Origins of Copyright
Part 3 of 6 – The Advent of the Public Domain

Rob Kittredge – www.RKIP.ca

As copyright protections under *Anne* began to expire, some printers began manufacturing and selling inexpensive copies of books which no longer enjoyed monopoly protection under the Statute, undercutting the prices being asked by the Company of Stationers member print houses. Company printers and booksellers continued to insist on the existence of a perpetual right to copy despite the limitation period in the *Statute of Anne.* They argued that while protection might be limited under the Statute, some species of eternal common law copyright must exist, and that the Statute did not function to extinguish that right[1]. Two important cases ensued.

In *Millar v. Taylor*[2]*,* the court held that such a common law right did in fact exist despite the limitations evident in *Anne*. Aston J. and the majority of the Court of Chancery drew on a Lockean view of natural right to property in the fruits of one's labour and found that a perpetual copyright did exist in the common law. Aston J. went on to declared it contrary to the principles of justice

for the state to interfere with that right. Aston J.'s conception requires a somewhat myopic view of the Lockian property principles, in that it ignores the two provisos which sit alongside Locke's labour based principle of private ownership - Locke's basic property principle states that property rights emerge from the mixing of one's labour with the raw natural state of things through actions such as taking or creating. His two provisos are that 1) the joining of labour can only create a property right where there is *"enough, and as good left in [the] common for others"*, and 2) he must take no more than he can use – property rights do not arise to allow a man to destroy or allow to spoil what he has taken.

Yates J. spoke out in dissent, acknowledging that the law abhors perpetuities, and recognizing the ramifications to society which would be occasioned by the grant of a perpetual property right in something so intangible and yet essential as literary work:

> *It is equally my duty, not only as a judge, but as a member of society, and even as a friend to the cause of learning, to support the limitations of the statute*[3].

Millar, the plaintiff, died shortly after the judgment and the case was never appealed. His estate sold the poem that formed the subject of the suit to a consortium of printers including a namesake of the erstwhile Archbishop of Canterbury, a Mr. Thomas Beckett. A printer named Donaldson then printed an

unlicensed copy of the poem. Beckett obtained an injunction. Donaldson appealed in the landmark case of *Donaldson v. Beckett*[4], which overturned *Millar v. Taylor* only five years after that decision was issued, rejecting the concept of an eternal common law copyright[5].

Sir John Dalryimple, appeared for the appellant:

> *The statute of queen Anne sir John noticed, with respect to the title, the preamble, and some of the clauses contained therein. He observed, That it had been mentioned the word 'vest' was adopted In the title, and the word 'secured' was inserted in the body of the Act. This he thought was a distinction of the greatest propriety, for* ***the Act was framed to give an author or his assignees a property in that which he had not before; it therefore vested something in him, and after having vested it, there was a provision made to secure it to the author***[6].

A word on the structure of the House of Lords at the time: Peers of the House had the right to give an opinion, and cast the deciding votes on legal cases which came before them, but twelve judges of the common law courts could be called upon by the House to deliver judgment on a matter to the House prior to the House pronouncements of opinion and the final vote. The decision of the common law judges was not binding on the House, and in a number of cases the Lords voted against the advice of the judges. In such cases, the vote of the

House prevailed[7].

Donaldson was one such case. The issue was divided into five questions, the first of which asked *"Whether at Common Law, an author of any book or Literary Composition, had the Sole Right of first printing and publishing the same for sale, and might bring an action against any person who printed, published, and sold the same without his consent?[8]"* The common law judges found (10:1) that such a right did exist, but that it either merged with or was extinguished by the action of the *Statute of Anne.*

In his book *"On the Origin of the Right to Copy,"* Ronan Deazley argues:

> *"That ten votes were cast in favour of the right to first print does not mean that ten judges were in agreement as to the existence of a common law copyright, or even in agreement as to what the question actually meant[9]."*

Deazley correctly observes the ambiguity in the question, and notes that what might appear on first blush to be a near-unanimous endorsement by the common law Judges of a perpetual common law copyright may in fact simply be an acknowledgment of a common law right to first printing. Deazley's analysis indicates that in fact only six of the Judges were actually voting in favour of a perpetual common law right, while four were advocating a common law right to first print. One disavowed the existence of either species of common law right[10].

In any case, the judges voted overwhelmingly that such rights – if they indeed existed – merged with the statutory right granted under *Anne* and would be extinguished upon the expiry of that statutory monopoly period[11].

Following the delivery of the verdict of the common law Judges to the House, five of the Law Lords spoke. Only one of the speakers favoured the existence of any species of common law copyright. The remaining four spoke resoundingly against the decision of the common law Judges. Lord Camden said:

> *If there be any thing in the world, my Lords, common to all Mankind, Science and Learning are in their nature publici juris, and they ought to be as free and general as air or water. They forget their creator, as well as their fellow creatures, who wish to monopolize his noblest gifts and greatest benefits. Why did we enter into Society at all, but to enlighten one another's minds, and improve our faculties for the common welfare of the species?*[12]

The Peers of the House of Lords voted overwhelmingly to overturn the injunction granted to Beckett by the Court of Chancery. The mechanism by which the House of Lords casts its votes does not require that the Lords issue reasons for judgment, and in this case it is somewhat difficult to determine whether the Lords were declaring that no common law copyright existed, or simply that such a right was extinguished by the *Statute of Anne*. We do, however, know that four of the five Law Lords who spoke to the House were

against the existence of a common law copyright. One way or the other, the vote in the House of Lords makes it clear that if a common law copyright existed, it merges with and is extinguished by the *Statute of Anne* upon expiry of the term of protection under that statute[13]. With the *Donaldson* decision, the Company of Stationers had lost their perpetual printing monopolies, and the public domain was born in earnest.

1 *Free Culture* (Supra.) at 91
2 *Millar v. Taylor,* 98 ER 201 (1769)
3 Ronan Deazley, *On the Origin of the Right to Copy* (Oxford: Hart Publishing, 2004) att 178
4 4 Burr. 2408, 98 Eng. Rep. 257 (1774)
5 *Free Culture* (Supra.) at 92
6 *Donaldson v. Beckett,* Proceedings in the Lords on the Question of Literary Property, February 4 through February 22, 1774
Online: http://www.copyrighthistory.com/donaldson.html
7 *On the Origin of the Right to Copy* (Supra.) at 193
8 *Ibid*. at 195
9 *Ibid*. at 197
10 *Ibid*. at 199
11 Fox at 27
12 Cobbett, *Parliamentary Debates,* vol 17, 993-96
Quoted in Ronan Deazley, *On the Origin of the Right to Copy* (Oxford: Hart Publishing, 2004) at 206
13 *On the Origin of the Right to Copy* (Oxford: Hart Publishing, 2004) at 210