

CHOKING THE CHANNEL OF PUBLIC INFORMATION: RE-EXAMINATION OF AN EIGHTEENTH-CENTURY WARNING ABOUT COPYRIGHT AND FREE SPEECH

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The U.S. Supreme Court in Eldred v. Ashcroft gave First Amendment importance to the topic of copyright history. In measuring whether Congress has altered the “traditional contours” of copyright such that First Amendment scrutiny must be applied, federal courts—including the Supreme Court in its 2011 Term case Golan v. Holder—must carefully examine the intertwined history of copyright and freedom of the press. The famous but misunderstood case of Donaldson v. Beckett in the British House of Lords in 1774 is an important piece of this history. In Donaldson, several lawyers, litigants, judges, and lords recognized the danger posed by copyright to untrammelled public communication. Eighteenth-century newspaper accounts shed new light on the free press implications of this important period in copyright law history.

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INTRODUCTION

On Tuesday, February 22, 1774, Lord Effingham Howard rose in the British House of Lords to declare that a perpetual common law copyright “might prove dangerous to the constitutional rights of the people”¹ because it could amount to government-sanctioned private censorship of communication. The press, Effingham said, was the lone check on official abuse of power, but a despotic leader from government or monarchy could use copyright law to thwart freedom of the press and hide his own wrongdoing. By purchasing the copyright in a work critical of himself and then preventing reproduction and distribution, the despot would be “securing in his closet the secret which might prevent the loss of freedom” and “choking the channel of public information.”² Effingham concluded by “declaring...that the Liberty of the Press was of such infinite consequence in this country, that if the constitution was overturned, and the people were enslaved, grant him but a free press and he would undertake to restore the one and redeem the other.”³

Effingham’s remarks came at the conclusion of the final day of a nearly three-week legal appeal pitting hidebound London booksellers against an innovative Scottish newspaper owner and bookseller named Alexander Donaldson. Effingham told his fellow lords—sitting as Britain’s highest judicial authority to decide the famous but misunderstood copyright case of *Donaldson v. Beckett*⁴—

¹ *Literary Property*, MORNING CHRON. & LONDON ADVERTISER, Feb. 26, 1774, at 2. Spelling here and throughout this manuscript has been modernized.

² *Id.*

³ *Id.*

⁴ The case is reported in multiple eighteenth-century sources, but not all of them are equally accurate and detailed. The authoritative legal reporter Sir James Burrow appended his report of *Donaldson v. Beckett* to an earlier case, *Millar v. Taylor*, decided on the same issue by the Court of King’s Bench in 1769. Burrow’s version tracks the minute book of the House of Lords. See MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 108-09 (1993). However, it lacks reporting of the speeches by the lords themselves and also contains a critical error in reporting the recommendations of the common law judges. See *Millar v. Taylor*, (1769) 98 Eng.

that he opposed the perpetual common law copyright sought by the London booksellers because the right would negatively “affect the Liberty of the Press.”⁵ In a defining and enduring precedent that retains relevance today in both the United Kingdom and the United States, Effingham and the majority of the other lords rejected the booksellers’ arguments and concluded that neither an author nor a printer could exercise copyright control of a creative work through a common law copyright after the statutory period of copyright had ended. The House of Lords reversed an injunction that had barred Donaldson from printing and selling copies of James Thomson’s *The Seasons* without compensating the London booksellers who had claimed to own the perpetual copyright.

Notwithstanding its expansiveness and eloquence, Effingham’s statement has received relatively little attention from scholars and jurists. This fact can be attributed in part to the idiosyncrasies of British case law reporting in the eighteenth century: the two most prominent reported versions of *Donaldson v. Beckett* do not even contain the speeches of Effingham or his fellow lords, confining themselves instead to speeches by lawyers arguing the case and

Rep. 201 (K.B.). (Burrow’s report of *Donaldson v. Beckett* begins on page 257. For the sake of accuracy, even when making a full citation to Burrow’s *Donaldson* alone, this article’s footnotes will cite “*Millar v. Taylor*, (1769) 98 Eng. Rep. 201, 257 (K.B.),” because that is where the report is located, and where it will be most easily found in electronic databases, even though the case was decided in the House of Lords in 1774.) Meanwhile, the version reported by Brown does not make the same error in counting the common law judges’ advisory opinions but, like Burrow, omits the lords’ speeches. See *Donaldson v. Beckett*, (1774) 1 Eng. Rep. 837 (H.L.). The Parliamentary History version (or Hansard) is more comprehensive than either Burrow or Brown because it contains concise summaries of the speeches by the lawyers, judges, and lords. See 17 Parl. Hist. Eng. (1774) 953. A version called here the “Anonymous Report” contains detailed first-person accounts of the speeches by the lawyers, judges, and lords. See THE PLEADINGS OF THE COUNSEL BEFORE THE HOUSE OF LORDS, IN THE GREAT CAUSE CONCERNING LITERARY PROPERTY (London, Wilkin, 1774) [hereinafter Anonymous Report]. The so-called Gentleman’s Report appears to be the most complete version of all five legal reports of the case. It includes a report of written submissions by the parties to the House of Lords that is not included in the other accounts. See THE CASES OF THE APPELLANTS AND RESPONDENTS IN THE CAUSE OF LITERARY PROPERTY (London, Bew 1774) [hereinafter Gentleman’s Report]. This article also gleans previously underappreciated details about *Donaldson* from eighteenth-century London and Edinburgh newspaper accounts found in the National Library of Scotland in Edinburgh, the British Library in London (Colindale), and the Burney Collection of Newspapers. The Reverend Charles Burney (1757-1817) amassed a large collection of early British newspapers, now housed at the British Library and made available electronically by Gale. The Burney Collection of Newspapers, which was digitized and made searchable in 2007, contains more than 1,200 titles and nearly one million pages.

⁵ Literary Property, *supra* note 1.

comments by common law judges who were invited to advise the lords in making the ultimate decision.⁶

However, in its treatment of two recent cases decided more than two centuries after *Donaldson*, the U.S. Supreme Court has given scholars fresh reason to carefully re-examine Effingham's warning about the dangers posed by copyright to free expression. First, by tying application of First Amendment scrutiny to a test of whether Congress has altered the "traditional contours" of copyright law, the Court in *Eldred v. Ashcroft*⁷ gave the matter of copyright history First Amendment importance. Second, despite longstanding claims⁸ that copyright law and the First Amendment did not conflict with one another due principally to copyright's idea-expression dichotomy and the doctrine of fair use, the Court in its 2011 Term considered whether a provision of the U.S. Copyright Act should be struck down because it violated the First Amendment's protections of freedom of speech.⁹ Thus, it appears, after decades of reluctance and much prodding by copyright

⁶ See *supra* note 4.

⁷ See *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003).

⁸ See, e.g., *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 560 (1985) ("In view of the First Amendment protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use, we see no warrant for expanding the doctrine of fair use to create what amounts to a public figure exception to copyright.").

⁹ See Transcript of Oral Argument at 3, *Golan v. Holder*, No. 10-545 (U.S. Oct. 5, 2011). Speaking of the law at issue in *Golan*, Anthony T. Falzone, the attorney for the professors and composers challenging the law told the Justices at oral argument: "Section 514 did something unprecedented in American copyright law. It took millions of works out of the public domain, where they had remained for decades as the common property of all Americans. That violated the Copyright Clause and the First Amendment." In questioning Solicitor General Donald B. Verrilli, Chief Justice John G. Roberts said: "General, there's something at least at an intuitive level appealing about Mr. Falzone's First Amendment argument. One day I can perform Shostakovich; Congress does something, the next day I can't. Doesn't that present a serious First Amendment problem?" *Id.* at 38.

scholars,¹⁰ the federal courts are being dragged toward a realization that copyright law is not “categorically immune from challenges under the First Amendment.”¹¹

In *Golan*, those challenging the Uruguay Round Agreements Act as a violation of the First Amendment contended that “[h]istory and tradition tell a different story” with respect to Congress’ removal of works from the public domain than with the series of copyright term extensions culminating in the Sonny Bono Copyright Term Extension Act that was challenged in *Eldred*.¹² In advancing their argument that “Section 514 privatized public speech rights,”¹³ the petitioners noted that the House of Lords in *Donaldson* “held the time limitations in the Statute of Anne cut off any common law copyrights the stationers might have held in published works.”¹⁴ The Government, meanwhile, argued that the Uruguay Round Agreements Act did not alter the traditional contours of copyright law, and thus no First Amendment scrutiny should be applied.¹⁵ This argument hinged in part on the contention that, when Congress passed the first Copyright Act in 1790, it took many works out of the public domain and brought them within copyright protection.¹⁶ Hence the question in *Donaldson*—whether works could have common law copyright protection even after statutory protection has expired—remains relevant today.

This article contends that understanding the “traditional contours”¹⁷ of copyright law requires more than superficial references to modern fair use and the idea-expression dichotomy. A careful reading of eighteenth-century sources

¹⁰ See, e.g., JESSICA LITMAN, DIGITAL COPYRIGHT (2001) (arguing that copyright law currently weighs too heavily in favor of owners and authors and against individuals); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001); Lawrence Lessig, *Copyright’s First Amendment*, 48 U.C.L.A. L. REV. 1057 (2001); Yochai Benkler, *Free As the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999).

¹¹ *Eldred v. Reno*, 239 F.3d 372, 375 (D.C. Cir. 2001). The Supreme Court in *Eldred* said the U.S. Court of Appeals for the D.C. Circuit “spoke too broadly” in making this statement. *Eldred*, 537 U.S. at 221. Meanwhile, the U.S. Court of Appeals for the Tenth Circuit applied intermediate scrutiny under the First Amendment to the Uruguay Round Agreements Act but ultimately concluded that the Act was constitutional. See *Golan v. Holder*, 609 F.3d 1076 (10th Cir. 2010), cert. granted, 131 S.Ct. 1600 (U.S. Mar. 7, 2011) (No. 10-545).

¹² Brief for the Petitioners at 14, *Golan v. Holder*, No. 10-545, (U.S. June 14, 2011).

¹³ *Id.* at 18.

¹⁴ *Id.* at 27.

¹⁵ See Brief for the Respondents at 12, *Golan v. Holder*, No. 10-545, (U.S. Aug. 3, 2011).

¹⁶ *Id.* at 17-18.

¹⁷ *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003).

reveals concerns that copyright threatened the structure of mass public communication that emerged after the system of licensing expired in the late seventeenth century. Although eighteenth-century political philosophers, lawmakers, and jurists may not have had a modern conception of individual free speech rights as they came to exist under the First Amendment, at least some of those early policymakers and commentators did appreciate the value of communication unfettered by public or private censorship and control.¹⁸

In this article, the relationship between copyright and free speech is explored through a re-examination of the *Donaldson v. Beckett* case. In Part I, the article reviews what modern scholars already have said about *Donaldson* as it relates to the eighteenth-century relationship between freedom of the press and copyright. Parts II and III re-examine accounts, primarily in newspapers, of the *Donaldson* decision in the House of Lords in 1774. The news accounts reveal some concern for the implications the case would have on freedom of the press, a topic that greatly affected the late eighteenth-century newspapers themselves. Based on a close re-examination of contemporary accounts of *Donaldson*, Part IV presents considerations for today's federal judges when applying—as they may be asked to do more frequently in light of *Eldred* and *Golan*—the “traditional contours” test championed by Justice Ginsburg's majority opinion in *Eldred*. The article's conclusions are applicable to *Golan* and should be of relevance to future disputes about copyright and free speech.

I

SCHOLARLY VIEWS ON *DONALDSON V. BECKETT*

Generally speaking, American scholars and jurists have exhibited a relatively superficial and poor understanding of *Donaldson v. Beckett*.¹⁹ Some of these misperceptions are understandable in light of the confusion and errors found in the supposedly authoritative eighteenth-century legal reports of *Donaldson*. In the history of American perceptions of the debate over English common law copyright, special mention must be given to James Madison's *The Federalist* No. 43, first published in New York newspapers in early 1788.²⁰ In No. 43, Madison argued that the proposed federal government should have exclusive jurisdiction over copyright law, a topic that most of the colonies already had addressed in their own laws. In doing so, Madison wrote that the proposed Constitution's Copyright

¹⁸ See *infra* notes 219-26 and accompanying text.

¹⁹ See *infra* notes 33-42 and accompanying text.

²⁰ THE FEDERALIST NO. 43, at 268 (James Madison) (Clinton Rossiter ed., 1961).

Clause²¹ created a federal government power that “will scarcely be questioned” and that “[t]he copyright of authors has been solemnly adjudged in Great Britain to be a right of common law.”²²

Written as it was in 1788, it is unclear whether *The Federalist* No. 43 accurately reflected all developments in English law up to that point, including the decision in *Donaldson* 14 years earlier.²³ However, even if Madison’s description of the state of English common law would be considered mistaken today, it would be difficult to fault him for restating the understanding of his time. Due to an error in the reporting of advisory opinions by common law judges,²⁴ Madison and his contemporaries understandably could have described *Donaldson* as holding that a common law copyright did exist. It must also be recalled that Madison’s *Federalist* No. 43 was a rhetorical and propaganda device to persuade colonists that the proposed Constitution’s Copyright Clause was in line with their common law history, and therefore it was in Madison’s interest to say that British common law included copyright protection.²⁵ In addition, the 1783 edition of Blackstone’s *Commentaries*, which would have contained a report of *Donaldson*, may not have been available to colonial lawyers until after the Revolutionary War, and so American colonists may have continued to apply the precedent of *Millar v. Taylor* long after British judges had abandoned it in *Donaldson*.²⁶

²¹ See U.S. CONST. art. I, § 8, cl. 8. “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”

²² THE FEDERALIST NO. 43, *supra* note 20.

²³ One scholar has pointed out that the colonists should have been aware of the British literary property debate because on January 29, 1774, Benjamin Franklin appeared before members of the House of Lords in the Privy Council and was dressed down by Solicitor General Wedderburn. Just days later, Wedderburn would argue before the lords in favor of common law copyright in *Donaldson v. Beckett*, and on this occasion Wedderburn pilloried Franklin for having published a series of letters in a Boston newspaper without authorization of the letters’ owners. See Liam Séamus O’Melinn, *What if James Madison Were to Assess the Intellectual Property Revolution?* 2008 MICH. ST. L. REV. 401, 403 (2008).

²⁴ See *infra* notes 30-32 and accompanying text for the observation that Burrows’ omission of the speeches and votes of the lords contributed to misunderstandings of *Donaldson*’s holding. It was the votes of the lords, not the common law judges, that decided the case, and the lords clearly voted against the existence of a common law copyright. See *infra* notes 184-87 and 191-93 and accompanying text for a fuller explication of Burrows’ miscounting of the votes of the common law judges and the effects of that error.

²⁵ See O’Melinn, *supra* note 23, at 408.

²⁶ See Susan P. Liemer, *How We Lost Our Moral Rights and the Door Closed on Non-Economic Values in Copyright*, 5 J. MARSHALL REV. INTELL. PROP. L. 1, 21-22 (2005). Another

While *Donaldson* has been called a case in which there was an answer but no rationale,²⁷ some modern scholars have argued that the real logic of the case was that common law copyright did not exist.²⁸ If it is the case that *Donaldson* stood for the fact that a common law copyright did not exist, then Madison—like Burrow, the official case reporter—got it wrong. Madison’s mistaken belief was then cited by the influential early U.S. Supreme Court case *Wheaton v. Peters*.²⁹

In the course of its opinion in *Wheaton*, the Supreme Court discussed *Donaldson* but may have perpetuated several errors. In *Wheaton*, the Court had to determine whether a common law copyright, if it existed in the United States, had been violated, as well as whether a violation of the U.S. Copyright Act had occurred, in an infringement claim involving the copying of its own reported decisions. Having cited and relied exclusively on Burrow, which did not contain the speeches of the lords, the Supreme Court mistook the advisory opinions of the common law judges for the rationale of the case.³⁰ Second, again relying on Burrow, the Court was misled into thinking that six of the 11 advisory judges had said the common law copyright was superseded by the Statute of Anne,³¹ when in fact six of the 11 judges (the difference being Nares, whose vote was misreported in Burrow) had said the common law copyright was not superseded by the Statute of Anne. Hence *Wheaton* mis-described the holding of *Donaldson* in a way that would be followed many times subsequently by jurists and scholars. In the end, *Wheaton* concluded that while there was a common law right of first publication, there was not a perpetual common law copyright in the United States that would

author speculates that Madison, in *The Federalist* No. 43, “may have been misled because his Blackstone was printed before the outcome of *Donaldson v. Beckett*.” Malla Pollack, *Purveyance and Power, or Over-Priced Free Lunch: The Intellectual Property Clause as an Ally of the Takings Clause in the Public’s Control of Government*, 30 SW. U. L. REV. 1, 110 n.659 (2000) (citing John F. Whicher, *The Ghost of Donaldson v. Beckett: An Inquiry into the Constitutional Distribution of Powers over the Law of Literary Property in the United States*, 9 BULL. COPYR. SOC’Y OF U.S.A. 102, 133 (1961-62)) For the coverage of *Donaldson* in the 1783 edition of Commentaries, see 2 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 407, note h (9th ed. 1783).

²⁷ See ROSE, *supra* note 4, at 103.

²⁸ See RONAN DEAZLEY, ON THE ORIGIN OF THE RIGHT TO COPY 191-210 (2004) [hereinafter DEAZLEY, ON THE ORIGIN]; RONAN DEAZLEY, RETHINKING COPYRIGHT 19-20 (hardcover ed. 2006) [hereinafter DEAZLEY, RETHINKING COPYRIGHT].

²⁹ See *Wheaton v. Peters*, 33 U.S. 591, 681, 685 (1834).

³⁰ See *id.* at 655-56 (“The eleven judges gave their opinions on the following points.”).

³¹ See *id.* at 656 (“It would appear from the points decided, that a majority of the judges were in favour of the common law right of authors, but that the same had been taken away by the statute.”).

continue to exist after publication; at the point of publication, the rights available to an author were through the Copyright Act alone.³²

The author and three graduate students reviewed all 271 journal and law review articles in the U.S. version of Westlaw's "Journals and Law Reviews" database that cite *Donaldson v. Beckett* (or *Becket*, as the spelling is sometimes rendered).³³ The review demonstrated significant confusion in the legal scholarship over the rationale and holding of *Donaldson* and showed that at least some of this confusion comes from errors and omissions in the eighteenth-century legal reports. Nearly 80 percent of the U.S. law review articles cite only to Burrow, only to Brown, or to Burrow and Brown together. Although they are the most common versions of *Donaldson* to be cited, Burrow and Brown are the least comprehensive and least accurate of the five reported versions of the case.³⁴ It has been well-documented by Abrams,³⁵ Deazley,³⁶ and Rose³⁷ that Burrow perpetuated an error regarding the vote of a judge named Nares, and that has had a significant impact on how the case has been perceived during more than 235 years.

Burrow does not include the speeches by the lords, and Brown does not report the speeches by either the lords or the judges. Thus neither of them is particularly useful in actually understanding the rationale of *Donaldson*. The fact that Burrow reports the speeches by the judges but not the lords has contributed to the tendency of some American scholars, accustomed to reading judicial rationales in written opinions, to mistake the advisory opinions of the judges for the binding logic of the lords, the ultimate decision-makers in the case.³⁸ Only about 12 percent of American legal journal articles cite the Parliamentary History, the Gentleman's Report, or the Anonymous Report, even though those versions of the

³² See *id.* at 658-61.

³³ See Appendix for a summary of the results of this review.

³⁴ See *supra* note 4 for a description of the five legal reports.

³⁵ See Howard B. Abrams, *The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright*, 29 WAYNE L. REV. 1119, 1156-70 (1983).

³⁶ See DEAZLEY, ON THE ORIGIN, *supra* note 28, at 199; DEAZLEY, RETHINKING COPYRIGHT, *supra* note 28, at 17-18.

³⁷ See ROSE, *supra* note 4, at 154-58.

³⁸ See Craig W. Dallon, *The Problem With Congress and Copyright Law: Forgetting the Past and Ignoring the Public Interest*, 44 SANTA CLARA L. REV. 365, 414-15 (2004) (discussing how the idiosyncratic nature of eighteenth-century House of Lords procedure has contributed to modern confusion about the meaning of *Donaldson*). See also H. Ron Davidson, *The Mechanics of Judicial Vote Switching*, 38 SUFFOLK L. REV. 17, 41 (2004). Abrams noted that the "dean of American copyright scholars," Melville Nimmer, initially made this error. See Abrams, *supra* note 35, at 1164 n.189.

case are more accurate and complete than either Burrow or Brown. Nearly 10 percent of the articles discussed *Donaldson* but cited no version of the actual case; instead, these articles either cited no source or cited a secondary source, such as a journal article or book, in referencing *Donaldson* (see Appendix).

Modern American legal scholars describe the holding of *Donaldson v. Beckett* in three major ways (see Appendix). About a fifth of the articles said the case held that no common law copyright existed at all. This is the meaning of *Donaldson* that has been most recently advocated by experts who have closely examined British copyright history, including the British scholar Ronan Deazley.³⁹ Meanwhile, another fifth of the articles focused their description of *Donaldson* on the general idea that publication of a work cut off some form of common law right. The third major description of the case by journal authors was that *Donaldson* held or recognized that common law rights were superseded by the Statute of Anne; some form of this description was present in nearly 30 percent of the articles. The remaining articles either did not describe the holding or merely noted the confusion surrounding *Donaldson's* meaning. In summary, then, as many as half of American law journal article authors seem to have misunderstood that the House of Lords decided against the common law right.

Of course, there are notable exceptions to the general rule that American scholars have struggled to understand *Donaldson*. For example, Mark Rose, an English professor at the University of California at Santa Barbara, has written extensively and perceptively about the history of copyright, and discussed the importance of the *Donaldson* case for understanding British and American roots of copyright law.⁴⁰ Before Rose, Howard Abrams wrote that, had the U.S. Supreme Court justices truly understood *Donaldson v. Beckett* at the time they decided *Wheaton* in 1834, the path of American copyright law may have been altered significantly.⁴¹ And before Abrams, Lyman Ray Patterson conducted a sophisticated review of copyright law history including *Donaldson*.⁴²

For the most part, however, these authors have not discussed *Donaldson* in the context of what it offers for understanding the eighteenth-century view on the relationship between freedom of the press and copyright. Rose, for example, only

³⁹ See DEAZLEY, ON THE ORIGIN, *supra* note 28, at 209-10; DEAZLEY, RETHINKING COPYRIGHT, *supra* note 28.

⁴⁰ See generally, ROSE, *supra* note 4.

⁴¹ See Abrams, *supra* note 35, at 1183-4.

⁴² See LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 172-79 (1st. ed., 1968).

briefly mentions Effingham's speech in two sentences.⁴³ Abrams gives similar cursory treatment to the Effingham statement.⁴⁴ Deazley, though, noted Lord Effingham Howard's "fear . . . of unchecked political suppression" and also pointed out that Effingham was not the first eighteenth-century English jurist to express concern that copyright might interfere with public communication.⁴⁵ Deazley noted that, in an earlier case brought against Donaldson by London booksellers, Lord Chancellor Northington declined to extend an injunction against Donaldson because, in his observation, a "perpetual property" in books "would give [booksellers] not only a right to publish, but to suppress too," and, Northington said, "this would be a fatal consequence to the public."⁴⁶

Many scholars have written well about the general relationship between copyright and free speech.⁴⁷ A smaller number of these analyses have cited *Donaldson* in contribution to the historical understanding of that relationship,⁴⁸ but very few American scholars have discussed Effingham's speech specifically. Among those that have done so, Diane Leenheer Zimmerman wrote that Effingham voiced a "modern-sounding concern" about freedom of the press.⁴⁹ In another article, Zimmerman wrote that although the general understanding of copyright law in the eighteenth century focused on societal goals and benefits rather than individual rights, Effingham stood out for his effort in *Donaldson* to

⁴³ See ROSE, *supra* note 4, at 86, 101-02.

⁴⁴ See Abrams, *supra* note 35, at 1163-64.

⁴⁵ DEAZLEY, ON THE ORIGIN, *supra* note 28, at 208.

⁴⁶ *Id.* at 172.

⁴⁷ See, e.g., Shyamkrishna Balganesh, Review, *Debunking Blackstonian Copyright*, 118 Yale L.J. 1126 (2009) (reviewing Neil Weinstock Netanel's book, *Copyright's Paradox*); Steven J. Horowitz, *A Free Speech Theory of Copyright*, 2009 Stan. Tech. L. Rev. 2 (2009); Raymond Shih Ray Ku, *F(ree) Expression? Reconciling Copyright and the First Amendment*, 57 Case W. Res. L. Rev. 863 (2007); David McGowan, *Why the First Amendment Cannot Dictate Copyright Policy*, 65 U. Pitt. L. Rev. 281 (2004); Peter K. Yu, *The Escalating Copyright Wars*, 32 Hofstra L. Rev. 907 (2004).

⁴⁸ See, e.g., Diane Leenheer Zimmerman, *Is There a Right to Have Something to Say? One View of the Public Domain*, 73 Fordham L. Rev. 297, 303 n.14, 314, 333 n.149 (2004); Michael D. Birnhack, *The Copyright Law and Free Speech Affair: Making-up and Breaking-up*, 43 IDEA 233, 285 n.237 (2003). For a view on copyright and free speech in Great Britain, see generally Michael D. Birnhack, *Acknowledging the Conflict Between Copyright Law and Freedom of Expression Under the Human Rights Act*, 14(2) Ent. L. Rev. 24 (2003).

⁴⁹ Diane L. Zimmerman, *The Statute of Anne and Its Progeny: Variations Without a Theme*, 47 Hous. L. Rev. 965, 979 (2010).

champion the cause of individual rights in the face of a potential perpetual copyright monopoly.⁵⁰

Mark Rose pointed out, in the context of a discussion about *Eldred*, that Effingham and others in the eighteenth century recognized that “treating writing simply as property,” rather than constitutionally protected expression, would lead to the private control of printing through copyright law in much the same way the government previously controlled printing through licensing.⁵¹ Effingham, Rose said, urged “that affirmation of a common-law right of literary property could provide a dangerous foundation for censorship.”⁵²

Effingham’s hypothetical about a despotic prince or minister using copyright law to suppress information contrary to his own interests “might appear somewhat far-fetched at first glance,”⁵³ Zimmerman wrote, but in reality, Effingham proved prescient. Zimmerman cited the examples of Howard Hughes, L. Ron Hubbard and J.D. Salinger, who—while not exactly despotic ministers and princes—were influential figures who attempted to use modern copyright law to suppress undesirable information about themselves.⁵⁴ Queen Elizabeth II famously extracted a front-page apology and a £200,000 charitable donation from Rupert Murdoch’s *Sun* newspaper after she threatened to sue for copyright infringement because the newspaper published the text of her Christmas Day 1992 address two days early.⁵⁵ “Public pronouncements do not belong to anybody,” the newspaper’s editor had complained futilely.⁵⁶ Indeed, in today’s world, “aggressive copyright claims” may often succeed in silencing a political or commercial rival through the use of preliminary injunctions even though a substantive infringement claim might be weak.⁵⁷

⁵⁰ See Diane Leenheer Zimmerman, *Information As Speech, Information As Goods: Some Thoughts on Marketplaces and the Bill of Rights*, 33 Wm. & Mary L. Rev. 665, 684 (1992).

⁵¹ Mark Rose, *The Public Sphere and the Emergence of Copyright: Areopagitica, the Stationers’ Company, and the Statute of Anne*, 12 Tul. J. Tech. & Intell. Prop. 123, 141 (2009).

⁵² *Id.* at 141 n.82.

⁵³ Zimmerman, *supra* note 50, at 684 n.134.

⁵⁴ *Id.*

⁵⁵ Richard Perez-Pena, *Chronicle*, N.Y. TIMES, Feb. 16, 1993, at B7.

⁵⁶ William E. Schmidt, *Queen Seeks Damages From Paper Over a Speech*, N.Y. Times, Feb. 3, 1993, at A3.

⁵⁷ See generally, Alfred C. Yen, Essay, *Eldred, the First Amendment, and Aggressive Copyright Claims*, 40 Hous. L. Rev. 673 (2003).

II

ALEXANDER DONALDSON AND THE CRUSADE AGAINST SPEECH MONOPOLY

Alexander Donaldson's background proves beneficial in explaining the context in which he rose to prominence and became involved in not just one case, but in a series of copyright litigation efforts. Even before Alexander Donaldson was born, his grandfather experienced firsthand the perils of publishing a newspaper without broad legal and societal free press guarantees. Capt. James Donaldson already was a satirical poet and author of several pamphlets when, in 1699, he received permission from the Privy Council to begin publishing the *Edinburgh Gazette* newspaper.⁵⁸ He was briefly jailed at one point for publishing false statements, but gained his release upon promising to allow the Privy Council to censor his newspaper in the future.⁵⁹ Capt. James Donaldson's grandson, Alexander, entered the bookselling business in 1750, while still in his early twenties.

With John Reid, Alexander Donaldson owned and operated a bookshop in Edinburgh. He also ran a bookshop in London with his brother John, until their partnership dissolved in 1773.⁶⁰ Donaldson forged a reputation, as a bookseller, for selling cheap editions of books for which the statutory period of copyright had expired. This made him the subject of both praise and criticism, and he was even compared to Robin Hood for his efforts to disseminate previously copyrighted information at low cost.⁶¹

Donaldson launched the *Edinburgh Advertiser* with Reid in 1764, and served as editor and publisher of the newspaper until the beginning of 1774, when he turned the operation over to his son, James. Donaldson's launch of the *Advertiser* was attributed to his public-spiritedness and enterprising nature, as he recognized a commercial opportunity.⁶² On the first page of the first edition, dated Tuesday, January 3, 1764, Donaldson and Reid wrote that the *Advertiser* was intended to be published on Tuesday and Friday to take advantage of the fact that no other newspapers were printed in Edinburgh on these days, yet mail delivery arrived

⁵⁸ ROBERT T. SKINNER, A NOTABLE FAMILY OF SCOTS PRINTERS 1-2 (1927).

⁵⁹ *Id.* at 2.

⁶⁰ *Id.* at 5.

⁶¹ 1 JAMES BOSWELL, THE LIFE OF SAMUEL JOHNSON, LL.D., 237-38 (London, Baldwin, 1791).

⁶² SKINNER, *supra* note 58, at 16.

from London on these days and so there was news to convey.⁶³ In stating their purpose of publishing the newspaper, Donaldson and Reid wrote:

Beside what are properly called *news*, the editors will give the utmost attention to whatever regards *religion, trade, manufactures, agriculture, and politics* in Great Britain, and Ireland, and the colonies thereto belonging; and will be careful to insert the best and most accurate accounts they can procure of all important transactions, interesting anecdotes, and useful discoveries, in every part of the British dominions. Nor shall the article of *Entertainment*, for which there is so large a demand, be unregarded. Essays on useful, ingenious, and entertaining subjects, both in prose and verse, if well wrote, and of moderate extent, will be thankfully received and readily inserted.⁶⁴

On the first day of publication, Donaldson and Reid criticized the other Edinburgh newspapers, all of whom refused to publish an advertisement announcing the launch of the *Advertiser*.⁶⁵ Within two months, Donaldson and Reid gave a lengthy invitation to and justification of advertising, saying that old notions about the disreputable nature of having one's personal or business name appear in a public print should be discarded.⁶⁶ The editors defended the value of the *London Gazette*, an official government newspaper, which may not have had independent editorial copy but did, they said, communicate some news and advertising to the public and also had spawned other, independent, newspapers throughout Great Britain.⁶⁷ The *Advertiser* was printed in quarto size, and, with an index published every six months, could be bound and preserved, thus enhancing its shelf life and value to readers and advertisers. Within six months after its first publication date, the *Advertiser* was apparently financially stable and had been received well throughout Scotland; in writing to thank his subscribers and

⁶³ *The Editors to the Public*, EDINBURGH ADVERTISER, Jan. 3, 1764, at 1. Copies of the *Edinburgh Advertiser*, which are not part of the Burney Collection and are thus not available electronically, were examined by the author at the National Library of Scotland in Edinburgh and the British Library in London (Newspaper Library Branch in Colindale). Typed transcriptions of the *Edinburgh Advertiser* cited throughout this article are on file with the author.

⁶⁴ *Id.*

⁶⁵ *A Card to the Publishers of the Edinburgh Newspapers*, EDINBURGH ADVERTISER, Jan 3, 1764, at 6.

⁶⁶ *On the Benefit of Advertising*, EDINBURGH ADVERTISER, Mar. 2, 1764, at 1.

⁶⁷ *Id.*

advertisers, Donaldson recommitted himself to “the utmost care . . . to insert the best essays and most interesting articles of intelligence that may occur.”⁶⁸

In his public writings as editor of the *Advertiser*, at least, Donaldson’s concern for profits eventually subsided in favor of a focus on editorial quality and independence. By the end of 1764, Reid had left the *Advertiser* and Donaldson remained alone as editor and proprietor. On the final day of 1771, he wrote a remarkable letter to readers acknowledging that newspapers might make mistakes, but asking readers to forgive them and warning government officials to refrain from both censoring and censoring:

If we have occasionally married couples without the privity of friends or relations, without the publication of banns, or even the consent of the parties themselves, it can be no secret to our fair readers that frequent examples of matrimony are absolutely necessary in this licentious age. If we have sometimes dismissed people of quality from the world, without asking leave of the college of physicians, the joy of their friends will prove the greater when they are raised to life in the succeeding paper. If we have been sometimes more in haste to decide a cause than the lawyers themselves, we have thereby placed before them an example, which all ranks of his Majesty’s subjects would concur in recommending to their notice. In fine, if we have given children to the barren, riches to the poor, or preferment to the undeserving, we have only done that for them, which intrigue, chance, or interest will frequently bring about; with this advantage in favour of all parties, that the progeny we bestow will cost nothing in education, the wealth we dispense may be retained without care, and the honours we confer be received without disgrace to the donor. As fickle as is fortune, we are favourable to all in their turn, and (as Macheath says) *the wretch of to day may be happy to morrow*)—in the EDINBURGH ADVERTISER.⁶⁹

Donaldson continued by writing that the *Advertiser* was “open to all parties and influenced by none,” mentioning specifically that some had accused his editorial approach of having been “too ministerial” while others charged him with being too critical of British government ministers.⁷⁰

⁶⁸ *The Editors to the Public*, EDINBURGH ADVERTISER, June 29, 1764, at 1.

⁶⁹ *To the Public*, EDINBURGH ADVERTISER, Dec. 31, 1771, at 1 (emphasis in original).

⁷⁰ *Id.*

In 1764, Donaldson publicly distributed an essay uncovering the scheming ways of London booksellers against Scottish booksellers like himself. Attached to the essay, Donaldson also published the text of several letters from London booksellers that exposed their schemes.⁷¹ Letters by this time had been judged to be the intellectual property of their authors,⁷² and so this act by Donaldson both provided the potential for a copyright infringement lawsuit and represented a manifestation of his belief in freedom of the press from private control. Donaldson was determined to invest in copyright litigation in order to protect future bookselling opportunities, and he pursued litigation vigorously.

The Court of Session, Scotland's highest court, decided in Donaldson's favor on July 28, 1773, in a copyright case brought by a London printer named John Hinton.⁷³ Hinton had sued Donaldson for copyright infringement after Donaldson and other Scottish printers published approximately 10,000 copies of Thomas Stackhouse's *A New History of the Holy Bible* between the years 1760 and 1770.⁷⁴ The Scottish court held that there was no perpetual common law copyright, or right of "literary property," and that Donaldson had not infringed the Statute of Anne because the statutory copyright term for Stackhouse's work had expired.⁷⁵ Later, in the run-up to the House of Lords' hearing in *Donaldson v. Beckett*, Donaldson used his newspaper, as well as advertisements in other newspapers, to publicize his victory over Hinton. Donaldson paid for advertisements in the classified ad section of London newspapers announcing that he was selling copies of the Scottish Court of Session decision.⁷⁶

⁷¹ ALEXANDER DONALDSON, *SOME THOUGHTS ON THE STATE OF LITERARY PROPERTY, HUMBLY SUBMITTED TO THE CONSIDERATION OF THE PUBLIC* 11-17 (London, Donaldson 1764).

⁷² See Mark Rose, *The Author in Court: Pope v. Curll (1741)*, 21 *Cultural Critique* 197 (1992).

⁷³ JAMES BOSWELL, *THE DECISION OF THE COURT OF SESSION UPON THE QUESTION OF LITERARY PROPERTY* (Edinburgh, Boswell, 1774).

⁷⁴ *Id.* at ii-iii.

⁷⁵ Stackhouse's Bible history was first published in England in 1738, and the statutory copyright term under the 1710 Statute of Anne was 14 years, with a 14-year renewal term possible if the author was still alive. Given that more than 28 years had passed between 1738 and 1767, the book had entered the public domain, or in other words was no longer under statutory copyright protection, when Donaldson published his version of it.

⁷⁶ Advertisement, *GAZETTEER & NEW DAILY ADVERTISER* (London), Jan. 27, 1774, at 1; Advertisement, *PUB. ADVERTISER* (London), Jan. 27, 1774, at 1. Essentially the same advertisement was published a few days later in *St. James' Chronicle or the British Evening Post*, the *London Evening Post* and the *Morning Chronicle and London Advertiser*. The London booksellers did not like the fact that Donaldson had come from Edinburgh to London and opened

Eleven of the twelve Court of Session judges⁷⁷ who gave their opinions in *Hinton* favored Donaldson, and for several of them the only reason for pause was an English Court of King's Bench decision issued in 1769. In that case, Andrew Millar sued Robert Taylor for publishing unauthorized copies of the poem *The Seasons* by James Thomson.⁷⁸ After hearing arguments on behalf of the booksellers by the famous legal commentator William Blackstone, the Court of King's Bench relied on a series of licensing acts, the system of letters patent granted by the Crown, the prerogatives and processes of the Stationers Company, and several Chancery Court injunctions to conclude there was a common law right of literary property. Lord Chief Justice Mansfield, a recognized authority with whom even the Scottish Court of Session judges were loath to disagree, delivered

a shop that was focused on selling books at cheaper prices than what the London booksellers could offer. Donaldson's critics contended that his books were not only inexpensive in price but also cheap in quality. A certain individual affiliated with or sympathetic to the booksellers (the letter was signed simply "Aldus") complained that Donaldson's shop was advertised with a sign that said, "The only shop for cheap books." Letter to the Printer, MORNING CHRON. & LONDON ADVERTISER, Feb. 15, 1774, at 2.

⁷⁷ Boswell, *supra* note 73, at 37. Since the sixteenth century, the Scottish Court of Session has acted as that country's highest civil court, though appeals currently may be made to the House of Lords or, since 2009, the Supreme Court of the United Kingdom. At the time of *Hinton v. Donaldson*, as today, the judges of the Scottish Court of Session were legal professionals who took honorary titles as "lords" upon their appointment to the court. See Court of Session—Introduction, <http://www.scotcourts.gov.uk/session/index.asp> (last visited Dec. 1, 2011).

⁷⁸ *Millar v. Taylor*, (1769) 98 Eng. Rep. 201-02 (K.B.). Thomson was educated in Edinburgh but moved to London in 1725 to serve as a tutor for a wealthy family while he pursued his literary career. Thomson's idea to write a poem about winter was not original; in fact, he told a friend that he got the idea from another poet named Robert Riccaltoun (sometimes rendered "Rickleton"). JAMES SAMBROOK, JAMES THOMSON 1700-1748: A LIFE 33 (1991). He sold the copyright in the poem "Winter" to a young Scottish bookseller named John Millan (he had changed his name from "Macmillan" to appear more English rather than Scottish) for three pounds. Alan Dugald McKillop, ed., JAMES THOMSON (1700-1748): LETTERS AND DOCUMENTS 22, 37 (Alan Dugald McKillop ed., Univ. of Kansas Press, 1958). The poem "Winter" was entered on the copyright registry at Stationers' Hall in London on April 29, 1726. *Id.* at 64. Thomson later wrote poems called "Summer" and "Autumn" and these copyrights, too, were sold to Millan. *Id.* at 63-64. Millan assigned the copyrights in "Winter," "Summer" and "Autumn" to Millar in June 1738. *Id.* at 120-122. The copyright for the poem "Spring," however, was sold to Andrew Millar in 1729. *Id.* at 69-70. "The Seasons," a collection of the four poems plus another called "A Hymn on the Seasons," was first published in 1730 and subsequently revised by Thomson numerous times and republished in various editions before his death in 1748. See HILBERT H. CAMPBELL, JAMES THOMSON 50-58 (1979). One critic said "The Seasons" made Thomson "enormously famous" (though certainly not enormously wealthy) and "was probably known, loved, and quoted more than any other English poem for a hundred years after Thomson's death...." *Id.* at 142.

the holding that the common law right existed “before and independent of” the Statute of Anne.⁷⁹ Taylor was enjoined from printing or selling copies of *The Seasons*.⁸⁰

As with *Millar v. Taylor*, the case of *Donaldson v. Beckett* was brought by London booksellers for unauthorized publication of Thomson’s *The Seasons*.⁸¹ On the same day Donaldson’s classified advertisement was published, one of the newspapers in which it appeared also published in its editorial columns a report that lawyers representing Donaldson before the House of Lords had requested the beginning of arguments in the case be delayed a week until Friday, February 4, 1774.⁸² Intended or not, the delay gave Donaldson the opportunity to print and begin selling copies of the Scottish Court of Session decision in *Hinton* prior to the House of Lords’ hearing.⁸³

The *Public Advertiser*, the newspaper that published both the classified advertisement and the editorial report about Donaldson, had lifted its editorial copy about the case verbatim from another London newspaper, the *Morning Chronicle and London Advertiser*. In fact, much of the content of eighteenth-century London newspapers consisted of passages reprinted from other newspapers, both foreign and domestic. News content was expressly not protected by copyright under the Statute of Anne, and the London newspapers reporting on the great eighteenth-century literary property debate culminating with *Donaldson v. Beckett* borrowed liberally from one another’s editorial columns. This tendency for newspapers to print verbatim copies of others’ material—as well as the public anticipation for the House of Lords’ consideration of *Donaldson v. Beckett*—was on clear display in the first days of February, 1774, when at least three London newspapers said the case “materially affects the Literature of this Country, as well as the Property of many Individuals, to an immense amount.”⁸⁴ One newspaper, the *Morning Chronicle and London Advertiser*, took such interest in the case that it printed transcripts of the proceedings for nearly three weeks and, even before the

⁷⁹ *Millar*, 98 Eng. Rep. at 252. Mansfield was a judge as well as a lord who would play a key role in the House of Lords’ consideration of *Donaldson* in 1774. He previously served as counsel for the booksellers.

⁸⁰ *Id.* at 257.

⁸¹ (1774) 1 Eng. Rep. 837-38 (H.L.).

⁸² *London*, PUB. ADVERTISER, Jan. 27, 1774, at 2.

⁸³ DEAZLEY, ON THE ORIGIN, *supra* note 28, at 194-95.

⁸⁴ *London*, LONDON EVENING-POST, Feb. 1-3, 1774, at 3; *London*, MIDDLESEX J. & EVENING ADVERTISER (London), Feb. 1-3, 1774, at 3; *For the Morning Chronicle*, MORNING CHRON. & LONDON ADVERTISER, Feb. 2, 1774, at 4.

arguments began, reproduced Lord Mansfield's lengthy opinion given five years earlier in *Millar v. Taylor*.⁸⁵

III

DONALDSON V. BECKETT RE-EXAMINED

Given the importance of *Donaldson v. Beckett* as well as the misunderstandings surrounding it, a detailed review of the facts and legal arguments in the case seems to be in order. This is particularly so in light of the importance placed on copyright history by the Supreme Court in *Eldred* and the task before the Court in its 2011 Term case of *Golan*. This re-examination relies heavily on contemporary newspaper accounts, a source not made the subject of original examination by most copyright history scholars, with the exception of Rose. Even Rose discussed only a small number of the scores of articles published about the case in London and Edinburgh newspapers in January and February of 1774. The newspaper articles provide a particularly relevant accounting of the case, given that Donaldson was a newspaper publisher and that they reveal the newspapers' own perspectives about freedom of the press in the first century after the expiration of government licensing.⁸⁶ Furthermore, *Donaldson v. Beckett* appears to have been one of the first judicial proceedings in the House of Lords covered "gavel-to-gavel" by newspapers.⁸⁷ Before it came to the House of Lords,

⁸⁵ *For the Morning Chronicle*, supra note 84.

⁸⁶ Parliament allowed pre-publication licensing to expire in 1694. Among the immediate results of this change in policy was the rise of newspapers in London. In the years leading up to the 1710 Statute of Anne, however, public policy debates focused on whether and how to regulate printing, including newspapers. See *infra* notes 225-26 and accompanying text.

⁸⁷ At this time, the newspapers themselves had just emerged from a significant free press battle with Parliament over reporting and publishing verbatim the debates in the House of Commons and the House of Lords. Via a Standing Order in 1698, the House of Lords made unauthorized publication of its official activities a breach of privilege, and the Lords vigorously sought to punish certain newspapers under this authority through the 1760s. William C. Lowe, *Peers and Printers: The Beginnings of Sustained Press Coverage of the House of Lords in the 1770s*, 7:2 *Parl. Hist.* 241, 242-43 (1988). By 1771 the radical journalist and member of Parliament John Wilkes, via the Printers' Case, helped secure the right of printers to report proceedings of the House of Commons. *Id.* at 244-45. To prevent a similar fate, the Lords excluded everyone—including reporters and members of the House of Commons—from their debates until 1774, when this practice eventually proved unsustainable. *Id.* at 248-49. While news coverage eventually would change the entire culture of Parliament, in early 1774 the Lords had not yet fully transformed their speeches into public performances for the benefit of the news media and their audiences. See Jason Peacey, *The Print Culture of Parliament, 1600-1800*, 26:1 *Parl. Hist.* 1 (2007) (surveying the development of print coverage of Parliament through the seventeenth and eighteenth centuries); Christopher Reid, *Whose Parliament? Political Oratory*

the case of *Donaldson v. Beckett* had been heard first in the Court of Chancery. Upon initial filing of the case in 1771, a temporary injunction was granted, and the injunction was made permanent in 1772 by Lord Chancellor Apsley,⁸⁸ another of the law lords who, like Mansfield, would play a key and unexpected role in the House of Lords' later consideration of the case. Given that Thomson's collection of poems was first published in 1730, and that the Statute of Anne granted a 14-year term with another 14-year renewal possible if the author was still alive, statutory copyright protection had expired by 1768, when Donaldson printed the copy of *The Seasons* at issue in *Donaldson v. Beckett*.⁸⁹

Under its eighteenth-century rules, the House of Lords reviewed Apsley's decree *de novo*. As Lord Chancellor sitting in his role as Speaker of the House, Apsley presided over the case but the ultimate decision rested with the entire House of Lords,⁹⁰ whose members were sometimes called "peers." Those lords who were not law-trained had equal say with those who were, but in practice the lay lords deferred to the law lords on most cases.⁹¹ In addition, the lords could—as they did in *Donaldson*—request legal advice from common law judges via "writs of assistance" on certain specific questions.⁹² The role of the common law judges from the courts of King's Bench, Common Pleas and Exchequer⁹³—to give their opinions on specific questions posed by the lords but not to decide the case themselves—is critical and appears to be misunderstood by many modern American legal commentators, who view the judges' opinions as justifications by the actual decision-makers rather than just advisory statements by external actors. Copyright scholar Ronan Deazley expressed the relationship between the lords and the judges on such occasions:

The lords, when faced with a particularly complex or difficult legal issue, could call upon the common law judges to proffer expert advice for the consideration of the House. The judges, if summoned, took up their position upon the woolsack, a position that was not considered to lie within the limits of the House. As a consequence, technically they

and Print Culture in the Later 18th Century, 9(2) Lang. & Lit. 122 (2000) (examining how a parliamentary culture of "gentlemanly orality" began to give way under the increasing scrutiny of print media).

⁸⁸ DEAZLEY, RETHINKING COPYRIGHT, *supra* note 28, at 15-16.

⁸⁹ See *supra* note 86 and accompanying text.

⁹⁰ DEAZLEY, ON THE ORIGIN, *supra* note 28, at 192.

⁹¹ *Id.* at 193.

⁹² Abrams, *supra* note 35, at 1157.

⁹³ *Id.*

“had no voice in the House” and could not give an opinion “unless formally asked for”. When they were asked for an opinion, if unanimous in their thinking, the senior judge present would deliver a collegiate address. If, however, there existed disagreement then the judges would be asked to answer the lords’ questions, each in turn, in order of increasing seniority.⁹⁴

What follows is a daily summary of the appeal taken primarily from contemporaneous newspaper accounts, with particular focus on aspects of the case relating to press freedom.

A. Day 1: Friday, February 4, 1774

Prior to the House of Lords’ first day hearing the case on February 4, 1774, London society had anticipated the outcome of the case with much anxiety.⁹⁵ Although it became clear in December 1772 that the House of Lords eventually would hear the case, it was for about a year in the hands of a University of Oxford law professor for “perusal and approbation.”⁹⁶ The Oxford professor apparently was assigned as special master to determine the amount of money the petitioners had derived from sales of copies of *The Seasons* and thus the amount they should pay to the London bookseller Beckett.⁹⁷

As the appeal in the House of Lords finally neared, London newspapers diligently kept their readers abreast of “[t]he great cause of literary property.”⁹⁸ In explaining its decision to reprint the lengthy Lord Mansfield opinion from *Millar v. Taylor* in two parts, the *Morning Chronicle and London Advertiser* just two days before the House of Lords took up *Donaldson* explained that “the public cannot be

⁹⁴ DEAZLEY, ON THE ORIGIN, *supra* note 28, at 193 (internal footnotes omitted).

⁹⁵ In addition to the copious news coverage of the appeal in the House of Lords, the extent to which the case attracted attention at the expense of other matters was evidenced by the fact that the House of Lords postponed its consideration of what to do in response to the American colonists’ Boston Tea Party, which had taken place in December 1773, until after *Donaldson* was resolved. See *London*, LONDON EVENING-POST, Feb. 8–10, 1774, at 3 (“The papers relative to the affairs at Boston, are preparing to be laid before a Great Assembly, that business being to come on after the affair of literary property is determined.”).

⁹⁶ DEAZLEY, ON THE ORIGIN, *supra* note 28, at 194 n.22.

⁹⁷ *Donaldson v. Beckett*, 1 Eng. Rep. 837, 839.

⁹⁸ The newspapers even kept their readership informed of week-long delays in the House of Lords. *Postscript*, LONDON CHRON., Jan. 22–25, 1774, at 8; *London*, MORNING CHRON. & LONDON ADVERTISER, Jan. 25, 1774, at 2; *London*, MORNING POST & DAILY ADVERTISER (London), Jan. 26, 1774, at 2; *London*, PUB. ADVERTISER (London), Jan. 27, 1774, at 2.

too well apprized [sic] of the peculiar nature of the question.”⁹⁹ The extent to which the debate over common law copyright roiled and divided the English legal community in the eighteenth century was evidenced by Mansfield’s statement, reprinted in the newspaper during the days leading up to the House of Lords hearing, that *Millar v. Taylor* was the first time the Court of King’s Bench had failed to reach unanimity in his time there.¹⁰⁰

On the first day of the *Donaldson* appeal, a letter-to-the-editor writer called “A Friend to Literature” anticipated some of the arguments that would be made against common law copyright: The writer noted that London booksellers had been paying authors for copyrights “from the day of Shakespeare to our times” and therefore it was evident common law copyright existed long before Parliament adopted the Statute of Anne in 1710.¹⁰¹ Further, the writer said, literary property may well have established a monopoly but no more so than any other form of property ownership.¹⁰² The author said Donaldson and other Scottish booksellers would never “give a shilling in their lives to the encouragement of literature” and that “plunder, and temporary subsistence is all their aim.”¹⁰³ Finally, the letter writer made an economic argument in favor of common law copyright, saying the failure to enforce it would cause legitimate copyright owners and booksellers to sell their works initially at exorbitant prices because of the expectation they would thereafter be pirated.¹⁰⁴

A large crowd of people reportedly had to be turned away on the first day due to lack of room in the House of Lords.¹⁰⁵ On that first day, the House of Lords heard just one advocate: Edward Thurlow,¹⁰⁶ the Attorney General, arguing on behalf of Donaldson. The newspapers described Thurlow’s remarks as “a long and

⁹⁹ *For the Morning Chronicle*, supra note 84.

¹⁰⁰ *Id.*

¹⁰¹ Letter to the Printer, *On Literary Property*, MORNING CHRON. & LONDON ADVERTISER, Feb. 4, 1774, at 2.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ ROSE, supra note 4, at 96.

¹⁰⁶ Thurlow was known as a “bold and determined lawyer.” 3 SIR LEWIS NAMIER AND JOHN BROOKE, *THE HOUSE OF COMMONS 1754-1790*, 530 (Oxford Univ. Press 1964). Thurlow and two of the lawyers who represented Beckett, the Solicitor General Alexander Wedderburn and John Dunning, were veterans of literary property litigation, having appeared against one another in 1761 in a case called *Tonson v. Collins*, (1761) 96 Eng. Rep. 169 (K.B.), and again in 1768 in *Millar v. Taylor*, (1769) 98 Eng. Rep. 201 (K.B.). DEAZLEY, *ON THE ORIGIN*, supra note 28, at 195.

eloquent speech”¹⁰⁷ against literary property, or perpetual common law copyright, in which he “declaimed against monopolies of that nature as repugnant to law.”¹⁰⁸

In February 1774, Thurlow was a 42-year-old lawyer on the ascendancy. He and Dunning, despite their positions on opposite sides of the copyright litigation and their sharp critiques of one another’s arguments, were known to be close associates. Thurlow’s arguments before the House of Lords on behalf of Donaldson were summarized in general form by Brown, together with and undifferentiated from those of his co-counsel, Sir John Dalrymple.¹⁰⁹ Burrow contains no report of Thurlow’s remarks or any others made by the lawyers in the case.¹¹⁰ The Parliamentary History contains a third-person account of Thurlow’s remarks, which were said to be focused on the nature of property and whether such a thing as literary property could even exist or was “too abstruse and chimerical a nature to be defined.”¹¹¹ Thurlow appealed to history, stating that if there had been a common law or natural right, then royal “grants, charters, licenses, and patents” would not have been necessary and neither would the Statute of Anne itself.¹¹² The Anonymous Report contains a third-person account similar to that of the Parliamentary History,¹¹³ but the Gentleman’s Report conveys what purports to be a first-person transcript of Thurlow’s remarks.¹¹⁴

The newspapers focused on Thurlow’s discussion of previous Chancery Court injunctions in favor of booksellers with respect to the unauthorized publication of the anonymous seventeenth-century work “Whole Duty of Man” as well as works by Milton, Pope, Swift and others.¹¹⁵ Thurlow argued these

¹⁰⁷ *London*, GAZETTEER & NEW DAILY ADVERTISER (London), Feb. 5, 1774, at 2. Another newspaper writer timed Thurlow’s remarks at two hours. *House of Lords*, ST. JAMES’S CHRON. OR BRIT. EVENING-POST (London), Feb. 3–5, 1774, at 4. (The front page of the *St. James’s Chronicle* erroneously displays the dates as Jan. 3–Feb. 5, 1774. The correct dates of coverage by that issue are Feb. 3–5, 1774.)

¹⁰⁸ *London*, LONDON EVENING-POST, Feb. 3–5, 1774, at 3.

¹⁰⁹ Brown simply describes the appellants’ case as being presented by “E. Thurlow, J. Dalrymple, A. Murphy.” Nowhere in the report are the respective arguments of the individual counsel ascribed to them on an individual basis. *See Donaldson v. Beckett*, (1774) 1 Eng. Rep. at 839-46 (H.L.).

¹¹⁰ *Donaldson v. Beckett*, (1769) 98 Eng. Rep. 201, 257 (K.B.).

¹¹¹ 17 Parl. Hist. Eng. (1774) 953, 954.

¹¹² *Id.*

¹¹³ Anonymous Report, *supra* note 4, at 1.

¹¹⁴ Gentleman’s Report, *supra* note 4, at 5.

¹¹⁵ *House of Lords*, MIDDLESEX J. & EVENING ADVERTISER (London), February 3–5, 1774, at 4.

injunctions were based not on a common law right of copyright but rather government printing patents and the prerogatives of the Stationers' Company.¹¹⁶ The *Edinburgh Advertiser* reported that Thurlow had referred to the Scottish Court of Session decision in *Hinton v. Donaldson*.¹¹⁷

Thurlow's arguments about the nature of property provoked strong public response from a newspaper reader, whose letter to the editor the following week expressed chagrin and surprise that the literary products of geniuses such as Shakespeare, Milton, Bacon, Newton, Pope, Locke and Addison could not be bequeathed to their posterity perpetually, but that other individuals could bequeath such mundane property as a windmill, fish pond, coal pit or lead mine.¹¹⁸ Other letters-to-the-editor displayed similar sophistication in responding to Thurlow's arguments and those of Sir John Dalrymple, which would follow on Monday. One, for example, evoked natural rights and a notion of the modern right of integrity,¹¹⁹ which predominates in European moral rights regimes and appears in the Berne Convention for the Protection of Literary and Artistic Rights.¹²⁰ Others

¹¹⁶ *Id.*

¹¹⁷ "The Attorney-General concluded, by hoping, 'That as the Lords of Session in Scotland had freed that country from a monopoly which took its rise from the chimerical idea of the actuality of Literary Property, their Lordships, whom he addressed, would likewise, by a decree of a similar nature, rescue the cause of Literature and Authorship from the hands of a few monopolizing booksellers, in whom the perquisites of other men's labours, the fruits of their inventions, and result, of their ingenuity, were at present wholly centered.' EDINBURGH ADVERTISER, Feb. 8–11, 1774, at 3. In its reporting of this part of Thurlow's speech, one London newspaper emphasized the public interest. Quoting Thurlow, the *Middlesex Journal and Evening Advertiser* wrote, "The Lords of Sessions[sic] in Scotland have freed their country from this monopoly; they did it from the clearest conviction that it was contrary to the interest of the public and of literature; and I cannot conclude myself with wishing, that your Lordships will also free this country from the same monopoly." *House of Lords*, *supra* note 115.

¹¹⁸ "Authors! Turn your Pens to Swords, or blunt them for the Service of the Law; what Property you gain by [murdering] the human Species will be your's [sic] and your Successor's; the immense Sums you may obtain by pleading for and against the Rights of others, the Law will secure to you and Representatives to the End of Time! Strange must the Laws of that Country be, where every Thing is protected but the Product of Genius!" Letter to the Printer, ST. JAMES'S CHRON. OR BRIT. EVENING POST (London), February 8–10, 1774, at 1.

¹¹⁹ *Some Thoughts on Literary Property*, MORNING CHRON. & LONDON ADVERTISER, Feb. 9, 1774, at 2.

¹²⁰ Berne Convention for the Protection of Literary and Artistic Works art. 6*bis*, Sept. 9, 1886, 25 U.S.T. 1341, 828 U.N.T.S. 221 (revised in Paris July 24, 1971, and in 1979) ("Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion,

expressed their support for copyright in terms of economic incentives to benefit the public.¹²¹

B. Day 2: Monday, February 7, 1774

As with the remarks by Thurlow, the arguments made by Sir John Dalrymple on behalf of Donaldson on February 7 were reported in brief summary form by Brown and completely ignored by Burrow. The record that later appeared in the Parliamentary History is very similar to a detailed third-person newspaper account¹²² published in the days immediately after the speech. Meanwhile, another, less-detailed newspaper account¹²³ seems to have been the basis for the version rendered in the Gentleman's Report and a substantial part of the Anonymous Report.

Dalrymple's speech,¹²⁴ though given little or no attention by Brown and Burrow, is singularly important because it provides a window to understand the contemporary view of the issue at stake in *Donaldson*, a topic of later confusion. Several newspapers reported Dalrymple's speech as emphasizing that "the point principally to be contended" in the *Donaldson* case was that the common law had never granted a property right to either bookseller or authors.¹²⁵ On this point,

mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.").

¹²¹ *A Thought on Literary Property*, MORNING CHRON. & LONDON ADVERTISER Feb. 9, 1774, at 2 (a letter writer stated that "an exclusive right to print a book must be legally vested somewhere, otherwise the community cannot reap the benefit of it; for no man will be at the expence [sic], risk and trouble of printing an impression of any book, if he is not certain that it is not in the power of any other man to print an impression of the same book").

¹²² *The Substance of Sir John Dalrymple's Arguments in the House of Lords Against Literary Property*, LONDON CHRON., Feb. 8–10, 1774, at 1 [hereinafter *Substance*]. Cf. Dalrymple's speech in Parliamentary History, 17 Eng. Parl. Hist. (1774) 957–63.

¹²³ *House of Lords*, MIDDLESEX J. & EVENING ADVERTISER (London), Feb. 5–8, 1774, at 4.

¹²⁴ Even before Dalrymple spoke, Woodfall's *Morning Chronicle* predicted that Sir John would give "an elaborate and learned speech." *London*, MORNING CHRON. & LONDON ADVERTISER, Feb. 7, 1774, at 3. In fact, Dalrymple's time before the lords proved illuminating and entertaining. One newspaper reporter said Dalrymple "seemed to exhaust, in this one speech, all the knowledge, metaphysical, legal, chemical and political, he possesses." *Substance*, *supra* note 122. Newspapers also noted that Dalrymple recently had sold rights to his book "Memoirs of Great Britain" to the very booksellers against whom he argued in the House of Lords. *London*, PUB. ADVERTISER (London), Feb. 9, 1774, at 2. Following his speech, Dalrymple was called a "pernicious bloodsucker of sleeping men" by one newspaper correspondent. *London*, MORNING CHRON. & LONDON ADVERTISER, Feb. 11, 1774, at 2.

¹²⁵ *London*, LONDON CHRON., Feb. 5–8, 1774, at 7; *London*, LONDON EVENING-POST, Feb. 5–8, 1774, at 3; *London*, GAZETTEER & NEW DAILY ADVERTISER (London), Feb. 8, 1774, at 2.

Dalrymple stated that the booksellers lobbied in favor of passage of the Statute of Anne precisely because they knew they did not already have a common law property right. It would have made no sense, Dalrymple said, for the booksellers to have lobbied for a 14-year copyright in the Statute of Anne if they already owned a perpetual right under the common law: “They knew their own situation,” Sir John told the lords. “They knew the rottenness of their pretended right, and wanted a *new real one*, instead of the *old imaginary one*.”¹²⁶ Dalrymple noted the Statute of Anne said it “vested” or “secured” a right, and that language would not have been present if the common law right already existed.¹²⁷

Dalrymple might have contributed to the confusion that surrounds *Donaldson*—including on the part of the judges and the lords—and continues to mystify legal scholars.¹²⁸ Although his main point of contention was that English common law, like that of Scotland and every other “civilized nation . . . under the canopy of heaven”¹²⁹ did not recognize a common law copyright,¹³⁰ Dalrymple also made an alternative argument. Ideas, Dalrymple said, might belong to the individual who has them as long as that individual keeps them secret. Once published, however, those ideas no longer belong to that individual.¹³¹ It was perhaps from this line of argument—Dalrymple’s emphasis that the Statute of Anne affected a sea change along with his discussion of the impact of publication of ideas—that grew the sentiment that the real issue in *Donaldson* was not whether

¹²⁶ *House of Lords*, *supra* note 123 (emphasis in original).

¹²⁷ *Id.*

¹²⁸ In general, Dalrymple’s argument is the least coherent but most entertaining of all the lawyers who argued before the House of Lords. Dalrymple made a joke about not believing anything said by the church; laughed at the attempts at writing poetry by British monarchy; poked fun at the Stationers’ Company for its silly rules, including one about members taking off their hats while speaking; and drew out an extended analogy to the Statute of Anne that involved an imaginary Parliamentary act to encourage planting hedges and trees. 17 Parl. Hist. Eng. (1774) at 959-62 (doubting the Church, mocking the poetry of British monarchy and the rules of the Stationers’ Company); Gentleman’s Report, *supra* note 4 at 22 (the imaginary act to encourage planting hedges and trees).

¹²⁹ *Substance*, *supra* note 122.

¹³⁰ That this was the main point of Dalrymple’s argument was recognized by the *Morning Chronicle*, in an account presumably written by Woodfall, reporting that Dalrymple “entered into a variety of observations upon the question at large” but ultimately “den[ied] that there ever were any [rights] at Common Law upon such principles as the Respondents contended for.” *Literary Property*, MORNING CHRON. & LONDON ADVERTISER, Feb. 8, 1774, at 2.

¹³¹ *Substance*, *supra* note 122.

a common law right existed in England but rather whether the common law right that surely existed was abrogated or preempted by publication of literary works.¹³²

The newspapers also reported that at least a portion of Dalrymple's argument centered on freedom of the press. According to William Woodfall's account in the *Morning Chronicle*,¹³³ Dalrymple "investigated the commencement and the secrecy attending the commencement of the art of printing, as well as the mode then taken by the printers to secure their property by patents, licenses, and Star Chamber decrees."¹³⁴ He observed that there was nothing so powerful in the political process as the press and said that the British monarchy had realized this early in the history of printing. The monarchy had to account for the fact that "free use of the press must be finally dangerous to themselves" and so the Crown colluded with the booksellers to create the system of licensing that prevailed until 1694.¹³⁵ In this way, he said, the Crown could exercise full control over the content of mass communication, much as it had done in the previous century with licensing.

¹³² See ROSE, *supra* note 4, at 109-10 (describing the possibility that Burrow's errors conveyed to readers the mistaken impression that the question being decided was only whether the common law right is abrogated by statute, and not whether there was a common law right at all).

¹³³ Woodfall, editor of the *Morning Chronicle and London Advertiser*, created "masterpieces" of detailed and accurate news coverage while other, less gifted reporters could compose only "brief sketches" that sometimes suffered from errors and lacked detail. Peter D.G. Thomas, *The Beginning of Parliamentary Reporting in Newspapers, 1768-1774*, 74(293) ENGL. HIST. REV. 623, 636 (1959). Woodfall, whose nickname was "Memory," possessed extraordinary skills and capacity to recollect things that "enabled him to sit in the Gallery without moving for twelve hours at a time, occasionally throughout the night, and then move on to his printing house to compose a hasty record of the proceedings." NEWSPAPER HISTORY: FROM THE SEVENTEENTH CENTURY TO THE PRESENT DAY 160 (George Boyce, James Curran & Pauline Wingate eds., 1978) [hereinafter NEWSPAPER HISTORY]. During the *Donaldson* case, a newspaper letter writer who called himself or herself "Justice" commented on the "astonishing memory" of Woodfall and noted that no other London newspaper even attempted to give verbatim accounts of the speeches in the House of Lords as the *Morning Chronicle* did even though Woodfall never took written notes. Letter to the Printer, MORNING CHRON. & LONDON ADVERTISER, Feb. 14, 1774, at 2. In parliamentary reporting, Woodfall was known to have acquired transcripts of politicians' remarks and may even have been part of a common practice at the time of accepting money from certain politicians to give them more lengthy coverage in the newspaper than that given to political rivals. See NEWSPAPER HISTORY, *supra*, at 161. It is not known whether these practices affected Woodfall's coverage of the *Donaldson* case in the House of Lords.

¹³⁴ *Literary Property*, *supra* note 130, at 2.

¹³⁵ *Id.*

C. Day 3: Tuesday, February 8, 1774

Solicitor General Alexander Wedderburn began presentation of the case for perpetual common law copyright on February 8.¹³⁶ In his remarks, Wedderburn appealed to both natural law and a public benefit rationale.¹³⁷ Wedderburn cited the 17th century Dutch jurist Hugo Grotius, who quoted the Roman lawyer Paulus in saying one who invented an object was the owner of it.¹³⁸ Wedderburn showed the lords a copy of the original grant by King James to the booksellers to print some of his poems, with the suggestion being that James would not have attempted to give the booksellers a literary property right he did not possess.¹³⁹

Later that day, the lords heard from John Dunning on behalf of the booksellers. Dunning had served as solicitor general prior to Thurlow, and in 1768 Dunning had been elected to the House of Commons. Colleagues called him a brilliant lawyer and “the foremost advocate of his day.”¹⁴⁰ Dunning was described by the newspapers as “having a violent Cold upon him”¹⁴¹ that caused him to be hoarse and difficult to understand.¹⁴² Dunning, apparently responding to Dalrymple, said it was not reasonable to conclude that mere publication could deprive a literary property owner of his or her right.¹⁴³

D. Day 4: Wednesday, February 9, 1774

On February 9, Thurlow was allowed one hour and 45 minutes to respond to the arguments that had been made by Wedderburn and Dunning.¹⁴⁴ Following Thurlow’s reply, Lord Chancellor Apsley directed that three questions be asked of the common law judges, who would render advisory opinions to assist the lords in deciding the case. Lord Camden then posed two additional questions to the judges. These questions and the judges’ subsequent responses have spawned a great deal of commentary and confusion.¹⁴⁵ There appears to be some dispute surrounding

¹³⁶ *London*, PUB. ADVERTISER (London), Feb. 9, 1774, at 2.

¹³⁷ 17 Parl. Hist. Eng. (1774) 963-66.

¹³⁸ Substance of the Arguments of the Solicitor General, in *Favour of Literary Property, on Tuesday Last*, LONDON CHRON., *supra* note 122, at 5.

¹³⁹ 17 Parl. Hist. Eng. (1774) 965-66.

¹⁴⁰ 2 NAMIER & BROOKE, *supra* note 106, at 367.

¹⁴¹ *London*, *supra* note 136.

¹⁴² *Literary Property*, *supra* note 119, at 2.

¹⁴³ *Id.*

¹⁴⁴ *London*, GAZETTEER & NEW DAILY ADVERTISER (London), Feb. 11, 1774, at 2.

¹⁴⁵ While the lords posed the questions to the judges in the form of whether the Statute of Anne superseded the common law copyright, if it ever existed, the lords themselves were not bound to answer those same five questions. The lords only had to decide whether the injunction

even the newspapers' contemporary reports of the questions. Woodfall's *Morning Chronicle*, for example, assured readers that all the other newspaper accounts of the questions were in error and that only the *Morning Chronicle*'s reporting could be trusted as accurate.¹⁴⁶

In fact, there are significant differences between the questions as rendered by the *Morning Chronicle*, on the one hand, and three other newspapers, on the other hand. According to the *Morning Chronicle*, Lord Chancellor Apsley repeated his three questions to the judges twice:

1. Whether at Common Law, the author of any literary composition had the sole first right of printing and publishing the same for sale, and could bring an action against any person for publishing the same without his consent.
2. If the author had such right originally, did the law take it away upon his printing and publishing the said book or literary composition, or might any person re-print and publish the said literary composition for his own benefit, against the will of the author.
3. If such action would have laid at Common Law, is the same taken away by the Statute of Queen Ann? Or is an author precluded by such statute from any remedy, except on the foundation of the said statute?¹⁴⁷

Meanwhile, the *London Evening Post* rendered Apsley's questions differently, and two other publications¹⁴⁸ mimicked this version:

Question I. Whether the author of a book, or literary composition, has a *common law right* to the sole and exclusive publication of such book or literary composition?

banning Donaldson's publication of *The Seasons*, in which the London booksellers claimed to own copyright, should be reversed.

¹⁴⁶ *London*, MORNING CHRON. & LONDON ADVERTISER, Feb. 11, 1774, at 2 ("The public may depend upon our authority, when we assure them, that the questions stated by the Lord Chancellor and Lord Camden, for the opinion of the Judges, respecting the existence of a common law right as to Literary Property, are erroneously worded in every paper of yesterday but the *Morning Chronicle*.").

¹⁴⁷ *Literary Property*, MORNING CHRON. & LONDON ADVERTISER, Feb. 10, 1774, at 2.

¹⁴⁸ *London*, *supra* note 144, at 2; CRAFTSMAN OR SAY'S WEEKLY J. (London), Feb. 12, 1774, at 3.

Q. II. Whether an action for a violation of *common law right* will lie against those persons who publish the book or literary composition of an author without his consent?

Q. III. How far the statute of the 8th Queen Anne affects the supposition of a *common law right*.¹⁴⁹

The *London Evening Post* version omits the middle question about whether a common law right, if one existed, was taken away upon printing and publication of a work. In the *London Evening Post*'s rendering, the first two questions are redundant and the third is less precise than in the report of the *Morning Chronicle*. All of the legal reports—Brown, Burrow, Parliamentary History, Gentleman's Report and Anonymous Report—follow in substance the *Morning Chronicle*'s account of the three questions posed by Lord Chancellor Apsley. But, as will be seen, at least one of the judges apparently understood the question to be the one printed in the *London Evening Post* and not the one in the *Morning Chronicle*.

Immediately after the three questions were put to the judges by Apsley, Lord Camden posed two additional questions. Although Camden's questions may seem repetitive of those posed by Apsley, modern scholars have noted that Apsley's questions focused on the rights of authors while Camden's questions focused on the rights of booksellers or printers who purchased copyrights from authors.¹⁵⁰ This is related to the fact that Camden's questions refer both to assignees and to a perpetual common law copyright that could, at least in theory, continue in force even after statutory rights have expired. Once again, the *Morning Chronicle* version of the questions was followed in substance by the five reported versions in Brown, Burrow, Parliamentary History, Gentleman's Report and Anonymous Report (and this time, there was no significant difference in the other newspapers' version):

1. Whether the author of any literary composition, or his assigns, had the sole right of printing and publishing the same in perpetuity by the Common Law?

¹⁴⁹ *House of Lords*, LONDON EVENING-POST, Feb. 8–10, 1774, at 3. It is evident this version makes the second half of Question No. 1 into Question No. 2 and omits the actual Question No. 2 (dealing with publication's effect on a common law right) entirely.

¹⁵⁰ DEAZLEY, RETHINKING COPYRIGHT, *supra* note 28, at 16 (citing PATTERSON, *supra* note 42, at 176-77).

2. Whether this right is any ways impeached, restrained, or taken away by the 8th of Queen Ann?¹⁵¹

Although the judges would not begin giving their opinions on the questions for nearly a week, it did not take that long for London citizens to begin chiming in with their own answers to the questions posed by Apsley and Camden. Even before the judges could begin to respond in the House of Lords on February 15, a letter-writer called “Brecknock” wrote in the *Morning Chronicle* that the purpose of the Statute of Anne was to encourage authors to publish their works as soon and as often as possible within 14 years or the exclusive right to do so would be lost.¹⁵²

E. Days 5, 6 and 7: Tuesday, February 15, 1774; Thursday, February 17, 1774; and Monday, February 21, 1774

A total of 11 judges, including two who were also members of the House of Lords, gave their opinions on the five questions posed. Had they been unanimous, the judges apparently would not have had to speak individually but rather could have submitted a single recommendation to the lords. But since they disagreed, the judges were given the opportunity by the lords to present their views in order from junior to senior.¹⁵³ The opinions of the judges have confused many readers of

¹⁵¹ *Literary Property*, *supra* note 147, at 2. The version of these two questions reported in the *London Evening Post* and other newspapers differs in wording, though not obviously in substance, from the *Morning Chronicle* report.

¹⁵² *On Literary Property*, MORNING CHRON. & LONDON ADVERTISER, *supra* note 76, at 1.

¹⁵³ *Literary Property*, MORNING CHRON. & LONDON ADVERTISER, Feb. 16, 1774, at 2 (noting that “the Judges were not entirely of the same opinion” and therefore the lords voted to invite the judges to “deliver their sentiments upon the subject.”). On February 15, the following judges were heard: Mr. Baron James Eyre of the Court of Exchequer, Mr. Justice George Nares of the Court of Common Pleas, Mr. Justice William Ashurst of the Court of King’s Bench and Mr. Justice William Blackstone of the Court of King’s Bench. Blackstone was indisposed (one newspaper noted he was “ill with gout,” *id.*) and so he sent a written statement to be read by Ashurst. *London*, LONDON EVENING-POST, Feb. 15–17, 1774, at 1. On February 17, the House of Lords heard from Mr. Justice Edward Willes of the Court of King’s Bench, Sir Richard Aston of the Court of King’s Bench, Baron George Perrott of the Exchequer, Baron Richard Adams of the Exchequer and Mr. Justice Henry Gould of the Court of Common Pleas. *London*, GEN. EVENING-POST (London), Feb. 15–17, 1774, at 1. Finally, on February 21, two judges who were also members of the House of Lords spoke: Lord Chief Baron Sydney Smythe of the Exchequer and Chief Justice of the Court of Common Pleas William De Grey. *London*, LONDON EVENING-POST, Feb. 19–22, 1774, at 3. That Mansfield did not speak as a judge was a surprise. *See London*, DAILY ADVERTISER, Feb. 18, 1774, at 1 (reporting that three lords were expected to speak on Monday). He did not speak as a judge or a lord, thus drawing the wrath of his former clients, the booksellers, who undoubtedly expected a repeat performance of his opinion in *Millar v. Taylor*. The booksellers felt that Mansfield had induced them to bring the costly and difficult appeal to

Donaldson for centuries, but in recent years scholars such as Deazley¹⁵⁴ have made detailed efforts to document the judges' views and to correct errors traditionally made in describing those views, even in the official reported versions of the case.

The following summary of the judges' advice to the lords, taken from contemporary newspaper accounts, is organized around the questions the judges had been asked to answer. It should be noted that not all of the judges explicitly answered all of the questions put to them, and virtually none of the judges spoke at length about the distinction between the questions posed by Apsley and those posed by Camden. In other words, the judges generally did not distinguish between the rights of authors and the rights of booksellers or printers.

1. Was there a common law copyright? (7 Judges "Yes"; 4 Judges "No")

On this question the judges who answered "No" were Eyre,¹⁵⁵ Perrott,¹⁵⁶ Adams¹⁵⁷ and De Grey.¹⁵⁸ Perrott and Adams (and probably De Grey) expressed the sentiment that manuscripts could be owned in their physical form and that this ownership would protect something like a right of first publication. This right was not unique to expression but was a kind of possessory right of the type that would extend to other property; as Perrott expressed, "[a]n author certainly had a right to his manuscript; he might line his trunk with it; or he might print it."¹⁵⁹ Perrott also believed that "[i]f a manuscript was surreptitiously obtained, an action at Common Law would certainly lie for the corporeal part of it, the paper."¹⁶⁰ This could not be called a common law copyright, however. Instead, De Grey described it as simply the power to do "what a man will with his own" and said it included the prerogative "of publishing or withholding from the world a literary composition."¹⁶¹ Meanwhile, the seven judges who concluded there was a

the House of Lords and then abandoned them; in newspaper copy he was derided as mean, treacherous and an imitator of Satan because he "tempted the booksellers, and now laughs at them for their folly." *London*, MIDDLESEX J. & EVENING ADVERTISER (London), Feb. 22–24, 1774, at 4.

¹⁵⁴ See DEAZLEY, ON THE ORIGIN, *supra* note 28, at 199–209.

¹⁵⁵ *Literary Property*, LONDON CHRON., Feb. 15–17, 1774, at 5.

¹⁵⁶ *Literary Property*, MORNING CHRON. & LONDON ADVERTISER, Feb. 19, 1774, at 2.

¹⁵⁷ *Literary Property*, MORNING CHRON. & LONDON ADVERTISER, Feb. 21, 1774, at 3.

¹⁵⁸ *Literary Property*, LONDON CHRON., Feb. 22–24, 1774, at 4.

¹⁵⁹ *Literary Property*, *supra* note 156, at 2.

¹⁶⁰ *Id.*

¹⁶¹ *Literary Property*, *supra* note 158.

common law right were Nares,¹⁶² Ashurst,¹⁶³ Blackstone,¹⁶⁴ Willes,¹⁶⁵ Aston,¹⁶⁶ Gould¹⁶⁷ and Smythe.¹⁶⁸

2. *Was the common law copyright lost upon publication? (7 Judges “No”; 4 Judges N/A)*

All seven judges who believed there *was* a common law right also believed that it was *not* lost upon publication. However, none of the remaining four judges clearly answered “Yes” to this question. Although all five of the case reports—Burrow, Brown, Parliamentary History, Gentleman’s Report and Anonymous Report—put Eyre in the camp of judges who answered in the affirmative,¹⁶⁹ a newspaper account says Eyre argued “for an Hour and a Half, in a very strong Manner against Literary Property”¹⁷⁰ and therefore, in his view, there was no common law right for publication to take away. A careful review of the various accounts of Eyre’s speech provides no basis for a conclusion that he answered in the affirmative on this question. In fact, there seems to be widespread confusion about what question Eyre was answering.¹⁷¹

One contemporary newspaper writer reported that Eyre’s vote was given in response to the second question as inaccurately described by the *London Evening Post* (whether an action could lie) rather than the version of the *Morning Chronicle* and the legal reporters (whether the right was lost upon publication).¹⁷² The

¹⁶² *Literary Property*, *supra* note 153.

¹⁶³ *Id.*

¹⁶⁴ *Id.* Blackstone was known to be in support of the rights of authors and booksellers, perhaps not coincidentally given his status as an author of the *Commentaries*, of which there were known to be pirated copies printed in Ireland and Scotland and then brought to England. Letter to the Printer, MORNING CHRON. & LONDON ADVERTISER, *supra* note 76.

¹⁶⁵ *Literary Property*, MORNING CHRON. & LONDON ADVERTISER, Feb. 18, 1774, at 2.

¹⁶⁶ *Id.*; *Literary Property*, *supra* note 156.

¹⁶⁷ *Literary Property*, *supra* note 157.

¹⁶⁸ *Literary Property*, *supra* note 158.

¹⁶⁹ See DEAZLEY, ON THE ORIGIN, *supra* note 28, at 199.

¹⁷⁰ *London*, PUB. ADVERTISER (London), Feb. 16, 1774, at 2.

¹⁷¹ The second question posed a variety of problems and the reporting of the judges’ answers to it seems full of error. Deazley, for example, notes an error in the reporting of Aston’s answer to Question No. 2. See DEAZLEY, ON THE ORIGIN, *supra* note 28, at 200. Deazley also reports discrepancies in the reporting of responses to the second question by not only Aston but also Perrott, Adams, Smythe and De Grey. See *id.* at 200-04.

¹⁷² *Literary Property*, *supra* note 155 (quoting Eyre saying, “if the notion of a common law right should be reprobated, such reprobation carried with it an explicit answer to the second

Gentleman's Report,¹⁷³ Anonymous Report¹⁷⁴ and Parliamentary History¹⁷⁵ all substantiate that Eyre said, in response to what he apparently thought was the second question, that an action could not be brought because there was no common law right. Thus it appears Eyre never squarely addressed the actual second question posed by Apsley: whether any common law right that existed was lost on publication. Burrow reports that Eyre said "if the author had such sole right of first printing, the law did take away his right, upon his printing and publishing such book or literary composition."¹⁷⁶ But there is no basis for this conclusion by Burrow in any of the narratives of Eyre's arguments, including the newspaper accounts. Given that Burrow made an error in recording Nares' vote on the next question,¹⁷⁷ it seems likely that Burrow's statement about Eyre's vote on this question could also be erroneous.

A letter-writer to the *Morning Chronicle* challenged Eyre's view that there was no common law right. The writer contended that the real danger to the public interest in free communication was that writers would not "bring the product of their ideas to public market" but would rather keep them unpublished and thereby monopolize those ideas.¹⁷⁸ This would happen, the writer said, if the statutory and common law schemes for copyright were not sufficiently protective as to convince the author that publication was in his or her best interest.

Like Eyre, the judges Perrott, Adams, and De Grey did not believe there was a common law right and did not squarely address this question. To the extent they believed a right was taken away by publication, it was the possessory right of first publication and not the common law copyright, which for them did not exist.¹⁷⁹

3. *Did the Statute of Anne supersede the common law copyright? (6 Judges "No"; 1 Judge "Yes"; 4 Judges "If right had existed, it would have been superseded")*

On this question, six of the judges who believed that the common law copyright existed answered "No" while only one judge, Gould, clearly answered

question: There being no common law right, an action could not be maintained against the re-publishers of an Author's book or literary composition, without his consent.").

¹⁷³ See Gentleman's Report, *supra* note 4, at 32.

¹⁷⁴ See Anonymous Report, *supra* note 4, at 15.

¹⁷⁵ 17 Parl. Hist. Eng. (1774) 972-73.

¹⁷⁶ *Millar v. Taylor*, (1769) 98 Eng. Rep. 201, 258 (K.B.).

¹⁷⁷ See *infra* notes 184-88 and accompanying text.

¹⁷⁸ Letter to the Printer, *MORNING CHRON. & LONDON ADVERTISER*, *supra* note 157, at 2.

¹⁷⁹ *Literary Property*, *supra* note 156 (Barron Perrott); *Literary Property*, *supra* note 158 (Baron Adams and Chief Justice De Grey).

“Yes.”¹⁸⁰ Although modern observers place Eyre in the affirmative camp, his opinion might best be described as: “If a common law right had existed, it would have been taken away by the statute” since he so strongly believed there was no common law copyright at all.¹⁸¹ De Grey’s opinion was similar, given that he spent a considerable amount of time arguing that the Statute of Anne would have superseded the common law right if it had existed but he also concluded the common law copyright did not exist.¹⁸² Perrott and Adams expressed the same sentiment.¹⁸³

Nares’ negative vote was erroneously recorded as “yes” by Burrow.¹⁸⁴ The Parliamentary History is internally contradictory, reporting on the same page that Nares voted both “yes” and “no” on this question.¹⁸⁵ However, it is of particular importance to note that no fewer than seven London newspapers recorded Nares’ vote as negative.¹⁸⁶ The importance of correctly placing Nares in the “no” group is that Nares is the swing vote who gives the judges supporting a common law right not superseded by the Statute of Anne the six votes necessary to constitute a majority among the eleven judges who spoke.¹⁸⁷ Given that the lords ultimately did not follow the judges’ advice on this point (because they reversed the injunction that had been given against Donaldson), it has been argued that the lords’ holding against common law copyright is strengthened.¹⁸⁸ In other words, if the lords had merely followed the advice of the judges, then the judges’ opinions

¹⁸⁰ *Literary Property*, *supra* note 158.

¹⁸¹ *Literary Property*, *supra* note 155.

¹⁸² *Literary Property*, *supra* note 158.

¹⁸³ *Literary Property*, *supra* note 156 (Baron Perrott); *Literary Property*, *supra* note 158 (Baron Adams).

¹⁸⁴ *Millar v. Taylor*, (1769) 98 Eng. Rep. 201, 258 (K.B.).

¹⁸⁵ 17 Parl. Hist. Eng. (1774) 975-76.

¹⁸⁶ *Literary Property*, *supra* note 155; LONDON EVENING-POST, Feb. 15—17, 1774, at 1; *Literary Property*, MIDDLESEX J. & EVENING ADVERTISER (London), Feb. 15—17, 1774, at 2; *London*, GAZETTEER & NEW DAILY ADVERTISER (London), Feb. 16, 1774, at 2; *Literary Property*, MORNING CHRON. & LONDON ADVERTISER, Feb. 16, 1774, at 2; *London*, PUB. ADVERTISER (London), Feb. 16, 1774, at 2; *House of Lords*, GEN. EVENING POST (London), Feb. 17—19, 1774, at 1.

¹⁸⁷ The erroneous recording of Nares’ vote remains somewhat mysterious as to its cause, but modern scholars such as Whicher, Abrams and Rose have documented in detail the error and its effects. Whicher, *supra* note 26, at 129-30; ABRAMS, *supra* note 35, at 1169; ROSE, *supra* note 4, at 154-58.

¹⁸⁸ See, e.g., ROSE, *supra* note 4, at 157—58 (arguing that the clerk’s error was substantively inconsequential because the House of Lords’ vote determined the outcome of the appeal but that the error “contributed to a less than fully justified sense of closure to the literary-property question.”).

would have been most important. But since the lords rejected the advisory opinions of a majority of the judges, it is the lords' statements that must be given priority.

4. *Was there a perpetual common law copyright that authors could assign to printers? (7 Judges "Yes"; 4 Judges "No")*

On this question the four judges who earlier stated there was no common law copyright again answered "No," and the same seven judges who endorsed the common law copyright can probably be placed in the "Yes" category. For most of these seven judges, the affirmative response is by implication because there was little discussion, according to the newspaper accounts, of how this question and the judges' corresponding responses may have differed from the first question.¹⁸⁹

5. *Did the Statute of Anne supersede the perpetual and assignable common law copyright? (6 Judges "No"; 1 Judge "Yes"; 4 Judges "If right had existed, it would have been superseded")*

Unsurprisingly, on this question the six "No" votes came from the same judges who answered "No" to the third question—those who believed that the common law copyright did exist, was not surrendered upon publication, and was not superseded by the Statute of Anne. And again, the only judge to clearly answer "Yes" was Gould, while Eyre, Perrott, Adams and De Grey—the four who believed no common law copyright ever existed—are probably best classified as answering that the statute would have taken the common law right away if it had existed.¹⁹⁰

In an effort to summarize the sentiments of the judges, Deazley has placed them in three camps: (1) those who believed there was a perpetual common law copyright that was neither abrogated by the Statute of Anne nor given up by publication (Nares, Ashurst, Blackstone, Willes, Aston, and Smythe); (2) those who believed there was a right of first printing that was not a common law copyright but rather a kind of possessory right in the physical manuscript itself, but that this right disappeared after publication because of the Statute of Anne (Eyre, Perrott, Adams, and De Grey); and (3) one judge who believed there was a

¹⁸⁹ See, e.g., *Literary Property*, MORNING CHRON. & LONDON ADVERTISER, Feb. 16, 1774, at 2 (the opinions of the judges focus on whether there is a common law right of literary property, and whether it is superseded by the Statute of Anne).

¹⁹⁰ *Literary Property*, LONDON CHRON., Feb. 15—17, 1774, at 5.

common law copyright but that it was superseded by the Statute of Anne (Gould).¹⁹¹

However, based on review of the newspaper accounts, this article concludes four categories of judges should be identified: (1) those who believed there was a perpetual common law copyright that was neither abrogated by the Statute of Anne nor given up by publication (Nares, Ashurst, Blackstone, Willes, Aston, and Smythe); (2) those who believed there was a right of first printing that was not a common law copyright but rather a kind of possessory right in the physical manuscript itself, but that this right disappeared after publication (Perrott, Adams, and De Grey); (3) those who believed there was not a common law copyright but that, if one had existed, it would have been superseded by the Statute of Anne (Eyre, Perrott, Adams, and De Grey); and (4) one judge who believed there was a common law copyright but that it was superseded by the Statute of Anne (Gould). The difference between this article's categorization and Deazley's is that, in this version, Perrott, Adams and De Grey each have been placed in two separate categories: one in favor of the possessory right of first publication and another for the alternative holding that, if a common law right had existed, it would have been superseded by the Statute of Anne. Meanwhile, based on a review of the newspaper and other accounts showing Eyre did not vote "yes" on the real Question No. 2 but rather answered a different question, Eyre has been moved from the category of those who believed that publication resulted in loss of a common law right. This seems to most accurately describe the four major ways of thinking about the case among the judges.

Another way of viewing the opinions of the judges is that seven out of 11 (categories 1 and 4 above) concluded there *was* a common law copyright, and four judges (categories 2 and 3 above) concluded there was *no* common law copyright. Significantly, six of the 11 judges believed the common law copyright survived the Statute of Anne, meaning that an author could assign rights to a printer in perpetuity and the printer could prevent others from publishing the work even after the statutory term of copyright protection had expired.¹⁹² Given this state of affairs at the conclusion of the judges' advisory opinions, one does not blame supporters of the booksellers for declaring in the newspapers that they were "well pleased that the Question of Literary Property is likely to go in Favour of those who have in

¹⁹¹ DEAZLEY, ON THE ORIGIN, *supra* note 28, at 205.

¹⁹² *Id.*

their Purchases treated it as such.”¹⁹³ In reality, however, the lords had something else in mind.

It is significant to note, especially in light of how the case has come to be perceived by American legal scholars, that only one judge—Gould—said there was a common law copyright superseded by the Statute of Anne. Meanwhile, equally significant in light of modern interpretations is that no judge concluded there was a common law copyright given up by publication of the work in question.

F. Day 8: Tuesday, February 22, 1774

After following the case closely and reporting on its numerous developments for more than two weeks, London newspapers were anxious for the decision by the House of Lords. One newspaper reported that Lord Camden was “infirm” and yet contended for more than two hours that there was no common law copyright.¹⁹⁴ He took the booksellers to task, calling them “monopolizers of letters” and “extinguishers of genius.”¹⁹⁵ Camden agreed with Dalrymple’s argument and said authors write for fame only and judges interpret law, not make it—essentially concluding that no common law right existed.¹⁹⁶ Apsley then seconded Camden’s motion to reverse the Chancery Court injunction Apsley had entered against Donaldson less than two years earlier.¹⁹⁷ Apsley spent a considerable amount of time speaking “against his own decree” and showing “the specious grounds which he went upon before, and candidly confessed his conviction by a different opinion from that he had before given.”¹⁹⁸ Apsley claimed that he had been bound in the Chancery Court to follow *Millar* but that he had no particular conviction in favor of common law copyright and after examining the legislative history of the Statute of Anne, thought it was clear that Parliament was against the common law right at the time of passage of the Act.¹⁹⁹

¹⁹³ *London*, ST. JAMES’S CHRON. OR BRIT. EVENING POST (London), Feb. 19—22, 1774, at 4.

¹⁹⁴ *London*, MIDDLESEX J. & EVENING ADVERTISER (London), Feb. 22—24, 1774, at 1.

¹⁹⁵ *Id.*

¹⁹⁶ DEAZLEY, ON THE ORIGIN, *supra* note 28, at 205-06. He also suggests (*id.* at 210) that Camden said the statute trumped, but it appears that Camden said there was never a common law right. ROSE, *supra* note 4, at 103 n.7 makes clear that Camden thought there was never a common law right.

¹⁹⁷ *Literary Property*, MORNING CHRON. & LONDON ADVERTISER, Feb. 26, 1774, at 2; *London*, LONDON EVENING-POST, Feb. 22—24, 1774, at 1.

¹⁹⁸ *London*, *supra* note 194.

¹⁹⁹ It is somewhat unclear from this whether Apsley meant there was a common law right superseded by the Statute of Anne, or that there never was a common law right.

Lord Lyttleton said there was a common law copyright not superseded by statute while the Bishop of Carlisle was reported to have agreed with Camden that there was no common law right. Meanwhile, Lord Effingham said there was no common law copyright because it would inhibit freedom of speech.²⁰⁰ One newspaper reported simply, “Lord Mansfield did not speak.”²⁰¹ In summary, then, four of the five lords who spoke were of a mind that there was no common law copyright. The House of Lords ultimately voted to reverse the injunction, either by voice vote or, in some accounts, a counted majority.²⁰² One newspaper reported that “a great personage has expressed much satisfaction” at the decision but did not say who that great personage might be.²⁰³ One Londoner called Ben Button wrote to the editor of the *St. James Chronicle*, “The Lord above knows but I don’t what the Lords here below can mean by their Decision against Literary Property in Perpetuity....”²⁰⁴

Finally, the newspapers related two tragically humorous stories—perhaps apocryphal—about the ramifications of the House of Lords decision. The first involves a conversation between a bookseller and his lawyer, reported to have been heard in the lobby of the House of Lords immediately after the decision in favor of Donaldson:

“*Bookseller*. And now, Sir, I am ruined;—my whole Fortune has been expended in Literary Moonshine.

“*Lawyer*. The more a Lunatic you, to lay out your Money upon a Non-entity, a Phantom,—to give a something for nothing.

“*B*. I thought it was Property; it was sold and conveyed to me as such; it has been esteemed so for sixty Years past: The Author would have libelled me if I had denied its being so; and I verily believed it was as much Property as what I gave in Exchange for it.

²⁰⁰ *Literary Property*, *supra* note 1.

²⁰¹ London, *supra* note 194.

²⁰² The Parliamentary History reports that there was a 22-11 vote in the House of Lords to reverse the decree. 17 Parl. Hist. Eng. (1774) 1003. None of the other versions report a numerical vote, and Rose—relying in part on contemporary newspaper accounts—contends that there was not a “formal division of the House” and that, instead, “[m]ost likely the decision was by simple voice vote.” ROSE, *supra* note 4, at 102.

²⁰³ London, LONDON EVENING-POST, Feb. 22–24, 1774, at 4.

²⁰⁴ Ben Button, Letter to the Printer, ST. JAMES'S CHRON. OR BRIT. EVENING POST (London), Feb. 24–26, 1774, at 1.

“L. And so it is; you see what it is to deal with an Author; you now see your Money is no more your Property, than his Works which you bought of him.

“B. This may be Sport to you; but it is hard to be ruined by a Decision on a doubtful Point.

“L. Doubtful! The Law can never be doubtful; for every Peasant is presumed to know the Law, and therefore you cannot plead ignorance in Excuse for your Folly.

“B. Was it so clear, Mr. Double-Tongue, when the Judges were divided in Opinion? [W]hen the Chancellor made the Decree which he afterwards reversed? [W]hen the Lords themselves were not unanimous? [W]hen---

“L. Pfhaw, you know nothing of the Matter—this is the glorious Uncertainty of the Law.

[Exit, chinking his Purse.

“BOOKSELLER folus.

“B. The glorious Uncertainty of the Law—that which has proved my Ruin, and makes your Fortune—What shall I do? Shall I turn Pirate? For they and the Smugglers are more encouraged than the fair Trader, or Merchant—NO, I’ll turn Lawyer, there I cannot err, for the Ignorance of Law, which has ruined me, is a good Plea in the Professors; and my Friend’s glorious Uncertainty of the Law will make my Opinion as often right as the best of them.”²⁰⁵

The second story reportedly took place at Eton, and in it the teller notes the anger of the booksellers toward Mansfield, who, had he spoken, might have been able to change the outcome of the case:

An arch thing happened here a day or two ago, between a young lad of this school and an old woman who sold gingerbread and cakes. The young spark having made free with the dame’s gingerbread while the old woman’s back was turned, and being discovered, was very severely rated by her for making free with her property: the boy observing that what he had taken was alphabet gingerbread, cried out,

²⁰⁵ BALDWIN'S LONDON WKLY. J., Feb. 26, 1774, at 4.

that she was mistaken, it was not her property, for the House of Lords had lately determined there was no such thing as literary property, and therefore lettered gingerbread was from thenceforth common. The old dame was as angry at this speech, though she did not understand it, as certain lawyers were at a great man's silence on this subject, which they did not understand, and determined to complain to the matter; but a friend of mine, who saw the affair, stepped in and paid for the gingerbread.²⁰⁶

The newspapers also reported that “ill consequences” were expected to result from the decision, and among those would be the discouragement of literature.²⁰⁷ Donaldson's EDINBURGH ADVERTISER, though, was ecstatic with the outcome. Donaldson, who by then had given control of the newspaper over to his son, probably did not have a direct hand in all the *Advertiser's* coverage of the case, and in any case the coverage was fairly objective. But at the conclusion of the case, the ADVERTISER published a letter from London—one cannot help but speculate whether it could have been written by Alexander Donaldson himself—that made a concession to the joy of victory by publishing all the names of the booksellers who had lost the case.²⁰⁸

CONCLUSION

This re-examination of *Donaldson v. Beckett*, and the discussion of modern American scholars' struggles to understand the meaning of the case, demonstrates that determining the “traditional contours” of copyright law may be difficult. The Supreme Court did not provide guidance in *Eldred v. Ashcroft* on how the “traditional contours” of copyright may best be understood, and the issue is little clearer today than it was in 2003. This article's examination of *Donaldson v. Beckett* has shown that, at the time of the adoption of the first American Copyright Act by the U.S. Congress in 1790, the British House of Lords had made clear that English common law did not recognize a common law copyright after expiration of statutory rights. It is also apparent through careful re-examination of the case that, while observers of and participants in eighteenth-century copyright legislation and

²⁰⁶ *Extract of a Letter from Eton*, LONDON CHRON., Mar. 3–5, 1774, at 6.

²⁰⁷ MORNING CHRON. & LONDON ADVERTISER, Feb. 26, 1774, at 3.

²⁰⁸ *Extract of a Letter from London*, EDINBURGH ADVERTISER, Feb. 25 – Mar. 1, 1774, at 4. The names are Thomas Becket, Peter Abraham de Hondt, John Rivington, William Johnson, William Strachan, Thomas Longman, William Richardson, John Richardson, Thomas Lowndes, Thomas Caflon, George Kearfley, Henry Baldwin, William Owen, Thomas Davies, and Thomas Cadell.

litigation may not have shared a single clear understanding of *Donaldson*, the potential conflict between copyright and free public communication was not only recognized by newspaper readers, journalists, lawyers, judges and lords but at least some of those involved were genuinely concerned about the negative impact of copyright on freedom of the press.²⁰⁹

The lessons learned from this history²¹⁰ can be of use to federal judges in reviewing free-speech-based challenges to copyright law. One such challenge was heard by the Supreme Court in the 2011 Term in *Golan v. Holder*. The Tenth Circuit addressed the First Amendment issue in the case,²¹¹ and concluded that Congress had altered the traditional contours of copyright in 1994 when it passed the Uruguay Round Agreements Act, a law that sought to bring the United States in compliance with obligations under the Berne Convention for the Protection of Literary and Artistic Rights.²¹² In bringing the works of certain foreign authors from the public domain back into copyright protection, the Tenth Circuit said, Congress triggered First Amendment scrutiny. One of the “traditional contours” of copyright, the court said, “is the principle that once a work enters the public domain, no individual—not even the creator—may copyright it.”²¹³ Ultimately, the Court of Appeals held that the law survived First Amendment scrutiny because Congress demonstrated a substantial or important interest—to secure foreign copyright protection for American authors under Berne by granting copyright

²⁰⁹ This fact does not mean that eighteenth-century participants in *Donaldson* contemplated modern problems posed by copyright law in the face of constitutional free speech guarantees. But it does counter the notion that copyright and free speech were never considered to be in conflict and, therefore, under the traditionalist mode of constitutional and statutory interpretation, American jurists in the twenty-first century should not apply First Amendment scrutiny to the Copyright Act. See, e.g., Stephen M. McJohn, *Eldred’s Aftermath: Tradition, the Copyright Clause, and the Constitutionalization of Fair Use*, 10 MICH. TELECOMM. & TECH. L. REV. 95, 107 (2003) (explaining *Eldred’s* traditionalist focus on the First Amendment safeguards within copyright itself); Michael D. Birnhack, *Copyright Law and Free Speech After Eldred v. Ashcroft*, 76 S. CAL. L. REV. 1275, 1278 (2003) (arguing that external constitutional scrutiny must be applied to copyright because its internal accommodations for free speech are insufficient).

²¹⁰ Of course, much more work can be done to understand the history of copyright and free speech, both before and after *Donaldson v. Beckett*. This article has not made a comprehensive attempt but only illustrates that the history is not as uncomplicatedly clear as some have suggested. A primary contribution of this article is to demonstrate that copyright law and free speech, while often considered completely separate branches of law, do have some shared history that should be further explored.

²¹¹ *Golan v. Gonzales*, 501 F.3d 1179 (10th Cir. 2007).

²¹² Berne Convention, *supra* note 120, art. 7.

²¹³ *Golan v. Gonzales*, 501 F.3d at 1184.

protection to foreign authors in the United States, even if their works were previously in the public domain—which was unrelated to the suppression of free expression and narrowly tailored.²¹⁴

Upon appeal to the U.S. Supreme Court, the orchestra conductors, educators and others challenging the law disagreed with the U.S. Solicitor General over what constituted the “traditional contours” of copyright. The plaintiffs-appellants argued before the Supreme Court on October 5, 2011 that the Tenth Circuit was right when it said that a traditional contour of the U.S. Copyright Act was that works could not be taken out of the public domain and put under copyright protection.²¹⁵ The United States, meanwhile, argued that First Amendment scrutiny would be applicable only if Congress took the extreme measure of doing away with fair use altogether, or abrogated the idea-expression dichotomy and gave copyright protection to mere ideas.²¹⁶ A substantial part of the written briefs and oral argument in the case focused on the state of English and American common law prior to 1790, when the United States adopted its first Copyright Act. Those challenging the law contended that Congress did not bring any public domain works into copyright protection in 1790 because common law copyright already protected those works at the time.²¹⁷ The Government countered that Congress did bring public domain works into copyright protection in 1790.²¹⁸ The former interpretation is not supported by the evidence discussed in this article as related to *Donaldson v. Beckett*, although admittedly this article makes no definitive conclusions about the American circumstances and developments from 1774 to 1790.

What this article has shown is that the historical relationship between copyright law and free speech is more complicated than a simple conclusion that they have been separate branches of law between which lawmakers and jurists have traditionally seen no conflict. In the episode of *Donaldson*, the conflict was recognized and made up a substantive part of the debate. No one connected with *Donaldson* viewed the free speech issues at stake in the way they would be viewed today under the First Amendment, but nonetheless the concern that copyright could inhibit communication of ideas and even the freedom of the press was present in the speech of Effingham, as well as in the newspaper coverage. The newspapers

²¹⁴ *Golan v. Holder*, 609 F.3d 1076, 1084 (10th Cir. 2010), *cert. granted*, 131 S.Ct. 1600 (2011).

²¹⁵ Transcript of Oral Argument at 23–24, *Golan v. Holder*, No. 10-545 (U.S. Oct. 5, 2011).

²¹⁶ *Id.* at 40.

²¹⁷ Brief for the Petitioners at 31, *Golan v. Holder*, No. 10-545 (U.S. June 14, 2011).

²¹⁸ Brief for the Respondents at 17-18, *Golan v. Holder*, No. 10-545 (U.S. Aug. 3, 2011).

themselves were just emerging from a bruising battle with the House of Commons and the House of Lords over publication of those bodies' proceedings, and several newspaper reporters and correspondents recognized that the copyright monopoly could pose a private threat to freedom of press similar to the state threat they knew well. Further, newspaper coverage of speeches by Thurlow and Dalrymple demonstrated that those lawyers made freedom of press issues a part of their arguments to the House of Lords. Finally, Donaldson himself engaged in free-press advocacy through the editorial pages of his own newspaper, the *Edinburgh Advertiser*, including during the appeal to the lords in *Donaldson v. Beckett*.

Perhaps one of the most important legacies of *Donaldson* should be the recognition that, regardless of whether the common law copyright existed then or exists today, and regardless of a statute's effect on that common law right, there is yet another source of law that trumps both common law and statute: a fundamental human right to freedom of expression. Although their opinions have been given relatively scant attention in the court of history, Effingham and the other lords who spoke have given an important warning about the dangers posed by copyright to public communication of ideas. Donaldson's *Edinburgh Advertiser* reported:

LORD EFFINGHAM then rose and said, though it might appear presumptuous in one of his cloth, (an officer) to give his opinion in a cause which had divided the learned judges, yet he thought, if a perpetual exclusive right was given to authors, it would also give them a right of suppressing: a bad minister might purchase *copies* of books or pamphlets, which arraigned his conduct, or were friendly to the liberties of the people, and suppress them, and thus a blow might be given to the constitution and liberty of the press; that where there was a free press, there would always be a free people, and he wished to see no encroachment made on it, or on the liberty of the subject, and was therefore for *reversing* the decree.²¹⁹

²¹⁹ *Extract of a Letter from London, supra* note 208 (emphasis in original). In response to Effingham's speech, a letter-to-editor writer said, "I was highly charmed with the divine and noble spirit of liberty, which breathes through the speech of Lord Effingham Howard, on the subject of Literary Property. May it ever inhere in him, and be communicated, not only to the House of which is a Member, but to the most distant corner of the kingdom, for ever to continue and be an inhabitant in the breast of every individual...." *Letter to the Editor*, GEN. EVENING POST, Mar. 8, 1774, at 4. The same letter writer, however, went on to dispute that Effingham's hypothetical about the despotic minister or prince could ever actually take place. *Id.*

In his eloquence and position, Effingham was not alone. Camden, too, expressed a sentiment not far afield, and Camden's statement has received more attention from history than Effingham's has. Camden said that science and learning are public property and "they ought to be as free and general as Air or Water."²²⁰ Indeed, Camden said, the very purpose of "enter[ing] into Society at all" is to "enlighten one another's Minds, and improve our Faculties, for the common Welfare of the Species."²²¹ Knowledge, he said, is of no use or enjoyment unless it is shared, and true geniuses seek understanding rather than money.²²² He cited the example of Milton, who, when offered five pounds for *Paradise Lost*, "did not reject it, and commit his Poem to the Flames, nor did he accept the miserable Pittance as the Reward for his labor; he knew that the real price of his Work was Immortality, and that Posterity would pay it."²²³

If the alteration of historical contours of copyright law is really what triggers First Amendment scrutiny, then courts in the future would do well to look carefully at copyright's past. Although it has been accepted that the modern American concepts of fair use and idea-expression dichotomy account for free-expression interests within copyright law itself,²²⁴ the reality of copyright history is that it has always had a more complicated relationship with free expression. The very purpose of copyright law—to "encourage learning" in the words of the Statute of Anne, or to "promote progress" of art in the words of the U.S. Constitution—arose in the period immediately after Parliament allowed the Licensing Act to expire in 1694 and various parties clamored for a law regulating printing. As he argued against a return of licensing, the journalist (later turned novelist) Daniel Defoe articulated a societal benefit to freedom of speech:

To put a general stop to public Printing, would be a check to Learning, a Prohibition of Knowledge, and make Instruction Contraband: And as Printing has been own'd to be the most useful Invention ever found out, in order to polish the Learned World, make men Polite, and increase the Knowledge of Letters, and thereby all useful Arts and Sciences; so the high Perfection of Human Knowledge must be at a stand, Improvements stop, and the Knowledge of Letters

²²⁰ Gentleman's Report, *supra* note 4, at 53.

²²¹ *Id.* at 53-54.

²²² *Id.* at 54.

²²³ *Id.* at 54.

²²⁴ *Harper & Row Publishers, Inc. v. Nation Enterp.*, 471 U.S. 539, 555-557 (1985).

decay in the Kingdom, if a general Interruption should be put to the Press.²²⁵

As an aside, Defoe argued later in the same essay that perhaps the government could require authors to attach their names to their works and thus cut down on undesirable attacks on others. This would have the incidental benefit, he said, of decreasing “press-piracy,” or what we would today call copyright infringement. In their efforts to get a bill regulating printing adopted and thus restore their monopoly powers, the booksellers or stationers who had benefited from licensing adopted Defoe’s public education rationale for free speech and attached it to copyright law.²²⁶ An understanding of the “traditional contours” of copyright law, then, must take into account the intertwined histories of free expression and copyright. Such an understanding will require much careful study and will not be aided by simplistic or mistaken rhetoric based on a cursory historical review.

Although the scope of this article has not permitted such a review of hundreds of years of copyright history, it has demonstrated that, even if the plaintiffs-appellants in *Golan v. Holder* are correct that American common law protected works under copyright in 1790, this protection did not emanate from English common law, at least in relation to *Donaldson*’s holding that there was no perpetual common law right that continued after statutory rights were extinguished. Perhaps more importantly, however, this article demonstrates that the Government’s argument in *Golan* that Congress can remove works from the public domain without First Amendment scrutiny is not in line with the outcome of the eighteenth-century Battle of the Booksellers that culminated with *Donaldson*. That episode suggests that legislative authority is not unlimited in the arena of copyright law and legislative enactments of copyright are to be read narrowly while the public interest, including in free communication, should be given weight when considering copyright questions.

²²⁵ DANIEL DEFOE, AN ESSAY ON REGULATION OF THE PRESS 3 (1704).

²²⁶ DEAZLEY, ON THE ORIGIN, *supra* note 28, at 32.

**APPENDIX—SUMMARY OF DATA FROM WESTLAW “JOURNALS AND LAW
REVIEWS” DATABASE ON *DONALDSON V. BECKETT***

(1) Number of Journal and Law Review Articles Published by Year that Reference or Discuss *Donaldson v. Beckett*

Year	Total
1891	1
1902	1
1904	1
1905	1
1907	1
1914	1
1915	1
1919	1
1920	1
1922	1
1935	1
1945	1
1954	1
1956	4
1960	2
1965	1
1966	1
1967	1
1969	1
1972	1
1977	1
1983	1
1984	3
1986	1
1987	2
1988	2
1989	2
1990	4
1991	1
1992	14
1993	9
1994	6
1995	6
1996	6
1997	5

1998	6
1999	1
2000	11
2001	9
2002	16
2003	23
2004	19
2005	16
2006	12
2007	19
2008	13
2009	21
2010	16
2011	2
Grand Total	271

(2) Citation or Citations Given for *Donaldson*

Anonymous	1
Brown	81
Brown Parliament	4
Burrow	120
Burrow Brown	12
Burrow Brown Parliament	4
Burrow Parliament	15
Burrow Parliament Anonymous Gentleman	1
None	12
Parliament	7
Parliament Anonymous	1
Other	13
Grand Total	271

(3) Authors' descriptions of holding in *Donaldson* (CL=common law copyright;
Anne=Statute of Anne)

CL given up by publication	20
CL given up by publication after Anne	38
CL superseded by Anne	71
CL, if it ever existed, given up by publication after Anne	4
CL, if it ever existed, superseded by Anne	7
No CL	54
None	51
Notes confusion surrounding Donaldson	13
CL existed in published works	2
other	11
Grand Total	271