently related, with many embellishments, that Johnson one day knocked Osborne down in his shop, with a folio, and put his foot upon his neck. The simple truth I had from Johnson himself. 'Sir, he was impertinent to me, and I beat him. But it was not in his shop: it was in my own chamber.'" (Boswell 1998 [1791], p. 112)

1708?–1772), rejected the suit brought by Millar and his cohorts to force Donaldson to cease publishing and to recognize their perpetual ownership rights to the titles they were publishing. The Lord Chancellor went so far as to say that "it might be dangerous to determine that the author has a perpetual property in his books, for such a property would give him not only a right to publish, but to suppress too."[76] Until that time, the Court of Chancery had been generally favorable to the position of the London booksellers and had frequently issued injunctions against the "pirate publishers," so clearly the prevailing trend of the times had changed. Perhaps the collusion revealed in the *Tonson v. Collins* case had started to cast its shadow over the booksellers' credibility.

The Lord Chancellor went further to propose that the case be taken to the highest court in the land—the House of Lords.[77] When the monopolist booksellers had sought to have the term of protection given in the Statute of Anne extended, the House of Lords had firmly turned down their plea; it had also rejected the assertions of the monopolists when the *Millar v. Kincaid* case was appealed there in 1750 as well. Taking that record of decisions into account, an appeal to the House of Lords was likely to have worked to the advantage of Donaldson. The monopolist booksellers, however, probably wanted to avoid that option. They were then forced to shift strategies in order to find a way to achieve their aim without directly targeting Donaldson, keeping their battle out of the Court of Chancery and getting a favorable decision at the Court of King's Bench, presided over by Lord Mansfield, who supported the principle of common law copyright.

The *Millar v. Taylor* case. The monopolist booksellers chose as their next target Robert Taylor (d.u.), suing him at the Court of King's Bench in 1766 for publication and sale of the book *The Seasons*.[78] *The Seasons* author James Thomson had sold his poetry to Millar and Millan in 1729, and since the longest their rights to the title under the Statute of Anne would be protected would have been twenty-eight years, that meant that at least by 1758, their copyright to *The Seasons* would have expired. Taylor published *The Seasons* because he believed the copyright had expired. It is interesting that Millar did not sue Taylor regarding the printing of *The Seasons*, only publication and sale. One theory goes that the edition of *The Seasons* that Taylor was selling was printed by none other than Alexander Donaldson.[79] If that was a fact, then it would bring into view intriguing relations among the three persons.

In the first trial of the *Millar v. Taylor* case, the lawyer representing Millar was John Dunning (1731–1783), a native of Devon in the southeastern part of England. Dunning was to be a key figure in the *Donaldson v. Becket* case, serving as Becket's attorney.

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76 *English Reports*, vol. 28, p. 924.
77 Rose 1993, p. 94.
78 *English Reports*, vol. 98, pp. 201–57.
79 Rose 1993, p. 94.

Dunning spoke with a Devonshire accent, which, with its rolled rs, was said by some to have a soothing effect. Dunning's name appears in *Life of Johnson* when the subject of the accents of people from Scotland comes up. Johnson, who prided himself on his ability to identify even subtle differences of accent, said that he could tell from Dunning's accent that he came from Devon,[80] suggesting that it was not a very heavy accent. And thus we can form an image of this gentleman who had established himself in the high society of London but could not completely conceal his country origins. Robert Gore-Browne describes him as a man whose wit "relieved the weary, calmed the resentful and animated the drowsy." His oratory was remarkably elegant, known for its fine sense of rhythm and unexpected climaxes. Unfortunately, he was not very good looking and his voice was husky, so he may not have cut a particularly striking figure in the courtroom.[81]

Meanwhile the attorney for Taylor in the first trial was the above-described Thurlow. In as much as Thurlow was to be Donaldson's attorney later on, we can see that the face-off between Dunning, standing for the monopolist side (Millar, Becket, etc.), and Thurlow, standing for the "pirate" side (Taylor, Donaldson, etc.), already began with this *Millar v. Taylor* case. At the same time, we find that while they might cross swords in the court room, Thurlow and Dunning were in fact close friends going back to their days together in the Inner Temple Law School.[82] These elements of interpersonal relations afford some insight on history that does not emerge by simply looking at court records.

The first trial was held 30 June 1767, but no decision was made. The second trial was held on 7 June of the following year, with Blackstone taking over as attorney for Millar and an Irish writer-cum-barrister named Arthur Murphy (1727–1805) representing the Taylor side. The morning after the second trial, however, Millar suddenly died; the cause of his death is not known. Millar's wife Jane, son William, the bookseller Longman II (1731–1797), and his former apprentice Thomas Cadell, along with Becket, became the executors of Millar's estate.

Cadell was a bookseller who had been trained as an apprentice with Millar and became his business partner in 1765. Millar had retired from the business in 1767 and handed over his shop to Cadell as his successor. Cadell joined forces with Strahan and went on to put out numerous best-selling works including Edward Gibbon's (1737–1794) *The History of the Decline and Fall of the Roman Empire* (published 1767–1789). Cadell also put out works by Blackstone, leading Scotland poet Robert Burns (1759–1796), Hume, Johnson, Adam Smith, and so on. Noting that he published books for Blackstone, who had served as attorney for monopolist Tonson in the 1761 *Tonson v. Collins* case, we can detect the behind-the-scenes connections linking Millar, Cadell, and Blackstone.

On 13 June 1768 the executors of Millar's estate put the copyright to *The Seasons* up for sale in London. Donaldson tried to submit a bid but was prevented from participating

80 Boswell 1998 (1791), p. 469.
81 Gore-Browne 1953, p. 13.
82 Gore-Browne 1953, p. 11.

in the sale. As a result of the sale, a group of fifteen people including Becket, Longman, and Cadell pooled their funds and purchased the copyright to *The Seasons*.

After Millar's death, Becket and others took over his role in the *Millar v. Taylor* case. The debate in the court focused on the issue of whether copyright was a matter of common law or not—in other words whether "copyright as author's right" was something that had existed from before the Statute of Anne, and whether that right continued after publication. The Millar side argued that their rights originated prior to the Statute while the Taylor side asserted that no such thing existed.

Records of the case show that of the three justices in charge of the case, two of them—Edward Willes (?–1787) and Richard Aston (?–1778) gave opinions supporting the Millar side both in terms of the historical aspect and the theory of ownership rights. The third justice, Joseph Yates, supported Taylor on the point that knowledge once made public is not something that can be monopolized (as the reader will recall, Yates had served as attorney for the defendants in the *Tonson v. Collins* case introduced above). Justice Yates held forth with eloquence for three hours, but ultimately, since the other two justices supported Millar, it appears that his arguments were not persuasive. It is said that in the thirty-two years during which Lord Mansfield served as chief justice on the Court of King's Bench, in fewer than twenty cases did the justices differ in this way over the decision.[83]

Without pursuing the tremendous detail of the points debated, let us look at the conclusion. The judgment was handed down 20 April 1769. The chief justice was, as in the case of the *Tonson v. Collins* case, Lord Mansfield. According to the judgment, it was clear in terms of the principles of justice and fairness that the manuscript before publication was protected under common law. If such protection should cease after publication and "pirate" editions appeared, the author would lose any profits to be gained from his work and be unable to correct any mistakes in "pirate" editions. The author, moreover, would not be able to prevent having his name affixed to the work; therefore, said Mansfield, copyright needed to be protected after publication as well as before.[84] And he stated:

> The accurate and elaborate investigation of the matter, in this cause, and in the former case of *Tonson and Collins*, has confirmed me in what I always inclined to think, "that the Court of Chancery did right, in giving relief upon the foundation of a legal property in authors; independent of the entry, the term for years, and all the other provisions annexed to the security given by the Act."
>
> Therefore my opinion is——"that judgment be for the plaintiff."[85]

83 Fifoot 1977, pp. 46–47.
84 *English Reports*, vol. 98, pp. 252–53.
85 *English Reports*, vol. 98, p. 257.

While he had not clearly committed himself in the *Tonson v. Collins* case, Lord Mansfield placed himself clearly on the side with the monopolist booksellers in stating that authors held legal ownership of their works, which was separate from term of protection and other provisions of the Statute of Anne. Mansfield handed down a decision supporting the view that copyright existed in common law and that authors held the rights to their manuscripts in perpetuity.