

ARTICLE

THE STATUTE OF ANNE: RHETORIC AND RECEPTION IN THE NINETEENTH CENTURY

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Although everyone agrees that the Statute of Anne¹ was the first copyright statute to be enacted anywhere, there has always been significant disagreement as to its meaning, purpose, and value. The eighteenth-century legal debates are well documented and find expression in the great cases, *Millar v. Taylor* (1769)² and *Donaldson v. Becket* (1774).³ Did an author have a right of first printing and publishing at common law? If so, was it perpetual? Was it lost on publication? Did the Statute of Anne take the common law right away, replacing it with a statutory

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1. Statute of Anne, 1710, 8 Ann., c. 19.
 2. *Millar v. Taylor*, (1769) 98 Eng. Rep. 201 (K.B.); 4 Burr. 2303.
 3. *Donaldson v. Beckett*, (1774) 1 Eng. Rep. 837 (H.L.); 2 Brown 129.

copyright? Was this a statute intended to benefit authors or publishers, or to recognise the wider interests of society? Differences of opinion on these matters were so fundamental that the House of Lords' determination of the particular legal issues in 1774 did not determine the debate. Quite the contrary.

Serjeant Talfourd, introducing his 1837 Copyright Bill, described the Act of Anne as literature's "fatal present."⁴ Although the 1842 Copyright Act—Talfourd's Act—repealed the Statute of Anne, its influence remained like a looming shadow.⁵ Writing in 1898, almost two hundred years after its enactment, Augustine Birrell characterised the Statute of Anne as a "perfidious measure" that "gave away the whole case of the British author."⁶ Others, such as the civil servant Thomas Henry Farrer who gave evidence to the Royal Commission of 1878, regarded the Act as a straightforward piece of legislation that set a statutory regime in place of customary rights unsanctioned by the state.⁷

This Article examines the range of continuing reactions to the Statute of Anne during the nineteenth century, not only in case law and legal treatises, but also in parliamentary material and in wider commentary and secondary sources. As might be expected, it provides evidence of the persistent disagreements of principle that pervade any debate concerning the history and theory of copyright. The Statute of Anne was both derided and appealed to as an authority, depending on the writer's standpoint. It was used, in different ways, by many who sought to harness its totemic power to reinforce their own particular positions. Its influence was such that it could not easily be ignored—by legal commentators, at least. But beyond this immediate circle, the Act of Anne's authority was not necessarily so powerful. This Article seeks to explore the range of rhetoric that the Act inspired and attempts also to assess its impact on the various efforts towards copyright reform during the nineteenth century.

4. 38 PARL. DEB., H.C. (3d ser.) (1837) 868.

5. Copyright Act, 1842, 5 & 6 Vict., c. 45, § 1 (repealing, *inter alia*, "an Act passed in the Eighth Year of the Reign of Her Majesty Queen Anne, intituled *An Act for the Encouragement of Learning, by vesting the Copies of printed Books in the Authors or Purchasers of such Copies during the Times therein mentioned*").

6. AUGUSTINE BIRRELL, SEVEN LECTURES ON THE LAW AND HISTORY OF COPYRIGHT IN BOOKS 19, 21 (1899).

7. See, e.g., COPYRIGHT COMMISSION, THE ROYAL COMMISSIONS AND THE REPORT OF THE COMMISSIONERS, 1878, [C. (2d series)] Cm. 2036, at 203 [hereinafter COPYRIGHT COMMISSION, REPORT OF THE COMMISSIONERS] (emphasising that law can create and limit a monopoly over property regardless of the absolute right historically claimed by authors).

I. COMMON LAW COPYRIGHT—A POWERFUL MYTH

Any discussion of the meaning and purpose of the Statute of Anne soon becomes contentious. The preamble notes:

Whereas Printers, Booksellers, and other Persons have of late frequently taken the Liberty of Printing, Reprinting, and Publishing, or causing to be Printed, Reprinted, and Published Books, and other Writings, without the Consent of the Authors or Proprietors of such Books and Writings, to their very great Detriment, and too often to the Ruin of them and their Families⁸

The Act was passed “[f]or Preventing therefore such Practices for the future, and for the Encouragement of Learned Men to Compose and Write useful Books.”⁹

It is possible to use this language to support various readings, as can readily be seen by citing four respected modern commentators. Saunders considers that “the purpose of the legislation was to break the [Stationers’] Company’s 150-year-old monopoly on the publishing of books in England.”¹⁰ Rose describes the Statute as “a codification of long-standing practices of the Stationers’ Company,” although with a limited rather than a perpetual term.¹¹ Deazley regards the Act as “a social *quid pro quo*”—“an entirely pragmatic bargain involving the author, the bookseller and the public.”¹² Feather explains his view:

[The Act] is essentially concerned with the protection of the rights of certain members of the book trade, and to a far lesser extent those of the buyers and readers of books, with a token gesture towards the good of society at large by creating favourable circumstances for the writing and (more especially) the publishing and selling of works of culture and learning.¹³

My purpose here is not to advocate one view over another, still less to resolve the disagreement. It is simply to note the fact that different interpretations continue to be offered. Similar divergences can be traced in the nineteenth-century debates,

8. Statute of Anne, 1710, 8 Ann., c. 19.

9. *Id.*

10. DAVID SAUNDERS, *AUTHORSHIP AND COPYRIGHT* 10 (1992).

11. Mark Rose, *The Author as Proprietor: Donaldson v. Becket and the Genealogy of Modern Authorship*, in *OF AUTHORS AND ORIGINS* 23, 25 (Brad Sherman & Alain Strowel eds., 1994).

12. RONAN DEAZLEY, *RETHINKING COPYRIGHT: HISTORY, THEORY, LANGUAGE* 13–14 (2006).

13. JOHN FEATHER, *PUBLISHING, PIRACY AND POLITICS: AN HISTORICAL STUDY OF COPYRIGHT IN BRITAIN* 5 (1994).

contributing to a sense of instability and insecurity as to the purpose of copyright throughout this period. The eighteenth century's great cases had not put an end to the disagreements. The efforts of the Stationers' Company to assert perpetual common law rights in works, even when the statutory period had elapsed, led to extensive public debate. Much was written on both sides.

In *Millar v. Taylor*, the Court of King's Bench ruled three to one in favour of common law literary property.¹⁴ Lord Mansfield's judgment made him an authors' champion:

From what source, then, is the common law drawn, which is admitted to be so clear, in respect of the copy before publication?

From this argument—because it is just, that an author should reap the pecuniary profits of his own ingenuity and labour. It is just, that another should not use his name, without his consent. It is fit that he should judge when to publish, or whether he ever will publish. It is fit he should not only choose the time, but the manner of publication; how many; what volume; what print. It is fit, he should choose to whose care he will trust the accuracy and correctness of the impression; in whose honesty he will confide, not to foist in additions: with other reasonings of the same effect.

I allow them sufficient to shew “it is agreeable to the principles of right and wrong, the fitness of things, convenience, and policy, and therefore to the common law, to protect the copy before publication.”

But the same reasons hold, after the author has published. He can reap no pecuniary profit, if, the next moment after his work comes out, it may be pirated upon worse paper and in worse print, and in a cheaper volume.

The 8th of Queen Ann. is no answer. We are considering the common law, upon principles before and independent of that Act.

The author may not only be deprived of any profit, but lose the expence he has been at. He is no more master of the use of his own name. He has no control over the correctness of his own work. He can not prevent additions. He can not retract errors. He can not amend; or cancel a faulty edition. Any one may print, pirate, and perpetuate the imperfections, to the disgrace and against the will of the author; may propagate sentiments under his name, which

14. *Millar v. Taylor*, (1769) 98 Eng. Rep. 201 (K.B.); 4 Burr. 2303.

he disapproves, repents and is ashamed of. He can exercise no discretion as to the manner in which, or the persons by whom his work shall be published.

For these and many more reasons, it seems to me just and fit, “to protect the [c]opy after publication.”¹⁵

Yet Justice Yates’s powerful dissent was likewise influential and frequently referred to in the deluge of comment that followed the case:

That every man is intitled to the fruits of his own labour,” I readily admit. But he can only be intitled to this, according to the fixed constitution of things; and subject to the general rights of mankind, and the general rules of property. He must not expect that these fruits shall be eternal; that he is to monopolize them to infinity; that every vegetation and increase shall be confined to himself alone, and never revert to the common mass. In that case, the injustice would lie on the side of the monopolist, who would thus exclude all the rest of mankind from enjoying their natural and social rights.

The labours of an author have certainly a right to a reward: but it does not from thence follow, that his reward is to be infinite, and never to have an end. Here, it is ascertained. The Legislature have fixed the extent of his property: they have allowed him twenty-eight years; and have expressly declared, he shall have it no longer. Have the Legislature been guilty of injustice? Little cause has an author to complain of injustice, after he has enjoyed a monopoly for twenty-eight years, and the manuscript still remains his own property.¹⁶

This analysis sets justice to an individual in the context of a wider social justice, an approach adopted by some nineteenth-century opponents of the extension of copyright.¹⁷ It insists that copyright has become a creature of statute and is no longer part of the common law.

Justice Yates also compared the rewards for copyright and patents, a technique that was again to be used frequently in the subsequent debates:

Examples might be mentioned, of as great an exertion of natural faculties, and of as meritorious labour in the

15. *Millar*, 98 Eng. Rep. at 252–53, 4 Burr. at 2398–99.

16. *Id.* at 231–32, 4 Burr. at 2359–60.

17. See ISABELLA ALEXANDER, *COPYRIGHT LAW AND THE PUBLIC INTEREST IN THE NINETEENTH CENTURY* 96–97 (2010) (summarising the arguments “on grounds of public welfare” to copyright extension and discussing Lord Macaulay’s casting of copyright as a monopoly that should be limited for the benefit of the reading public).

mechanical inventions, as in the case of authors. We have a recent instance, in Mr. Harrison's time-piece; which is said to have cost him twenty years application: and might not he insist upon the same arguments, the same chain of reasoning, the same foundation of moral right, for property in his invention, as an author can for his?

If the publi[c] should rival him in his invention, as soon as it comes out, might not he as well exclaim, as an author, "that they have robbed him of his production, and have iniquitously reaped where they have not sown?" And yet we all know, whenever a machine is published, (be it ever so useful and ingenious,) the inventor has no right to it, but only by patent; whi[c]h can only give him a temporary privilege.¹⁸

As is well known, the matter came before the House of Lords only a few years later in *Donaldson v. Becket*.¹⁹ Considering himself bound by *Millar v. Taylor*, Lord Chancellor Apsley had granted an injunction against Donaldson: a decision founded on the existence of common law copyright.²⁰ Donaldson's appeal was heard by the House of Lords. The twelve common law judges were assembled to offer advice to the peers and asked to give their opinions on five questions.²¹ Lord Mansfield did not speak, out of delicacy, having given his opinion in *Millar v. Taylor*.²² This left eleven votes only. Lack of transparency in the formulation of the questions, coupled with some inaccuracy in the recording of the votes, caused confusion on a number of points. The common understanding of the result was that a large majority of the judges (ten to one) thought that there was a perpetual common law copyright, but that six judges to five thought that the Statute of Anne had curtailed this right.²³ The House of Lords would normally have followed the majority of the judges, but, unusually, it did not.²⁴ Five more peers spoke on the matter. "Of these . . . only Lord Lyttleton" (a lover of poetry, particularly that of John Milton) "spoke in favour of the common law right."²⁵ The "Bishop of

18. *Millar*, 98 Eng. Rep. at 232, 4 Burr. at 2360–61.

19. *Donaldson v. Beckett*, (1774) 1 Eng. Rep. 837 (H.L.); 2 Brown 129.

20. *See id.* at 839, 2 Brown at 130–31 (noting the pleasure with which Lord Chancellor Bathurst decreed that the injunction "should be made perpetual").

21. *Id.* at 846–47, 2 Brown at 144–45 (enumerating the questions put to the judges).

22. SAUNDERS, *supra* note 10, at 66–67.

23. *See Donaldson*, 1 Eng. Rep. at 847, 2 Brown at 145 (recounting the result of the *ad seriatim* delivery of the judges' opinions).

24. *See* DEAZLEY, *supra* note 12, at 19 ("The House of Lords . . . was not bound to follow the opinion of the majority of the judges . . . [yet] it almost always chose to do so . . .").

25. *Id.*

Carlisle, and Lords Howard, Apsley and Camden, all spoke against it.²⁶

Lord Camden's trenchant speech had a powerful effect. Lord Camden was a prominent lawyer, who had been at various times Chief Justice of the Common Pleas, Attorney-General, and Lord Chancellor.²⁷ He had had a vigorous disagreement with Lord Mansfield regarding the law of libel, and there was little love lost between the two men.²⁸ Lord Camden gave his tongue free rein, lashing out at "the whole bead-roll of citations and precedents, which they have produced"—meaning, the history of Stationers' Company custom and practice, and the Court of Chancery's injunctions apparently supporting these—dismissing this as a "heterogeneous heap of rubbish."²⁹ He also attacked the notion of literary property as "fanciful" and denied the "moral" claim:

If there be any thing in the world 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. . . . 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? Those great men, those favoured mortals, those sublime spirits, who share that ray of divinity which we call genius, are intrusted by Providence with the delegated power of imparting to their fellow-creatures that instruction which heaven meant for universal benefit; they must not be niggards to the world, or hoard up for themselves the common stock.³⁰

This view of publication as a gift to the public was regarded by opponents of literary property as a necessity. Although willing to accept that an author had complete dominion over a work before it was published, these commentators thought that a perpetual common law right of literary property would threaten the public interest by restricting not only other authors, but also the wider reading public.³¹

Deazley has unravelled the many complications of the scenario and restates the voting accurately. As he notes, the peers were asked simply whether the perpetual injunction previously granted by Lord Chancellor Apsley should be

26. *Id.*

27. *Camden, Charles Pratt, Earl, and Viscount Bayham (1713–1794)*, in 4 *ENCYCLOPÆDIA BRITANNICA* 735 (9th ed. New York, Henry G. Allen & Co. 1888).

28. *Id.*

29. 17 *PARL. HIST. ENG.*, H.L. (1774) 993.

30. *Id.* at 997–99.

31. See BRAD SHERMAN & LIONEL BENTLY, *THE MAKING OF MODERN INTELLECTUAL PROPERTY LAW* 28–35 (1999) (discussing in detail notions of literary property as a gift).

overturned. They voted that it should. The common law judges were not asked this specific question, leading to debate as to the ratio of the case. In their speeches, Lord Camden and Lord Chancellor Apsley had denied the very existence of the common law right. The majority of peers voted with them, and it is argued that their position represented the law.³² However, for decades to follow, the general understanding of the outcome proved to be more powerful in debate than the precise truth.

Lord Camden's powerful rhetoric appears to have persuaded his fellow peers to disregard tradition and vote according to their own opinions, rather than those of the assembled common law judges.³³ His views were shared by others in the wider public sphere.³⁴ Many were reluctant to acknowledge that mental labour should be regarded as a form of property, particularly one closely analogous to real property.³⁵ They saw difficulties in explaining how title arose, in identifying its subject matter and owner, in demarcating its boundaries, and in determining whether it had been infringed.³⁶ The intangible qualities of this literary "property" led to accusations that it was merely fanciful and chimerical.³⁷ Advocates of the literary property analysis could point to the tangible manifestations of this sort of mental labour—in the printed copy and in the profits that flowed from it. But this brought the response (exemplified in Lord Camden's speech) that, once disclosed by publication, the resources within a work should be free for all to use and build on.³⁸ The now well-known distinction between idea and expression was not yet widely discussed, let alone accepted. In spite of these doubts, in the end, intangible property came to be accepted as a legal fact. However, these themes—both criticisms and responses—recur frequently in commentary and argument throughout the nineteenth century. Those trying to shape copyright law continued to feel free to appeal to principle rather than acknowledging the authority of *Donaldson v. Becket*.³⁹ Lord

32. RONAN DEAZLEY, ON THE ORIGIN OF THE RIGHT TO COPY 205–10 (2004).

33. *Id.* at 210.

34. *See, e.g.,* SHERMAN & BENTLY, *supra* note 31, at 39–41.

35. *See id.* at 19 (recognising the disagreement between advocates and opponents of the perpetual literary property right "over the possibility of recognising mental labour as a form of property").

36. *Id.* at 20–26.

37. *See id.* at 25 (describing opponents' claims that literary property was "ideal and imaginary" and incapable of definition).

38. *See id.* at 28 (comparing the position of an author engaged in the publication of her work to that of "an owner of a piece of land [who] lays it open into a highway" (quoting *Millar v. Taylor*, (1769) 98 Eng. Rep. 201 (K.B.) 234; 4 Burr. 2303, 2364 (Yates, J.))).

39. *See infra* notes 147–157 and accompanying text.

Camden might be compared to Lord Macaulay, whose oratory appeared victorious in the parliamentary debate on the 1841 bill, but whose triumph was not universally acknowledged.⁴⁰ Even after *Donaldson*, those who preferred the outcome in *Millar* persisted in restating arguments not accepted by the majority of peers and in rearguing points not reflected in the result of the case.⁴¹ This helped to keep the Statute of Anne, and its interpretation, at the heart of the continuing debates about copyright's aims and efficacy.

II. DEPOSIT COPIES

The Statute of Anne sought to achieve several objectives, not all of equal prominence. It granted exclusive rights for a term of twenty-one years for existing works and a term of fourteen years for all works printed after commencement of the Act.⁴² These new works enjoyed a further term of fourteen years if the author was still living at the original term's expiry.⁴³ Fines and other penalties for infringement were specified, although these could only be invoked if the proprietor had entered title to the copy in the Stationers' Company Register Book.⁴⁴ The Act provided for a cumbersome system to regulate the price of books sold at prices that were "too high and unreasonable."⁴⁵ What proved to be of much more practical significance was the new requirement to deposit nine copies of the work, on the paper used for the best edition, for the use of the most important libraries in England and Scotland.⁴⁶ The Licensing Acts had required delivery of three copies only.⁴⁷

40. See MACAULAY'S SPEECHES ON COPYRIGHT AND LINCOLN'S ADDRESS AT COOPER UNION 15 (Charles Robert Gaston ed., 1914) (conceding as "apparent" that Lord Macaulay's parliamentary victory was "conspicuous").

41. See RULING CASES 72 (Robert Campbell ed., London, Stevens & Sons, Ltd. 1896) (addressing subsequent cases where the court appeared to overlook the "existence of a note of the opinions delivered by the Judges, and of the speeches of the peers, in *Donaldson v. Becket*"); see also *infra* notes 152–156.

42. Statute of Anne, 1710, 8 Ann., c. 19.

43. *Id.*

44. *Id.*

45. See *id.* (describing in detail the intricate and extensive process by which the prices of books were to be regulated under the Act).

46. See *id.* (listing the Royal Library, the Libraries of the Universities of Oxford and Cambridge, the Libraries of the four Scottish Universities (*viz.*, Edinburgh, Glasgow, St. Andrews, and the King's and Marischal Colleges, Aberdeen), the Library of the Faculty of Advocates in Edinburgh, and the Library of Sion College, London as those libraries receiving deposit copies).

47. See Licensing of the Press Act, 1662, 13 & 14 Car. 2, c. 33, § 17 (requiring one copy of each new book to "be delivered to the keeper of his Majest[y]s library" and two others "to be sent to the vice-chancellors of the two universities respectively").

Under the provisions of the Act of Anne, the penalties for default were severe: a fine of £5, plus the value of the copy, plus legal costs.⁴⁸ The increased deposit requirements in themselves could represent a very heavy burden. A typical print run might well be only 250 copies, and nine copies represented a not insignificant fraction of this. If the value of the book was high, particularly if it contained many plates, the cost to the proprietor could be very considerable. Printers had therefore argued that the deposit provisions applied only to such books as they chose to register, and did as much as they could to minimise their liability even for these works.⁴⁹ Some support for their approach seemed to be implied in the Copyright Act of 1775, passed in the wake of *Donaldson v. Becket*.⁵⁰ The universities of Oxford and Cambridge had petitioned for special protection, fearing the loss of their perpetual copyright privileges.⁵¹ Although the main purpose of the 1775 Act was to enable various institutions “to hold in perpetuity the copyright in books given or bequeathed to them for the advancement of learning and the purposes of education,” it did include a provision reminding printers of their obligation under the Act of Anne to deposit copies of all new works.⁵² However, since there were still no penalties for failure to register a work, library authorities remained dubious about claiming copies of unregistered works.⁵³

These practices were reinforced by the decision in *Beckford v. Hood* (1798).⁵⁴ The case raised the question whether a

48. Statute of Anne, 1710, 8 Ann., c. 19.

49. See, e.g., *Univ. of Cambridge v. Bryer*, (1812) 104 Eng. Rep. 1109 (K.B.) 1110; 16 East 317, 318 (demonstrating defendant-printer’s rejection of liability for those works printed and published but not entered into the register book at Stationers’ Hall).

50. See ROBERT MAUGHAM, A TREATISE ON THE LAWS OF LITERARY PROPERTY 51 (1828) (explaining that under the Copyright Act, 1775, 15 Geo. 3, c. 53, § 6, “no person should be subject to the penalties in the act, unless the title to the copies of the whole of such book, and every volume, be entered in the register book of the Stationers’ Company”).

51. See 38 PARL. DEB., H.C. (3d ser.) (1837) 869–70 (describing the universities’ immediate response to the loss of their superior copyright protection).

52. *Id.* at 870. The 1775 Act repeats the clause in the Act of Anne regarding the deposit of nine copies and notes that it “has not proved effectual,” having been “eluded” by the entry of the title to a single volume, or part of it. Copyright Act, 1775, 15 Geo. 3, c. 53, § 6. The Act provides that there will be no penalties for those infringing unless nine copies of the whole of the book, including “every volume thereof,” “be actually delivered” to the warehousekeeper of the Stationers’ Company. *Id.*; see 38 PARL. DEB., H.C. (3d ser.) (1837) 870 (explaining the main purpose of the 1775 Copyright Act).

53. See SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE S. COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION: STUDIES 17–19, at 3 (Comm. Print 1960) (noting the 1775 Act’s silence on “the effect of a failure to register or deposit on the available remedies, if any”).

54. *Beckford v. Hood*, (1798) 101 Eng. Rep. 1164 (K.B.); 7 T.R. 620.

copyright proprietor could sue for infringement even if the work had not been registered under the terms of the Statute.⁵⁵ All four judges agreed that damages could be recovered at common law, notwithstanding the failure to register.⁵⁶ Lord Chief Justice Kenyon alluded to the difference of opinion seen in *Donaldson v. Becket*, speaking of the minority's approach with considerable respect, although affirming the conclusion that copyright was not perpetual:

All arguments in support of the rights of learned men in their works, must ever be heard with great favour by men of liberal minds to whom they are addressed. [I]t was probably on that a[c]count that when the great question of literary property was dis[c]ussed some Judges of enlightened understanding went the length of maintaining that the right of publication rested exclusively in the authors and those who claimed under them for all time: but the other opinion finally prevailed, which established that the right was confined to the times limited by the Act of Parliament. And that I have no doubt was the right decision.⁵⁷

He then went on to affirm that he had no doubt that penalties under the Act were intended to be an addition to the penalties available at common law.⁵⁸ Justice Ashurst concurred in this construction, noting that he “was one of those who thought that the invention of literary works was a foundation for a right of property independently of the Act of Queen Ann.”⁵⁹ Thus, like Lord Kenyon, he subtly stressed the strength and reasonableness of the minority's position. However, Justice Ashurst was not willing to concede that the majority had the right of the matter, focusing on the fact that the present case involved a “much narrowed” point.⁶⁰ Justice Grose engaged directly with the result in *Donaldson v. Becket*, noting that he had at first thought that the majority “were of opinion that the common law right of action was taken away by the Statute of Anne,” but on reflection “it appear[ed] that the amount of their opinions went only to establish that the common law right of action, could not be exercised beyond the time limited by that statute.”⁶¹ Justice Lawrence likewise concurred.⁶² The approach

55. *Id.* at 1164, 7 T.R. at 621.

56. *Id.* at 1167–68, 7 T.R. at 627–29.

57. *Id.* at 1167, 7 T.R. at 627.

58. *Id.* at 1167–68, 7 T.R. at 627–28.

59. *Id.* at 1168, 7 T.R. at 628 (Ashurst J., concurring).

60. *Id.*

61. *Id.* at 1168, 7 T.R. at 629 (Grose, J. concurring).

62. *Id.* (Lawrence, J. concurring).

and analysis adopted by all the judges in *Beckford v. Hood* acts both to circumscribe the House of Lords' decision and to give currency to the sentiments underlying the minority view.⁶³

This decision seemed to imply that the common law and the statutory rights were entirely separate. The assumption was, therefore, that deposit and registration were required only within the statutory context. This reduced still further the number of entries in the Stationers' Company Register. There seemed little point in going to the trouble and expense of registration and deposit if damages could be recovered at common law regardless of whether a work was entered. The printers' practice was given some support by the 1799 Act for the Suppression of Seditious Societies. The Act required printers to print their name and address on the title page of every work and to keep one copy of it on their premises for six months.⁶⁴ Printers argued that this was further confirmation that only registered books need be deposited because otherwise the requirement to keep a further copy would be superfluous.⁶⁵ It was not just the printers who held this view. The 1801 Copyright Act extended the effect of the Statute of Anne to Ireland and, in doing so, extended the deposit provisions to include the libraries of Trinity College and the King's Inns, Dublin.⁶⁶ The framers of the Act were attempting to mirror the English law as closely as possible, and their interpretation of the deposit requirements was that of the printers; registration was thought to be entirely optional and required only for those intending to seek penalties under the Act rather than at common law.⁶⁷

63. Lowndes argued that although the court was constrained "to construe the [Act] of Anne . . . as taking away a previously existing common-law right . . . [,] they could not conceal from themselves, the injustice of such a construction, or reconcile it to the express language of the act." JOHN J. LOWNDES, AN HISTORICAL SKETCH OF THE LAW OF COPYRIGHT 62 (2d ed. London, Saunders & Benning 1842) (1840); see Ronan Deazley, *The Life of an Author: Samuel Egerton Brydges and the Copyright Act 1814*, 23 GA. ST. U. L. REV. 809, 814, 816 (2007) (indicating that the decision in *Beckford v. Hood* was unanimous and that it changed how the House of Lords' decision in *Donaldson v. Becket* would be interpreted prospectively).

64. Unlawful Societies Act, 1799, 39 Geo. 3, c. 79, § 29, reprinted in R.C. BARRINGTON PARTRIDGE, THE HISTORY OF THE LEGAL DEPOSIT OF BOOKS THROUGHOUT THE BRITISH EMPIRE 307 (1938).

65. PARTRIDGE, *supra* note 64, at 44.

66. Copyright Act, 1801, 41 Geo. 3, c. 107, § 6.

67. *Minutes of Evidence Taken Before the Select Committee on the Copyright Acts of 8 Anne c. 19; 15 Geo. III, c. 53; 41 Geo. III, c. 107; and 54 Geo. III, c. 116*, H.C., at 35–36 (1818) [hereinafter *1818 Minutes of Evidence*] (statement of Sir Thomas Edlyne Tomlins, Knt.). In *Cambridge University v. Bryer* (1812), Judge Le Blanc acknowledged that this was what the framers of the Act had intended, but considered this to be a clear misunderstanding of the intention of the Statute of Anne. Univ. of Cambridge v. Bryer, (1812) 104 Eng. Rep. 1109 (K.B.) 1115–16; 16 East 317, 332–34.

The debate was reopened as a result of Basil Montagu's *Enquiries and Observations Respecting the University Library*, framed as a Socratic dialogue that considered Cambridge University's copyright privilege.⁶⁸ Montagu was a Cambridge man himself, now a Chancery barrister with a strong interest in literature and politics.⁶⁹ He was inconvenienced because the seventh volume of the Term Reports—which happened to contain *Beckford v. Hood*—was not in the University Library.⁷⁰ Montagu's work raised more questions than it answered. The issue was then taken up by Edward Christian, Downing Professor of the Laws of England at Cambridge University.

Christian had been irritated to discover that many recent law publications were not in the University Library.⁷¹ He was advised by British Museum officials that they had taken counsel's opinion, which was that the libraries had no claim to copies of works not registered at Stationers' Hall.⁷² Christian studied the subject, coming to his own and opposite conclusion in *A Vindication of the Right of the Universities of Great Britain to a Copy of Every New Publication*.⁷³ This caused alarm amongst the printers. The Member of Parliament John Charles Villiers (who was a friend of Edward Christian) became involved in the subject, organising a number of meetings between the interested parties.⁷⁴ These seem to have resulted in an informal agreement that if the copyright term was extended to twenty-eight years certain, then there would be no more disagreement about deposit copies.⁷⁵ In June 1808, Villiers introduced a bill directed towards achieving this.⁷⁶ There was more opposition than predicted, with Sir Samuel Romilly objecting that the deposit requirement represented a heavy tax on authors and publishers, and the bill

68. BASIL MONTAGU, *ENQUIRIES AND OBSERVATIONS RESPECTING THE UNIVERSITY LIBRARY* (1805). For more on Basil Montagu, see David Graham & John Tribe, *Basil Montagu QC (1770–1851): A Portrait of an Early 19th Century Life in Literature and the Law* (Jan. 15, 2009) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1328460.

69. Deazley, *supra* note 63, at 817 & n.30.

70. *Id.* at 817.

71. Robert Southey, *Inquiry into the Copyright Act*, 21 Q. REV. 196, 200 (1819).

72. *1818 Minutes of Evidence*, *supra* note 67, at 84 (statement of Edward Christian).

73. EDWARD CHRISTIAN, *A VINDICATION OF THE RIGHT OF THE UNIVERSITIES OF GREAT BRITAIN TO A COPY OF EVERY NEW PUBLICATION* 37 (1807). For Robert Southey's scathing criticism of this pamphlet, see Southey, *supra* note 71, at 200, 203–05.

74. *1818 Minutes of Evidence*, *supra* note 67, at 84 (statement of Edward Christian).

75. Edward Christian's account was that "they all agreed, if you do but get an extent of copyright, we shall never disturb the Universities again; they were the most respectable and opulent booksellers in London." *Id.*

76. 3 THE PARLIAMENTARY REGISTER 530–31 (London, John Stockdale 1808).

did not pass.⁷⁷ Villiers was sent abroad as ambassador to Portugal, and the bill was withdrawn.⁷⁸

Shortly after this, emboldened by Professor Christian's advice, the University of Cambridge attempted to enforce their claim to a copy of each book published on best paper. A printer named Henry Bryer was sued for failing to deliver a copy of Heywood's *A Vindication of Mr. Fox's History of the Early Part of the Reign of James the Second*.⁷⁹ The University claimed the £5 penalty plus £1.16s as the value of the book.⁸⁰ The case turned directly on the construction of Section five of the Statute of Anne. Lord Chief Justice Ellenborough considered the objects of the Statute:

I think it has properly but two, viz. the object of protecting the copyright, and that of the advancement of learning; and there is a section in this statute which has that in view, and which it is singular enough has not been adverted to in the argument. The first, second, and third sections relate to the protection of the right of authors, or of the person having the property in the copy, or the purchaser; the fourth and fifth have especially for their object the advancement of literature; and the fourth is pregnant with this purpose, that literature should be made accessible at easy rates and prices, to persons desirous of purchasing books; and therefore it subjects to the archbishop, and the chiefs of the Courts of Law, the power of settling the prices of books. I am aware that this section has been repealed, but although repealed, it makes a part of one entire Act, and shews the object of the Legislature was to make learning easy of access. With the same purpose the fifth section provided for a delivery of nine copies of the books printed to certain public libraries, five out of those nine being to be transmitted to Scotland, in order to secure a deposit accessible to literary persons; for the books might have been of such considerable price, as not to be easily attainable by scholars of ordinary means. These therefore are the two objects, and in furtherance of these objects are the provisions contained in this statute to be construed.⁸¹

It is notable that the emphasis here is on access by "literary persons" and "scholars of ordinary means," rather than the

77. 11 PARL. DEB., H.C. (1st ser.) (1808) 990, 993; PARTRIDGE, *supra* note 64, at 48–49.

78. 1818 *Minutes of Evidence*, *supra* note 67, at 84–85 (statement of Edward Christian).

79. Univ. of Cambridge v. Bryer, (1812) 104 Eng. Rep. 1109 (K.B.) 1110; 16 East 317, 317.

80. *Id.*

81. *Id.* at 1111, 16 East at 321.

reading public more widely. Construing the Statute in light of these purposes, Lord Ellenborough concluded that entry in the Register was a condition precedent to recovery of the statutory penalties by the copyright proprietor, but not to the proprietor's obligation to deliver the required number of copies.⁸² Justice Le Blanc reached the same conclusion, considering this to be the "clear obvious meaning of the Act of Parliament."⁸³ Printers and booksellers petitioned for relief, claiming that the ruling would cause them excessive hardship, lose them sales, and discourage expensive editions.⁸⁴ They also argued that the basic copyright term of fourteen years was too short.⁸⁵ The matter was referred to a select committee chaired by Davies Giddy, who was known for his mathematical and scientific interests.⁸⁶

The evidence taken by the select committee was factual, very detailed, and highly specific to the book trade.⁸⁷ All but one witness was a publisher or bookseller. There was no discussion of the Act of Anne itself in the evidence, whether its general purposes or its particular provisions. This is a somewhat puzzling detail, given the committee's terms of reference.⁸⁸ The committee seemed simply to want to know how a demand of eleven copies for deposit would affect sales, costs, and production of each of the witnesses. One of the leading publishers, Thomas Norton Longman, stated that the cost of eleven extra copies could make the difference between profit and loss on a small edition (250 or 500).⁸⁹ Thus, the requirement might tip the balance against publication. He was willing to give a very detailed and frank explanation of the costs and methods of doing business.

82. *Id.* at 1112–13, 16 East at 324–25.

83. *Id.* at 1114–15, 16 East at 330–31.

84. 24 PARL. DEB., H.C. (1st ser.) (1812) 310.

85. *Id.*

86. *Minutes of Evidence Taken Before the Committee on Acts of 8 Anne, and 15 & 41 Geo. III, H.C.*, at 1 (1813) [hereinafter *1813 Minutes of Evidence*] (indicating Davies Giddy was the chair of the committee).

87. *Id.* (providing minutes of the meetings of the committee, including numerous detailed inquiries into the practices of the book trade and the impacts of the Acts of 8 Anne and 15 & 41 Geo. III on the same).

88. The Committee was appointed to:

[E]xamine several Acts passed in the 8th Year of Queen Anne, and in the 15th and 41st Years of His present MAJESTY, for the encouragement of Learning, by vesting the Copies of printed Books in the Authors or Purchasers of such Copies, and for other purposes therein mentioned; and to report, whether any and what Alterations are requisite to be made therein, together with their Observations thereon, to The House

COMMITTEE ON ACTS OF 8 ANNE, AND 15 & 41 GEO. III, REPORT ON COPY RIGHT OF PRINTED BOOKS, 1812-3, H.C., at 1 [hereinafter 1813 REPORT].

89. *1813 Minutes of Evidence, supra* note 86, at 4.

Many other publishers concurred. Joseph Mawman offered a typical view, insisting that the obligation would bear heavily on high-priced small editions with engravings, though acknowledging it made very little difference for low-priced editions, large editions, or school books.⁹⁰ The publishers proposed various “modifications” to the deposit scheme, which were drafted by Sharon Turner, the solicitor retained by the book trade to defend Bryer.⁹¹ These included stipulations that no more than five copies could be demanded and none of books with coloured prints, that some proportion of the retail price would be paid, that delivery would be only on demand, and that the term of copyright would be increased to twenty-eight years certain.⁹²

The report was conservative, affirming the basic scheme of copyright legislation already in place. The committee observed:

[A]lthough great changes have taken place in the literary systems of this Country, since the first of the Laws referred to them was enacted, on which the others depend; yet they conceive that the substance of those laws is proper to be retained; and in particular that, continuing the delivery of all new works, and in certain cases of subsequent editions, to the Libraries now entitled to receive them, will tend to the advancement of learning, and to the diffusion of knowledge, without imposing any considerable burden on the Authors, Printers, or Publishers of such works.⁹³

The committee recommended some changes to the deposit requirements: (1) the British Museum should have a copy on best paper, whereas other libraries should receive only the most common format of the work and (2) delivery should be on demand.⁹⁴ Both of these suggestions came from Longman’s evidence, although his preference had been for doing away with the deposit requirement altogether or, if that was not accepted, significantly reducing the number of copies demanded.⁹⁵ The committee’s concessions did not go far to meet the publishers’

90. *Id.* at 16.

91. Note Turner’s view that “the Act of Anne, instead of being a boon and a benefit to authors, has operated to their injury, since it has been found to curtail their natural and legal right to their intellectual property. If this Act had not passed, they would not only have had no copies to deliver, but their Copyright would have been perpetual.” SHARON TURNER, REASONS FOR A MODIFICATION OF THE ACT OF ANNE RESPECTING THE DELIVERY OF BOOKS AND COPYRIGHT 24 (London, Nichols, Son & Bentley, 1813).

92. *Id.*

93. 1813 REPORT, *supra* note 88, at 1.

94. *Id.*

95. *Compare id.* (calling for standard paper, except in the case of the British Museum, and delivery on demand), with 1813 Minutes of Evidence, *supra* note 86, at 14 (same, except calling for the “non-delivery of the eleven copies, or to reduce the number”).

anxieties, particularly since strict enforcement of these modified deposit obligations (either by penalties or loss of copyright) was advised.⁹⁶ Nor did they seem fully to reflect the publishers' evidence that the burden on certain types of books was disproportionately heavy. However, the committee did note that, before *Bryer*, there had been "an universal misapprehension" as to the correct interpretation of the Statute of Anne, and that many "contracts [had been] made on the faith of [a different but] long established usage."⁹⁷ It therefore suggested that Parliament might consider depriving *Bryer* of retrospective effect.⁹⁸ Finally, the committee recommended fixing the copyright term at a point unspecified though beyond fourteen years.⁹⁹ In the published evidence, only one question was asked about copyright term, apparently as an afterthought, a full month after the bulk of the evidence had been taken.¹⁰⁰ The committee stated merely that it could see no reason for a contingent reversion, but beyond this principle did not engage with details. One can only speculate regarding the discussions that led to the committee's recommendations.¹⁰¹ Perhaps the chairmanship of Davies Giddy played a significant role.

Giddy then introduced a bill to implement the committee's recommendations.¹⁰² When the bill was committed, two additional and significant concessions to the publishers were made. One was a provision allowing publishers to state in the Register that copyright was not sought, which reduced their deposit obligation to a single copy for the British Museum (on best paper).¹⁰³ The other was a requirement that libraries other than the British Museum should pay one third of the retail price of books demanded.¹⁰⁴ The bill faced serious opposition, inside and outside

96. 1813 REPORT, *supra* note 88, at 1.

97. *Id.* at 2. The committee was most likely commenting on the recent decision in *Bryer*. See generally *Univ. of Cambridge v. Bryer*, (1812) 104 Eng. Rep. 1109 (K.B.); 16 East 317 (concerning an interpretation of the Statute of Anne in a case decided in 1812 before the Court of King's Bench).

98. 1813 REPORT, *supra* note 88, at 2.

99. *Id.*

100. 1813 *Minutes of Evidence*, *supra* note 86, at 33.

101. See Deazley, *supra* note 63, at 827–28 (providing possible explanations for why the committee gave recommendations that "were not more favorably disposed to the booksellers," including the presence of Lord Archibald Hamilton or the opinions of Sir William Scott).

102. A Bill [as amended by the committee] To amend the several Acts for the Encouragement of Learning, by securing the Copies and Copyright of printed Books, to the Authors of such Books, or their Assigns, 1813-4, H.C. Bill [184] (May 18, 1814) [hereinafter Bill of May 18, 1814].

103. *Id.* at cl. B.

104. *Id.* at cl. C.

Parliament, and was recommitted three times.¹⁰⁵ The changes favoured the deposit libraries rather than the booksellers. Edward Christian argued, based on the privilege granted to them in the Act of Anne (and confirmed in *Bryer*), that “[t]he Universities must never consent to the payment of a single farthing for their own just right; there must be no compromise, they must have the whole or nothing.”¹⁰⁶

The 1814 bill reverted to the committee’s original recommendations, requiring eleven copies without payment.¹⁰⁷ During the passage of the bill, the publishers were assured that the libraries would be selective in their requests.¹⁰⁸ However, the deposit libraries subsequently decided that their privileges should be strictly enforced.¹⁰⁹ Even worse for the publishers was that a drafting change had the unintended consequence of bringing reprints within the scope of the Act.¹¹⁰ Booksellers were quick to publicise costly or incongruous requests. The famous bookseller James Lackington wrote to the Member of Parliament Sir Samuel Egerton Brydges, complaining that one of the books demanded was “of a singular nature to prove useful in the ‘*Encouragement of Learning*,’ namely, a ‘*Treatise upon Greyhounds*,’ and surely cannot prove eminently useful to the learned Bodies for whom it is demanded.”¹¹¹

105. See Deazley, *supra* note 63 at 830–31 (noting that the bill was recommitted three times and describing the contention with the bill from within the House of Commons and from outside interest groups).

106. EDWARD CHRISTIAN, A VINDICATION OF THE RIGHT OF THE UNIVERSITIES OF THE UNITED KINGDOM TO A COPY OF EVERY NEW PUBLICATION 154 (3d ed. Cambridge, J. Smith 1818).

107. Compare A Bill [as amended on third recommitment] To amend the several Acts for the Encouragement of Learning, by securing the Copies and Copyright of printed Books, to the Authors of such Books, or their Assigns, 1813-4, H.C. Bill [321] (July 15, 1814) (calling for eleven copies to be submitted without making reference to compensation), with Bill of May 18, 1814, *supra* note 102 (same). The former eventually became the 1814 Copyright Act. See GENERAL ALPHABETICAL INDEX TO THE PRINTED BILLS, REPORTS, ESTIMATES & ACCOUNTS, AND PAPERS: SESS. 1813–14, at C (noting that the July 15, 1814 bill was the last brought before the House of Commons that session); see also Copyright Act, 1814, 54 Geo. 3, c. 156 (codifying the final version of the bill).

108. See Deazley, *supra* note 63, at 837 (noting that a provision was included in the bill to ensure booksellers only had to deliver books that were requested, which was an “element[] of the bill . . . designed to ameliorate the grumbles of the book trade to some extent”).

109. See *id.* (“[I]t soon became clear, [however, that] the libraries rarely exercised any discretion . . . , often simply requesting all the works on the registration lists sent to them . . .”).

110. SAMUEL EGERTON BRYDGES, REASONS FOR A FARTHER AMENDMENT OF THE ACT 54 GEO. III C. 156, BEING AN ACT TO AMEND THE COPYRIGHT ACT OF QUEEN ANNE (1817), reprinted in FOUR TRACTS ON COPYRIGHT: 1817–1818, Part A, 35–36 (Stephen Parks ed., 1974).

111. *Id.* at 38–39.

Brydges was a sympathetic listener, being a noted bibliographer with his own private press.¹¹² He became involved in a campaign to amend the 1814 Act, drafting a bill that would have compelled libraries to restrict their demands to what was really needed and to pay a proportion of the price.¹¹³ In 1818 Brydges succeeded in introducing his bill.¹¹⁴ The universities lobbied hard, and a fierce pamphlet war ensued.¹¹⁵ Petitions were submitted on both sides.¹¹⁶ Brydges eventually withdrew his bill, but succeeded in having another select committee appointed.

The evidence taken by the 1818 Select Committee was again much concerned with the book trade. As before, publishers complained of the expense of the deposit requirements, which they said deterred them from publishing valuable titles. Full details of pricing and production of many named books were offered. Publishers also argued that they lost sales, beyond the potential sales to the named libraries, because several people could consult the deposit copies and would do so rather than purchasing them. The blanket nature of the libraries' demands was criticised as indiscriminate and wasteful. A number of librarians and curators of deposit libraries gave evidence. They regarded the privilege as of great importance to the library and to scholarship more generally. They also defended their demands for all works rather than a selection, explaining that they might not otherwise know about new publications and needed to examine them as to their suitability for their libraries. The suggestion that the deposit privilege might be replaced with a pecuniary sum was not well received, as it was thought likely to be less valuable than the books themselves. The question of copyright term was not thoroughly examined, although a few publishers, when asked,

112. Warwick Wroth, *Bridges, Sir. Samuel Egerton (1762–1837)*, in 7 *DICTIONARY OF NATIONAL BIOGRAPHY* 164–65 (Leslie Stephen ed., 1886).

113. Brydges' pamphlets included (1) *Reasons for a Farther Amendment of the Act of 54 Geo. III. c. 156, Being an Act to Amend the Copyright Act of Queen Anne* (1817) and (2) *A Summary Statement of the Great Grievance Imposed on Authors and Publishers; and the Injury Done to Literature, by the Late Copyright Act* (1818). See *FOUR TRACTS*, *supra* note 110 (reproducing these pamphlets).

114. 36 *PARL. DEB.*, H.C. (1st ser.) (1817) 1063–67.

115. See, e.g., *STATEMENT ISSUED BY AUTHORITY OF THE SYNDICS OF CAMBRIDGE UNIVERSITY* (1818); *SAMUEL EGERTON BRYDGES, A VINDICATION OF THE PENDING BILL FOR THE AMENDMENT OF THE COPYRIGHT ACT FROM THE MISREPRESENTATIONS AND UNJUST COMMENTS OF THE SYNDICS OF THE UNIVERSITY LIBRARY AT CAMBRIDGE* (1818); *FURTHER STATEMENT ISSUED BY AUTHORITY OF THE SYNDICS OF CAMBRIDGE UNIVERSITY* (1818); *S.E. BRYDGES, ANSWER TO THE FURTHER STATEMENT* (1818).

116. FEATHER, *supra* note 13, at 114.

said that they were likely to pay no more for the fixed than the contingent term.¹¹⁷

The select committee's report rehearsed at some length the history of the deposit requirements, from the licensing acts onwards.¹¹⁸ Its account of the Act of Anne's prehistory and consequences is striking, particularly as this material was not part of the evidence and was presented as uncontroversial fact:

During this period [after the expiry of the Licensing Acts and before the Act of Anne], the claim of authors and publishers to the perpetual Copyright of their publications, rested upon what was afterwards determined to have been the common law, by a majority of nine to three of the Judges, on the cases of *Millar* and *Taylor* in 1769, and *Donaldson* and *Becket* in 1774. Large estates had been vested in Copyrights; these Copyrights had been assigned from hand to hand, had been the subject of family settlements, and in some instances larger prices had been given for the purchase of them (relation being had to the comparative value of money) than at any time subsequent to the Act of the 8th of Queen Anne. By this Act, which in the last of these two cases, has since been determined to have destroyed the former perpetual Copyright, and to have substituted one for a more limited period, but protected by additional penalties on those who should infringe it, it is directed, that nine copies of each book that shall be printed or published, or reprinted and published with additions, shall, by the printer, be delivered to the warehouse-keeper of the Company of Stationers¹¹⁹

The report went on to explain that it had been "universally understood" that the subsistence of copyright did not depend on registration, and that, both prior to *Beckford v. Hood* and following it until the decision in *Bryer*, it had been thought that only registered titles need be deposited.¹²⁰ The manner of application of the scheme to Ireland (via the 1801 Copyright Act) was offered as evidence of the widespread nature of this understanding.¹²¹ This

117. See generally *1818 Minutes of Evidence*, *supra* note 67 (containing minutes of evidence before the committee with a focus on facts relating to the book trade and recording the competing testimony given by members of the book trade against that of representatives of the university libraries).

118. See SELECT COMMITTEE ON THE COPYRIGHT ACTS OF 8 ANNE, C. 19; 15 GEO. III, C. 53; 41 GEO. III, C. 107; AND 54 GEO. III, C. 116, REPORT FROM SELECT COMMITTEE ON THE COPYRIGHT ACTS, 1817-8, H.C., at 3-4 [hereinafter 1818 REPORT] (detailing the history of the deposit requirement from the early 1600s to the early 1800s).

119. *Id.* at 4. Deazley has shown how this reading was similarly expressed as fact in legal treatises also. See DEAZLEY, *supra* note 12, at 32-42.

120. 1818 REPORT, *supra* note 118, at 4.

121. *Id.*

account, in many ways sympathetic to the losing side in *Donaldson*, shows how firmly entrenched the belief in common law copyright was. Note the weight given to the conclusion reached by the judges, and the emphasis on the large majority agreeing with it.¹²² In contrast, the Act of Anne was presented as having substantial negative effects: it “destroyed” perpetual copyright and introduced “the burthen of delivery” of nine copies.¹²³ All this acted subtly to reinforce the reasonableness of the original position and cast doubt on the newly prevailing state of things, particularly the decision in *Bryer*. International precedents were offered as further evidence that the British position was unusual: “[T]here is no other country in which a demand of this nature is carried to a similar extent.”¹²⁴

The committee was resolved on five points. Its main recommendation was brief and unequivocal—the requirement for the delivery of eleven copies should be repealed except as it applied to the British Museum and replaced with a fixed allowance for the remaining libraries.¹²⁵ Intriguingly, the committee added a second recommendation in case compliance with the first was not thought “expedient.”¹²⁶ This was to reduce the number of deposit libraries to five: the British Museum and the libraries of Oxford, Cambridge, Edinburgh, and Dublin Universities. It was thought that books of prints should be exempt from the requirement to deposit other than at the British Museum and that books wherein the copyright had been abandoned should be totally exempt. Finally, the committee sought the repeal of the requirement (under the 1799 Act for the Suppression of Seditious Societies) that printers should retain one copy of all works printed by them, thinking deposit at the British Museum sufficient to discharge its purpose.¹²⁷ This report seemed to offer a clear vindication of the publishers’ position, but nothing resulted from it. A further petition to Parliament, from London booksellers, begging for relief as recommended by the committee, went unanswered.¹²⁸ Perhaps the publishers could find no

122. The report must have counted Lord Mansfield as an opinion in favour of the common law right, in spite of his silence in *Donaldson v Becket*. The report pointedly ignored Lord Camden’s powerful speech and the outcome of the peers’ vote.

123. 1818 REPORT, *supra* note 118, at 4–5.

124. *Id.*

125. *Id.* at 5. The implication was that the figure should be set with reference to the value of books likely to be accepted into the libraries, rather than the (higher) value of all books registered.

126. *Id.*

127. *Id.*

128. 39 PARL. DEB., H.C. (1st ser.) (1819) 1113–14; PARTRIDGE, *supra* note 64, at 71–72.

parliamentary champion, Egerton Brydges having moved abroad. Perhaps the universities lobbied successfully behind the scenes.

In 1832 a proposal from the French King to offer a complete set of the books published in France (to which he was entitled), in return for a complete set of the books published in England, was pursued enthusiastically by the government.¹²⁹ But in the end, the scheme came to nothing.¹³⁰ It was not until 1836 that the matter was taken up again in the House of Commons, this time by James Silk Buckingham, a prolific journalist and author.¹³¹ Buckingham set the issue in the context of the campaign against “taxes on knowledge,” such as the stamp duty on newspapers and the excise duty on paper.¹³² He argued that the nation was rich enough to buy all the books it needed. His view of the 1814 Copyright Act, with its embedded reference to the Act of Anne’s preamble follows:

[I]t is a strange way indeed of encouraging learning, to subject all its cultivators, who desire to make their researches public for the benefit of others, to a heavy tax, by compelling them, before they can sell a single copy for their own benefit, to give away eleven copies of their works to eleven public libraries and institutions, from which they receive no benefit whatever in return, but by which they absolutely injure the sale of their own remaining copies to a far greater extent than the loss of the eleven copies at first abstracted.¹³³

Buckingham’s ideal would have been to repeal the deposit requirement entirely, but realising that this would not find favour, he introduced a bill to abolish the copyright privilege (with compensation from the Consolidated Fund) for all except the British Museum, which would have been required to purchase one copy at cost price. The bill as passed was somewhat modified. Under the terms of the 1836 Copyright Act, six libraries lost their deposit privileges, receiving instead a fixed grant in compensation.¹³⁴ Those retaining their privileges were the British Museum, the Bodleian Library at Oxford, Cambridge University Library, the Library of the Faculty of Advocates in Edinburgh, and the Library of Trinity College, Dublin.¹³⁵

129. PARTRIDGE, *supra* note 64, at 130–31.

130. *Id.* at 132–33.

131. He had also been, for a number of years, a bookseller’s clerk at Plymouth Dock. 1 JAMES SILK BUCKINGHAM, AUTOBIOGRAPHY OF JAMES SILK BUCKINGHAM 134–35, 152 (London, Longman et al. 1855).

132. 33 PARL. DEB., H.C. (3d ser.) (1836) 440.

133. *Id.* at 441.

134. Copyright Act, 1836, 6 & 7 Will. 4, c. 110, §§ 1–2.

135. PARTRIDGE, *supra* note 64, at 77.

This was the backdrop to the introduction of Talfourd's first copyright bill in 1837. The notion that there had once been a perpetual common law copyright, now done away with by the Act of Anne, appeared firmly entrenched. Opinions differed as to the merits of the fundamental issue, but those who were uncomfortable with the outcome of *Donaldson v. Becket* felt free to look back to the position adopted by Lord Mansfield in *Millar v. Taylor*, even though it had not prevailed. The confusion regarding the Act of Anne's provisions on registration and deposit had not enhanced the Statute's repute. It had been shown to be a source of uncertainty and potential unfairness, rather than a model of principle and clarity.

III. TALFOURD'S ACT—THE QUESTION OF COPYRIGHT TERM

Beginning in 1837, Talfourd sought repeatedly a very considerable extension of copyright term to the author's life plus sixty years.¹³⁶ This proposal remained in all versions of the bill until, Talfourd having left Parliament, it was entrusted to Mahon in 1842.¹³⁷ In Mahon's hands it became the 1842 Copyright Act, often referred to as Talfourd's Act in recognition of the Serjeant's sustained efforts on its behalf.¹³⁸ Talfourd embarked on copyright reform from his position not just as a lawyer, but as a literary critic and minor author also. Many of his friends were literary figures, and he held the literary calling in great esteem. His own personal and emotional conviction was that perpetual copyright was the correct reward for authors.¹³⁹ Although Talfourd was not foolhardy enough to propose this in his bills, the length of the term requested, particularly given the post mortem element, seemed to many onlookers to amount to much the same thing. The question of copyright term came to be identified in the public mind as the main purpose of Talfourd's bills, even though these in fact encompassed much wider aims of consolidation and amendment.¹⁴⁰

When introducing the 1837 bill, Talfourd had to decide how to present his somewhat audacious request and how to explain that it was justified. He chose to do so by suggesting that he was simply correcting a mistake and returning copyright to its original purpose—"the encouragement of learning." The preamble to the Statute of Anne was offered in support of his

136. See 38 PARL. DEB., H.C. (3d ser.) (1837) 873 (proposing the extended term).

137. SAUNDERS, *supra* note 10, at 129.

138. *Id.*

139. *Id.* at 128.

140. ALEXANDER, *supra* note 17, at 92–93.

argument, as a long-standing historical precedent that—when rightly interpreted—encapsulated the true intentions of Parliament. Idealistic and romantic in nature, known for the floweriness of his expression, Talfourd’s account of the relevant history reflected his nostalgic perspective. He presented the outcome of *Donaldson v. Becket* as an unintended consequence of the Act of Anne, which accidentally diverted the law from its right and true course:

In truth, the claim of the author to perpetual copyright was never disputed, until literature had received a fatal present in the first act of Parliament for its encouragement—the 8th Anne, c. 19, passed in 1709; in which the mischief lurked, unsuspected, for many years before it was called into action to limit the rights it professed, and was probably intended, to secure.¹⁴¹

Like others before him, Talfourd pressed an analogy with real property, arguing that the House of Lords’ interpretation of the Act of Anne had “substituted a short term in copyright for an estate in fee.”¹⁴² He also observed that the 1775 Copyright Act had given the universities back their perpetual copyright privileges, whereas “the term of twenty-eight years, with the possible reversion beyond that time for life, is all authors have yet obtained in return for that inheritance of which the statute of Anne deprived them.”¹⁴³

The fact that the 1814 Copyright Act introduced a reversionary life-term interest presents a considerable puzzle. As has been noted, those sponsoring the bill sought only a fixed twenty-eight year term. The select committee asked only one question about copyright term, and the publishers seemed comparatively indifferent to the matter. Writing in 1812, the author Isaac D’Israeli had argued the case for a longer copyright.¹⁴⁴ His fundamental position was that authors had a natural right in their literary property in perpetuity, but understanding that he lived in “an Arithmetical age,” he endorsed Samuel Johnson’s suggestion that the term should be extended to a century.¹⁴⁵ The poet laureate, Robert Southey, took

141. 38 PARL. DEB., H.C. (3d ser.) (1837) 868–69.

142. *Id.* at 869.

143. *Id.* at 869–71.

144. 1 ISAAC DISRAELI, CALAMITIES OF AUTHORS 38–39 (1812).

145. *Id.* at 41–42 (“Johnson himself, who rejected that perpetuity of literary property, which some enthusiasts seemed to claim at the time the subject was undergoing the discussion of the judges, is however for extending the copy-right to a century. Could Authors secure this their natural right, Literature would acquire a permanent and a nobler reward . . .” (emphasis omitted)).

a close interest in the discussions which led to the 1814 Act. His friend Charles Williams Wynn was a member of the select committee, and they corresponded on the matter. As a practical matter, Southey acknowledged that a fixed term of twenty-eight years would be an improvement on the Act of Anne's provision (a fourteen year term with contingency for a further fourteen years if the author was still living at the original term's expiry). But fundamentally, as he explained to Wynn in 1813, Southey was in favour of perpetual copyright:

My opinion is that literary property ought to be inheritable, like every other property; and that a law which should allow you the use of the trees upon your estate for eight-and-twenty years, and after that term make them over to the Carpenters' Company, would not be more unjust than that which takes from me and my heirs the property of my literary labours, and gives it to the Company of Booksellers.¹⁴⁶

Nevertheless, there is no evidence that Southey's private position had any direct influence on the 1814 bill.

The possibility of a life interest in copyright was introduced in an amendment proposed by Sir Egerton Brydges just before the bill left the Commons.¹⁴⁷ There is no record of any parliamentary debate on the issue in either House, and no evidence remains of Brydges' arguments in favour of his proposal.¹⁴⁸ It seems unlikely that a developed argument based on natural rights would have escaped all report, but it is impossible to know. Southey, for one, remained unconvinced that a limited statutory term was the proper outcome. Assessing the 1814 Copyright Act in a *Quarterly Review* article, he spoke with approval of the original bill, which, much amended, subsequently became the Act of Anne:

It is worthy of notice, that the bill, as it was introduced, had no limitation of the copyright, but proceeded upon the fair common law right and natural equity of authors and proprietors to a perpetual copyright, which they had always before enjoyed. The limitary words were introduced during its progress through parliament¹⁴⁹

Those who disagreed with the outcome of *Donaldson v. Becket* continued to say so. Twenty years later, Southey

146. Letter from Robert Southey to Charles Williams Wynn (May 23, 1813), in 2 SELECTIONS FROM THE LETTERS OF ROBERT SOUTHEY 323, 323 (John Wood Warter ed., London, Longman et al. 1856).

147. Deazley, *supra* note 63, at 839.

148. *Id.*

149. Southey, *supra* note 71, at 198.

suggested to Talfourd that copyright term should be calculated from the death of the author to avoid the problem of having several different terms for the works of the same person.¹⁵⁰ Southey proposed life plus ninety-nine years, being a term well known from leases.¹⁵¹ He said, however, that he would be “thankful” for Talfourd’s proposed term, expressing the hope that it would not expire before “a growing sense of justice in the nation” led Parliament to grant perpetuity.¹⁵²

Talfourd’s 1837 bill fell with the death of William IV. Considerable opposition to his plans had materialised, particularly from publishers and printers. In his speech moving the second reading of the bill in 1838, Talfourd took a more direct approach than in 1837, relying squarely on what he termed “the principle of this bill”: “That principle is, that the present term of copyright is much too short, for the attainment of that justice which society owes to authors, especially to those (few though they be) whose reputation is of slow growth and of enduring character.”¹⁵³

He referred to *Millar v. Taylor*, noting that the common law right was recognised by a “large majority of the judges, with Lord Mansfield at their head, after solemn and repeated argument.”¹⁵⁴ He emphasised that “six to five of the judges only” had decided that “the stringent words ‘and no longer,’ in the statute of Anne took that right away.”¹⁵⁵ Talfourd’s message was that the common law right carried a distinguished imprimatur and that its loss was both surprising and a close call.¹⁵⁶ During the debate, those

150. See Letter from Robert Southey to Charles Williams Wynn (May 31, 1837), in 4 SELECTIONS FROM THE LETTERS OF ROBERT SOUTHEY, *supra* note 146, at 511, 512 (relating to Wynn his suggestion to Talfourd).

151. *Id.*

152. *Id.* Southey expressed anxiety lest he die before Talfourd’s bill should pass, allowing “rascally booksellers” to seize his works “as property which the law allowed them to scramble for.” Letter from Robert Southey to H. Taylor (Dec. 2, 1837), in 6 THE LIFE AND CORRESPONDENCE OF ROBERT SOUTHEY 354, 354–55 (Charles Cuthbert Southey ed., London, Longman et al. 1850). Southey lived until 1843.

153. 42 PARL. DEB., H.C. (3d ser.) (1838) 556.

154. *Id.* at 557.

155. *Id.* Williams Wynn reiterated the point that copyright “was enjoyed in perpetuity” after the Act of Anne and that it was not “limited” until the decision in *Donaldson v. Becket*. Williams Wynn supported the bill, with a view to encouraging enduring rather than ephemeral publications. *Id.* at 587–88.

156. As another example of this technique, consider the following:

But it was also holden by six of the judges against five, that such common law right was taken away by the statute, 8 Anne, by which an author was precluded from every remedy except on the foundation of that statute, and the terms and conditions prescribed thereby. Now let it be remembered that Mansfield and Blackstone, the two judges included in the majority favourable to the author, are not only two names distinguished in legal history as reflecting splendour on

in favour of the bill spoke in favour of the increased protection of literary property, while those against sought to characterise it as a monopoly and an unjust tax on the public. The Solicitor General, Sir Robert Monsey Rolfe, observed: “[W]hat tax could possibly be more injurious than a tax on that knowledge which they were all so desirous to diffuse?”¹⁵⁷

Unlike his opponents, Talfourd could not rely on disciplined trade support with large numbers of group members accustomed to coordinated petitioning and protest. Authors were not a cohesive group, and supporters had to be garnered individually. William Wordsworth was the most famous of those who associated their names with the bill. But he had been very reluctant to do so at first. Wordsworth’s interest in the matter was of long standing, as well as directly personal. He felt strongly that literary property should be protected as other forms of property were and considered copyright law an “extreme injustice.”¹⁵⁸ He was closely involved in Talfourd’s campaign, though at first sought to use his influence privately rather than publicly, writing dozens of letters to friends and acquaintances in an attempt to gather parliamentary support.¹⁵⁹ Wordsworth objected “to appearing publicly as a Suppliant, for what I consider cannot be denied without the most flagrant injustice to the best Authors of the Country, and a correspondent injury to its

their profession, but men whose minds travelled beyond that profession, deeply read in the civil law on which they based their knowledge of the law of England, men of great literary attainments, and of extensive views.

The Law of Copyright, 19 L. MAG. OR Q. REV. OF JURISPRUDENCE 365, 367–68 (1838). The novelist Anthony Trollope put the same point to the publisher John Blackwood when hearing his evidence to the Royal Commission:

Are you aware that of the four judges before whom the case was tried, two of them, Lord Mansfield and Judge Blackstone, were of opinion that the author’s rights were so paramount that even the Act of Parliament curtailing them to 14 years did not suffice to rob him of the property, even though the 14 years had elapsed?—I was not aware of that.

You were not aware that judges so great as Lord Mansfield and Judge Blackstone have thus recorded their opinion in favour, at any rate, of a much prolonged copyright?

COPYRIGHT COMMISSION, REPORT OF THE COMMISSIONERS, *supra* note 7, ¶¶ 866–67.

157. 42 PARL. DEB., H.C. (3d ser.) (1838) 570. Sir Robert Monsey Rolfe later became Baron Rolfe and then Lord Cranworth. Twice Lord Chancellor, he was one of those involved in determining whether foreigners could acquire copyright, most notably in *Jefferys v. Boosey*, (1854) 10 Eng. Rep. 681; 4 H.L.C. 815. 1 THE AMERICAN YEAR-BOOK AND NATIONAL REGISTER FOR 1869, at 780 (David N. Camp ed., Hartford, O.D. Case & Co. 1869).

158. Letter from William Wordsworth to John Gardner (May 19, 1830), in 5 THE LETTERS OF WILLIAM AND DOROTHY WORDSWORTH 264, 265 (Alan G. Hill ed., 1979); see CATHERINE SEVILLE, LITERARY COPYRIGHT REFORM IN EARLY VICTORIAN ENGLAND 159–62 (1999) (tracing Wordsworth’s early references to copyright in his correspondence from 1808 to 1836).

159. W.J.B. Owen & Jane Worthington Smyser, *Introduction* to 3 THE PROSE WORKS OF WILLIAM WORDSWORTH 303, 303–04 (W.J.B. Owen & Jane Worthington Smyser eds., 1974).

literature.”¹⁶⁰ However, he had responded at length in print to a petition from Kendal print workers published in the *Kendal Mercury*.¹⁶¹ Although the letter was signed “A.B.,” Wordsworth’s authorship was an open secret.¹⁶²

The Kendal petition, using language typical of many of the trade petitions, objected that the extended term would be injurious to the wider reading public by deterring the publication of cheap editions. It argued that “every book, after its author has received from the public an equitable remuneration, becomes the property of the public, who, by affording such remuneration, have purchased it.”¹⁶³ There was no direct mention of the Statute of Anne, although similar references to literature becoming public property were of course familiar from the great debates on the question of literary property. Much more immediate were the allusions to the campaign against so-called “taxes on knowledge,” a term that encompassed various newspaper taxes and also paper duties.¹⁶⁴ Wordsworth’s response likewise made no reference to the Statute of Anne. Instead, he worked through the petition, clause by clause, to refute each point with contrary examples. Wordsworth’s defence was founded essentially on principle: “[Y]ou violate a fundamental right, by leaving that species of property which has the highest claim to protection, with the least share of it”¹⁶⁵

Several petitions against the bill in 1838 appeared to echo more or less closely the preamble to the Statute of Anne, though often without an explicit citation. The Company of Stationers of Glasgow argued that the existing copyright term was long enough and asked that no extension be sanctioned until it was proved “that such extension will be for the good of the public and for the benefit of authors, and tend to the encouragement or advancement of science and learning.”¹⁶⁶ A petition of booksellers

160. Letter from William Wordsworth to Thomas Noon Talfourd (Apr. 14, 1838), in 6 THE LETTERS OF WILLIAM AND DOROTHY WORDSWORTH 553, 553 (Alan G. Hill ed., 1982).

161. Letter to the Editor of the *Kendal Mercury* (Apr. 12, 1838), in 3 THE PROSE WORKS OF WILLIAM WORDSWORTH, *supra* note 159, at 309.

162. Paul M. Zall, *Wordsworth and the Copyright Act of 1842*, 70 PUBLICATIONS MODERN LANGUAGE ASS’N AM. 132, 136 n.7 (1955).

163. Petition of the Operative Letter-Press Printers and Others Connected with the Profession in the Borough of Carlisle, Petition 4,629, App. 389 (Apr. 9, 1838). The lawyer Sir Edward Sugden had made the same point: copyright “became valuable only through the medium of the public, and, therefore, at some time or other the public ought to reap their share of the benefits conferred by it.” 42 PARL. DEB., H.C. (3d ser.) (1838) 590.

164. 33 PARL. DEB., H.C. (3d ser.) (1836) 440 (statement of John Silk Buckingham).

165. Letter to the Editor of the *Kendal Mercury*, *supra* note 161, at 312.

166. Petition of the Incorporation of the Company of Stationers of Glasgow, Petition 4,631, App. 390 (Apr. 11, 1838).

and publishers of Westminster did rehearse and cite the preamble before arguing that the bill would “be a great discouragement to the progress of learning and science.”¹⁶⁷ Compositors and pressmen at a leading London publisher believed that the bill would be “highly prejudicial to the progress of literature.”¹⁶⁸ It is difficult to be sure whether this phrasing is a distant reverberation of the Statute or a reference to the much more contemporary debate concerning the diffusion of knowledge. This debate had a number of facets.

Characterisation of copyright as a “tax on knowledge” generated huge opposition to Talfourd’s bill. Although a tax had first been imposed on British newspapers in the early eighteenth century, by the early nineteenth century it had reached a level which put newspapers out of the reach of most working people—although increasing literacy levels meant that the reading public was growing in size rapidly.¹⁶⁹ The radical press regarded the levels of taxation imposed on newspapers as political censorship and continued to publish in defiance of the law.¹⁷⁰ Individual titles could reach tens of thousands of readers, notwithstanding successive governments’ attempts to destroy the radical press by enforcing punitive laws strictly.¹⁷¹ The war was fought fiercely in the early 1830s. Parliamentary petitioning was a familiar mechanism for the radicals, used as a way of building and maintaining popular support.¹⁷² The circulation of leading radical newspapers such as the *Poor Man’s Guardian* far outstripped that of the main establishment newspaper, the *Times*, and the unstamped press as a whole reached hundreds of thousands of readers.¹⁷³ In 1836 a campaign led by John Roebuck

167. Petition of Booksellers and Publishers of London and Westminster, Petition 4,821, App. 407 (Apr. 25, 1838).

168. Petition of Compositors and Pressmen Employed on the Premises of Bradbury & Evans, Petition 4,495, App 365 (Apr. 4, 1838).

169. JOEL H. WIENER, *THE WAR OF THE UNSTAMPED* 2–3 (1969).

170. See *id.* at 180–83 (“[P]olitical idealism and a pronounced sense of grievance, rather than a projection of financial gain, were the motivating elements behind the working-class journalism of [the radical press].”).

171. See, e.g., BOB CLARKE, *FROM GRUB STREET TO FLEET STREET* 233 (2004) (describing punitive action against and circulation of publications by William Cobbett, the “father of radical press”).

172. See WIENER, *supra* note 169, at 108–09 (noting that the basis of middle-class repeal turmoil “remained firmly grounded in the activities of London radicals” and that “the number of petitions forwarded to Parliament during 1836 was approximately four times greater than it had been the preceding year”).

173. See H.S. Chapman, *The Newspaper Stamp Return*, in 1 PAMPHLETS FOR THE PEOPLE 12, 12–13 (J.A. Roebuck ed., London, Charles Ely 1835) (estimating the weekly circulation of London’s unstamped papers at 200,000 copies). Compare WIENER, *supra* note 169, at 184 (estimating the *Poor Man’s Guardian* weekly circulation at around

in the House of Commons resulted in the reduction of the newspaper stamp from 4d to 1d, it having become clear that government opposition to cheap political publishing was both futile and counterproductive.¹⁷⁴ Some tried to respond to what they saw as the potential dangers of the unstamped press by offering the working man something more positive. A number of religious groups distributed cheap religious tracts. Others, notably the Society for the Diffusion of Useful Knowledge, produced cheap material for self-education, in this case excluding politics, theology, and fiction.¹⁷⁵ These organisations also opposed measures that they thought would hamper the diffusion of knowledge.¹⁷⁶ Thus, Talfourd's bill engaged a much wider field of opponents than those in the printing trade. Those in favour of the proposals were almost exclusively authors, or at least connected with the literary world in some way. Furthermore, in terms of sheer numbers, the balance was very much against Talfourd. From 1838 to 1840, almost 500 petitions against the copyright bills were presented, signed by over 30,000 people. Talfourd's supporters submitted a mere 37 petitions, with a total of 341 signatures.¹⁷⁷

Almost none of the petitions in favour of Talfourd's bill mentioned the Statute of Anne. Petitions from individuals, not unexpectedly, focused on that petitioner's particular circumstances. Wordsworth did eventually submit a petition outlining his own views and circumstances, presenting the "main object" of the bill as being:

[T]o relieve men of letters from the thralldom of being forced to court the living generation, to aid them in rising above degraded taste and slavish prejudice, and to encourage them to rely upon their own impulses, or to leave them with less excuse if they should fail to do so.¹⁷⁸

10,000), with CLARKE, *supra* note 171, at 233 (estimating the *Times* weekly circulation at around 7,000).

174. 34 PARL. DEB., H.C. (3d ser.) (1836) 652–53; PATRICIA HOLLIS, *THE PAUPER PRESS* 3 (1970).

175. See JOHN FEATHER, *A HISTORY OF BRITISH PUBLISHING* 163 (1988) (containing background information on the Society for the Diffusion of Knowledge); see also WIENER, *supra* note 169, at 39–40 (enumerating the objectives of the Society for the Diffusion of Knowledge).

176. See Petition from British Medical Association, Petition 6,967, App. 661 (May 1, 1839) (objecting to the bill as "tending to prevent that diffusion of knowledge and general education so important in promoting habits of industry and morality, and thereby increasing happiness and preventing crime"). See also Petition 5,953, App. 455 (May 9, 1838) (noting petitioners as "Dr Birkbeck, and certain other persons interested in the general diffusion of literature and science, assembled at a public meeting at the Freemasons' Hall").

177. For further discussion, see CATHERINE SEVILLE, *LITERARY COPYRIGHT REFORM IN EARLY VICTORIAN ENGLAND* 33 (1999).

178. Petition 2,324, App. 188 (Feb. 27, 1839).

This was a strongly personal and high-minded literary perspective, which cannot have had much popular appeal. Even though Wordsworth must have been familiar with much of the literature produced during the campaign, he made no effort to frame his points in legal terms. Common themes found more generally in supporters' petitions were that literary property should be treated as other property¹⁷⁹ and that justice required an extended term as a fair reward for works of lasting value, as well as to allow authors to provide for their families. Talfourd drafted a general purpose petition, emphasising this latter theme, copies of which were circulated for the signatures of as many authors as could be mustered.¹⁸⁰

In introducing the second reading of the 1839 bill, Talfourd again used a very simple argument, asking, "[W]hether the present limitation of copyright is just?"¹⁸¹ Those opposing the bill continued to argue that the possible benefit to authors would be far outweighed by the detriment to the public by restricting the diffusion of knowledge.¹⁸² Radical opponents used obstructive parliamentary tactics to prevent the bill from being discussed in committee.¹⁸³ In 1840 similar tactics from the same quarter led again to the defeat of the bill.¹⁸⁴ Talfourd this time framed his argument with reference to the proper extent of literary property:

The question was whether an author having committed to paper the thoughts he had conceived and cherished in solitude, should have any property in them, or whether they should become that of the public, whether an author communicating his inspirations to the world should only demand of the public the produce of their immediate sale, or look at large unto posterity for the reward of works which might not receive immediate attention from the public.¹⁸⁵

179. Thomas Hood's petition was "thought too richly studded with jests to be presented to the House of Commons," but was reproduced in Talfourd's book. T. N. TALFOURD, *THREE SPEECHES DELIVERED IN THE HOUSE OF COMMONS IN FAVOUR OF A MEASURE FOR AN EXTENSION OF COPYRIGHT* 141–44 (1840). Hood states that he "is the proprietor of certain copyrights which the law treats as copyhold, but which, in justice and equity, should be his freeholds." *Id.* at 141.

180. Petitions 2,325 & 2,326, Apps. 189 & 190 (Feb. 27, 1839). These note that "the term during which the law secures to authors the profits arising from the productions of their own industry and genius, is insufficient to provide for the fair reward of works which are written to endure."

181. 45 PARL. DEB., H.C. (3d ser.) (1839) 920.

182. SHERMAN & BENTLY, *supra* note 31, at 29–30.

183. FEATHER, *supra* note 13, at 140–41.

184. *Id.* at 141.

185. 51 PARL. DEB., H.C. (3d ser.) (1840) 1254.

Perhaps unwisely, Talfourd declared that “every scholar and thinker” could form a judgment on this.¹⁸⁶ The radical Member of Parliament Henry Warburton was known as a clever scholar and scientist. A member of the Political Economy Club from its foundation, he had worked with other radicals to found the Society for the Diffusion of Political and Moral Knowledge.¹⁸⁷ He had opposed Talfourd’s bills vehemently and welcomed any opportunity to respond to his arguments.¹⁸⁸ Warburton was insistent that literary property remained private property only while it was in manuscript. He certainly took the view that copyright law was founded on a quid pro quo: “The state gave to authors a certain protection for their works, and they were bound, on the other hand, as an equivalent for this protection, to see that the public had the advantage of having the work published at a reasonable rate.”¹⁸⁹

Warburton referred to the power granted by the Statute of Anne to limit the price of books, which he considered was evidence supporting his position. He therefore opposed the bill “on the paramount plea of public utility.”¹⁹⁰

During the second reading, Warburton reminded the House of Commons that *Donaldson v. Becket* had determined “that not any perpetual copyright at common law rested in booksellers and publishers.”¹⁹¹ Opponents continued to argue that the bill elevated the interests of a class of authors above those of the public.¹⁹² Lord Mahon argued that, on the contrary, the bill was based “on high and public grounds” and would elevate the public taste by encouraging works that endured.¹⁹³ Talfourd reiterated this point, emphasising that authors had previously had a perpetual copyright at common law “before the statute of Anne, passed for the protection of authors, took the copyright away.”¹⁹⁴

186. *Id.*

187. W.P. Courtney, *Warburton, Henry (1784?–1858)*, in 59 *DICTIONARY OF NATIONAL BIOGRAPHY* 296–97 (Sidney Lee ed., New York, The MacMillan Co. 1899).

188. *See* FEATHER, *supra* note 13, at 140–42 (describing Warburton’s repeated motions of opposition to Talfourd’s bills).

189. 51 *PARL. DEB., H.C. (3d ser.)* (1840) 1255.

190. *Id.* at 1255–56.

191. 52 *PARL. DEB., H.C. (3d ser.)* (1840) 404.

192. *Id.* at 403, 405–06.

193. *Id.* at 407, 410.

194. *Id.* at 422. In his treatise published at this time, avowedly supportive of Talfourd’s position, the barrister John J. Lowndes argued that there had always been a common law right, “that the statute of Anne is not to be held as abrogating that common-law right,” and that *Donaldson v. Becket* “is not to be considered as a sound construction.” *LOWNDES, supra* note 63, at 100–01.

This clash of views expressed a fundamental difference in philosophy and approach that Talfourd recognised as such. Warburton and his colleagues considered that *Donaldson v. Becket* had put an end to the sort of principled discussion that Talfourd sought to reopen. Talfourd simply could not accept the premise on which this position was founded, as he made clear in an essay prefacing the publication of his speeches on copyright:

The advocates of the Bill proceed on the assumption that an author has *some property* in the creations of his own mind, after he has communicated them to the world through the medium of the press;—that this property is as sacred, and as much the subject of legal protection, as any tangible wealth which may be inherited or acquired; and that the laws of political economy and of social justice by which the gains of industry are secured to the party who acquires them, to the exclusion of mankind at large, are as applicable to the products of thought, or imagination, or research, as to a merchant's capital; and being so applied directly for individual benefit, are as clearly for the benefit of all, cherishing the same motives to exertion, by securing the same rewards to success. On the other hand, the opponents of the Bill assume that there is a paramount right in the body whom they call "*the Public*,"—that is in those who read, and in those who, for their own gain, supply readers with books—to the productions of an author's industry or genius, so soon as he shall have published them; and that any term of exclusive right which may be awarded to the author, is mere matter of grace and bounty; in derogation of this right of the public; and which it is the duty of those who guard the interest of the public to render as short as they can, so that they leave sufficient inducement to an author to compose and to publish.¹⁹⁵

Thomas Babington Macaulay did not go so far as to regard the public as having a positive right to an author's works once published, but he did have a strong regard for "the public good."¹⁹⁶ His unexpected and much-cited intervention in the debate was sufficient to defeat the 1841 bill.¹⁹⁷ Macaulay considered that a natural right could not survive the death of the author, and that therefore the question of the length of the post mortem term should be decided by the legislature "in the way which may appear to be most conducive to the general good."¹⁹⁸ He made no

195. TALFOURD, *supra* note 179, at xvi–xvii.

196. 56 PARL. DEB., H.C. (3d ser.) (1841) 344.

197. FEATHER, *supra* note 13, at 142.

198. 56 PARL. DEB., H.C. (3d ser.) (1841) 345–46.

reference to the Statute of Anne or any other legal precedents, seeming to feel that Parliament was free to determine the matter without reference to any historical constraint. His conclusion was that:

It is good, that authors should be remunerated; and the least exceptionable way of remunerating them is by a monopoly. Yet monopoly is an evil. For the sake of the good we must submit to the evil; but the evil ought not to last a day longer than is necessary for the purpose of securing the good.¹⁹⁹

To characterise copyright as a “monopoly” was to reject all argument that literary property was property like all other property. The question became one simply of public interest. Macaulay believed that a long post mortem term would operate as a tax on readers, which would not bring even remotely proportionate benefits to authors.²⁰⁰ Talfourd attempted to retrieve matters, but could not do enough to neutralise Macaulay’s authority and eloquence.

Talfourd regarded Macaulay’s stance as a betrayal of the literary calling. Others thought Macaulay’s position very poorly argued.²⁰¹ Edward Bulwer (later Bulwer-Lytton) wrote a savage and high-profile article in the *Examiner*, attacking Macaulay’s reasoning: “He takes commonplace for his premises and paradox for his conclusions; and the richness of a fertile memory conceals the meagreness of a most defective logic.”²⁰² Having rebutted each of Macaulay’s points carefully, Bulwer argued in conclusion that justice to authors, “whose hourly service to the thoughts of each and the civilization of all no legislative enactment can remunerate,” could be granted “without detriment to the public.”²⁰³ Wordsworth considered writing a public letter refuting “that trash advanced by Macauley.”²⁰⁴ Instead, he pressed John Gibson Lockhart to respond. Lockhart was the editor of the influential *Quarterly Review*. He had refrained from public

199. *Id.* at 348.

200. *Id.* at 350.

201. LOWNDES, *supra* note 63, at viii (referring to Macaulay’s speech as “a brilliant and sparkling address, though of no very great logical power”).

202. Edward Bulwer, Editorial, *The Defeated Copyright Bill*, *EXAMINER*, Feb. 28, 1841, at 130. Though unsigned, this article is attributed to Bulwer. Letter from John Stuart Mill to Albany Fonblanque (Jan. 1, 1842), in 13 *COLLECTED WORKS OF JOHN STUART MILL* 495 n.3 (Francis E. Mineka ed., 1963).

203. Bulwer, *supra* note 202, at 131.

204. Letter from William Wordsworth to Thomas Noon Talfourd (Feb. 8, 1841), in 7 *THE LETTERS OF WILLIAM AND DOROTHY WORDSWORTH*, at 178 (Alan G. Hill ed., 2d ed. 1988).

intervention in the debate previously. As Sir Walter Scott's son-in-law he was vulnerable to accusations of bias and personal interest. However, Lockhart did now agree to respond to Macaulay.

In a long and balanced piece, Lockhart argued that a future copyright bill "ought to be a new one in its general arrangement as well as very many of the details."²⁰⁵ The article opened with consideration of *Donaldson v. Becket*. Lockhart emphasised the closeness of the decision, but assured his readers that he would not revisit the question of perpetual literary property, noting that "[t]he English rule of legislative, not privilegial protection, and that for some limited term only, has been everywhere adopted."²⁰⁶ Carefully reviewing the arguments and precedents, Lockhart noted that other countries, although following the principle of a limited term, had in practice adopted much more generous periods of protection than England. He took care to avoid endorsing a particular copyright term but suggested that the French and Prussian codes (life plus twenty and thirty years, respectively) afforded a useful model.²⁰⁷ This article, appearing between parliamentary sessions, set the scene for the 1842 Copyright Bill.

Talfourd, worn down and concerned about the expense of another general election, retired from Parliament in 1841.²⁰⁸ Lord Mahon agreed to take matters forward. He was an established historian, as well as a pragmatic politician. Having consulted parliamentary colleagues, he proposed a term of the author's life plus twenty-five years.²⁰⁹ He also consulted the leading publishers, giving them early drafts of the bill and rewording contentious provisions.²¹⁰ In return, the publishers Longman and Murray ensured that petitions in favour of it were received from all relevant quarters.²¹¹ Mahon's 1842 bill represented a carefully brokered compromise, and the brief petition supporting it reflected this faithfully. The petitioners described themselves as "authors, booksellers and publishers of literary works, and printers, stationers, and bookbinders of the United Kingdom and Ireland."²¹² This phrasing acknowledged and integrated a

205. John Gibson Lockhart, *The Copyright Question*, 69 Q. REV. 186, 191 (1842).

206. *Id.* at 186–87.

207. *Id.* at 186–89, 220.

208. CUMBERLAND CLARK, *DICKENS AND TALFOURD* 21–22 (1919).

209. 61 PARL. DEB., H.C. (3d ser.) (1842) 1355–56.

210. JAMES J. BARNES, *AUTHORS, PUBLISHERS AND POLITICIANS* 122–23 (1974).

211. *Id.* at 122.

212. Petition 6252, App. 303 (Mar. 16, 1842).

considerable range of interest groups, some of whose members had previously been well known to be opposed to the copyright measures. Now, however, the petitioners could express in harmony their “great satisfaction” with the new bill, whose provisions were “most important for the protection of the just rights of your petitioners, and for the encouragement and promotion of literature and science.”²¹³ Mahon here folded several references into a single phrase. The allusion to justice indicated that a fair outcome for all had been achieved. There was a clear and deliberate echo of the preamble to the Statute of Anne, but re-expressed in a form which could be read to encompass a wider public constituency than the comparatively limited community whose “learning” was originally envisaged.

In the House of Commons, Mahon argued that copyright had become a “confused jumble of laws” which he wished to consolidate.²¹⁴ He ran quickly and selectively through the history, emphasising that Lord Mansfield and others had judged that authors enjoyed a perpetual copyright: “I wish this fact to be especially remarked—the existence of perpetual copyright according to the common law.”²¹⁵ The Act of Anne had “inadvertently limited” this copyright: “inadvertently three little words crept in—and no longer.”²¹⁶ Mahon observed “that it is consolatory to reflect that haste and heedlessness in legislation are not confined to the present time.”²¹⁷ Having thus sought to undermine the authority of the Statute of Anne, Mahon addressed carefully a number of the objections to the bill. He concluded with the claim that his bill would “provide due and adequate rewards for literature” whilst bestowing “a public blessing” by encouraging men to write “not for their own age, but for all time.”²¹⁸

Macaulay criticised the “life plus” element of Mahon’s proposal because it would protect “early, crude, and imperfect work” above the “later and abler works.”²¹⁹ He proposed a fixed term of forty-two years.²²⁰ The radical Thomas Wakley made a long and somewhat insolent speech suggesting that authors were already sufficiently rewarded, attempting to disparage literary

213. *Id.*

214. 61 PARL. DEB., H.C. (3d ser.) (1842) 1351–52.

215. *Id.* at 1350–51.

216. *Id.* at 1351.

217. *Id.*

218. *Id.* at 1360, 1363.

219. *Id.* at 1369.

220. *Id.* at 1371.

works as compared to inventions and scientific works, and reiterating his view that the bill “could only work mischief to the public.”²²¹ Macaulay again pressed his proposal. Mahon resisted it, emphasising that it would make it difficult to issue complete editions and reminding the House that the post mortem term would allow literary men to provide for their families.²²² The Prime Minister, Sir Robert Peel, proposed a combination of the two plans.²²³ This, after several divisions, was the solution that prevailed.

In the House of Lords, the Lord Chancellor, Lord Lyndhurst, was in charge of the bill.²²⁴ Like Mahon, he emphasised that there was now concurrence of opinion amongst those affected; he had presented petitions from authors, from publishers, and from printers and stationers. Lyndhurst then explored the history of copyright. His reading of the Act of Anne was unequivocal:

The bill of 1709 was introduced into the other House of Parliament, by Mr. Wortley, and the object of it was declared to be the encouragement of learning. Everybody who looked at the provisions of that bill, at its recitals, and at its apparent objects, must see, that the principal object of it was the advancement of literature. It was intended, for a limited period, to impose additional penalties for the infringement of copyright. No one reading the bill, and attending to the language and to the provisions of it, could entertain a different opinion. Unfortunately, however, two or three expressions found their way into the bill, which ultimately led to a different construction. But at that time when the bill was passed, no person put that construction upon it; and it was not till many years afterwards, that it occurred to anybody to think, that it limited the right which authors had by law to a complete property in their publications.²²⁵

Lyndhurst also rehearsed the history of the two great eighteenth-century cases at some length. He quoted Lord Mansfield in *Millar* with approval and emphasised both the close vote and Lord Mansfield’s silence in *Donaldson*.²²⁶ In summary, he explained:

So that the result of the whole of the legal proceedings upon the subject had been to establish this: that by the common law of the country every author had a right—an exclusive

221. *Id.* at 1385–86.

222. *Id.* at 1392–93.

223. *Id.* at 1393–94.

224. 63 PARL. DEB., H.L. (3d ser.) (1842) 777.

225. *Id.* at 778–79.

226. *Id.* at 779–80.

right to the publication of his works—that they were his property—that he had a right to hold them against all the world; but that an act of Parliament, intended, according to his view, and he believed, according to the view of every person who had looked carefully into its provisions—for a different object, had, from the mere accidental circumstance of the introduction of one or two ill-considered words, led to an abridgement of the author’s right, and reduced it from perpetuity to a term of fourteen years, and for a second period of fourteen years contingent upon the circumstance of the author’s living beyond the first period of fourteen years.²²⁷

The present bill asked their Lordships “to mitigate the existing severity of the law.”²²⁸ Lyndhurst defended the post mortem term on the grounds that an author had expended a life of labour on his works, and this “property” should not be “seized by strangers and distributed amongst the public” at the moment of death.²²⁹ He put forward the bill as a compromise, based on “justice,” which “asked for less than the parties were entitled to” and asked that it should be approved without modification.²³⁰

Lord Brougham, a former Lord Chancellor, was known to be opposed to aspects of the bill. Its supporters had tried, unsuccessfully, to assuage his doubts beforehand.²³¹ An early topic in Brougham’s speech was “the extraordinary course of argument which [Lord Lyndhurst] had taken in respect to the origin of the existing law.”²³² He expressed amazement at Lord Lyndhurst’s readiness to rekindle the debate over common law copyright and attempt to impeach the decision of the House of Lords in *Donaldson*.²³³ Although willing to acknowledge that the King’s Bench judges in *Millar* had found that there was a common law copyright, as had “a large minority” of the common law judges in *Donaldson*, Brougham emphasised that the House of Lords had concurred with the majority of the judges in deciding that the common law right had been limited on the passing of the Statute of Anne.²³⁴ Further, Brougham stressed

227. *Id.* at 780–81.

228. *Id.* at 782.

229. *Id.*

230. *Id.* at 786–87.

231. *See id.* at 788 (explaining that Lord Brougham was not a party in the negotiations of the compromise in the House of Commons).

232. *Id.* at 789.

233. *Id.*

234. *Id.*; see RICHARD GODSON, A PRACTICAL TREATISE ON THE LAW OF PATENTS FOR INVENTIONS AND OF COPYRIGHT 311 (2d ed. London, Saunders & Benning 1840) (1823) (“[I]t was settled [in *Donaldson*], that if the right contended for did ever exist, it had been

that, for nearly seventy years since *Donaldson*, parties had relied on the decision—“the view laid down by the highest authority in the land of the law with regard to literary property.”²³⁵ Brougham’s main objection to the bill was that publishers would pay no more for an extended term than they did for the present one, and that it would tend to prevent the publication of cheap works—particularly those works whose copyrights were about to expire but would be extended by the bill.²³⁶ Brougham had a long record of commitment to the provision of cheap and accessible education and saw cheap publications as one route to this.²³⁷ He was a founder member of the Society for the Diffusion of Useful Knowledge and was respected for this work.²³⁸ His proposal was for a discretionary extension of term from fourteen years to twenty-one years.²³⁹ This would of course have been a cut in term, which Brougham sought to justify by reference to the patent term. However, his arguments were insufficient to defeat the bill.

The Copyright Act 1842 was a pragmatic compromise, rather than a measure born of true consensus.²⁴⁰ In the long debate that preceded it, the Act of Anne was sometimes cited, more often ignored. Its aims and interpretation continued to be contested, perhaps, distorted. Similarly, the House of Lords’ decision in *Donaldson* was both welcomed and challenged, as well as being often misrepresented. Truth mattered less than perceived authority. The widespread belief persisted that the Statute of Anne, as interpreted in *Donaldson*, had taken away the common law right of literary property, replacing it with a

abrogated by the statute of 8 Anne . . .”). The book had been recently reissued. Godson himself was not sympathetic to the idea of a common law right. *See id.* at 306–07 (questioning the existence of a common law copyright).

235. 63 PARL. DEB., H.L. (3d ser.) (1842) 789–90.

236. *Id.* at 791, 800–02.

237. *See, e.g.*, HENRY BROUGHAM, PRACTICAL OBSERVATIONS UPON THE EDUCATION OF THE PEOPLE, ADDRESSED TO THE WORKING-CLASSES AND THEIR EMPLOYERS (1825), reprinted in 8 WORKS OF HENRY LORD BROUGHAM 417, 419 (Edinburgh, Adam & Charles Black 1872) (“The first method, then, which suggests itself for promoting knowledge among the poor, is the encouragement of cheap publications; and in no country is this more wanted than in Great Britain, where, with all our expertness in manufactures, we have never succeeded in printing books at so little as double the price required by our neighbours on the continent.”); *see also* SEVILLE, *supra* note 158, at 52–53 (summarizing Brougham’s involvement in organisations promoting cheap and accessible education and his commitment to the preservation of cheap education while in Parliament).

238. JOHN MCGILCHRIST, THE LIFE & CAREER OF HENRY, LORD BROUGHAM 222 (London, Cassell, Petter & Galpin 1868).

239. 63 PARL. DEB., H.L. (3d ser.) (1842) 805.

240. Copyright Act, 1842, 5 & 6 Vict., c. 45.

limited term.²⁴¹ Both the Act of Anne and *Donaldson* had become talismans, lucky charms, counters—to be fought over, seized, and used as potent weapons by whichever side was holding forth. Disagreements as to copyright's purpose and priorities remained unresolved, as participants in the debate continued to argue over the correct balance between authors' rights and the interests of the public.

IV. FOREIGN AUTHORS AND THE STATUTE OF ANNE

A further important aspect of copyright law required judicial consideration of the Act of Anne's aims. This was the question whether foreign authors could obtain copyright under its terms.

Early cases on copyright for foreign authors had focused on the act of first publication in Britain and compliance with the requirements of the Statute.²⁴² They also considered the purposes of the Statute of Anne, particularly as expressed in the preamble. In *Clementi v. Walker* (1824), Justice Bayley observed: “[T]he British Legislature must be supposed to have legislated with a view to British interests and the advancement of British learning.”²⁴³ Similarly, in *Guichard v. Mori* (1831), Lord Brougham (now Lord Chancellor) noted that the legislature “encourages the importation of foreign works; it wishes to keep open the avenues of knowledge.”²⁴⁴ Again, in *Chappell v. Purday* (1845), Chief Baron Pollock was confident that the Act of Anne and the 1814 Copyright Act:

[W]ere passed for the encouragement of learning and the arts, by ensuring to authors, artists, and inventors, the reward of their labours. In their language the acts are general; but primâ facie it must be intended that a British

241. Curtis's copyright treatise captures this view:

It is clear, that there was such a thing as literary property in England, before the reign of Queen Anne; and it is equally clear that in the years 1769 and 1774, in the cases of *Millar v. Taylor*, and *Donaldson v. Becket*, this property was ascertained and declared to have been a right at common law, and consequently it must have existed ever since the introduction of printing into England. The last of these cases, if the answers of the judges are the proper *criteria* of the decision, decides only that the common law right had been taken away by the statute of Anne.

GEORGE TICKNOR CURTIS, A TREATISE ON THE LAW OF COPYRIGHT 75 (London, A. Maxwell & Son 1847).

242. *Bach v. Longman*, (1777) 98 Eng. Rep. 1274 (K.B.); 2 Cowp. 623; *Clementi v. Walker*, (1824) 107 Eng. Rep. 601 (K.B.); 2 B. & C. 861; *Guichard v. Mori*, (1831) 47 Eng. Rep. 1134 (Ch.); 2 Coop. T. Cott. 216; *D'Almaine v. Boosey*, (1835) 160 Eng. Rep. 117 (K.B.); 1 Y. & C. Ex. 288.

243. *Clementi*, 107 Eng. Rep. at 604, 2 B. & C. at 867–68.

244. *Guichard*, 47 Eng. Rep. at 1134, 2 Coop. T. Cott. at 216.

Legislature means only to protect British subjects, and to foster and encourage British industry and talent²⁴⁵

The same approach prevailed in *Boosey v. Purday* (1849).²⁴⁶

However, in *Boosey v. Jefferys* (1851), reversing a Court of Exchequer decision, Lord Chief Justice Campbell took an opposite view:

[W]e see no sufficient reason for thinking that it was the intention of the legislature to exclude foreigners from the benefit of the Acts passed for the protection of literary property. . . . Assuming that the legislature looked only to the enlightenment of the kingdom of Great Britain, without any general regard for the republic of letters, may it not be highly for the encouragement of learning in this country, that foreigners should be induced to send their works composed abroad, either in English or in a foreign language, to be first published in London?²⁴⁷

Lord Campbell's opinion did more than emphasise the importance of the protection of literary property in the legislative scheme. It also made it clear that (although the case did not need him to decide the point) he was "strongly inclined to agree with Lord Mansfield and the great majority of the Judges, who . . . declared themselves to be in favour of the common-law right of authors."²⁴⁸

His view did not prevail.²⁴⁹ On appeal the House of Lords reversed the decision.²⁵⁰ In *Jefferys v. Boosey* (1854), the conclusion was that the Act of Anne was intended to advance the interests of British subjects, although this would allow a resident foreigner to be covered by the Statute (as a British subject for the time being).²⁵¹ The question of the common law right was again debated. Lord Brougham was clearly of the view that there had

245. *Chappell v. Purday*, (1845) 153 Eng. Rep. 491 (Exch.) 497; 14 M. & W. 303, 317–18.

246. *Boosey v. Purday*, (1849) 154 Eng. Rep. 1159 (Exch.) 1163–64; 4 Ex. 145, 154–57.

247. *Boosey v. Jefferys*, (1851) 155 Eng. Rep. 675 (Exch.) 680–81; 6 Ex. 580, 593–94.

248. *Id.* at 680, 6 Ex. at 592. For a fuller account of these cases, with particular reference to the common law right, see DEAZLEY, *supra* note 12, at 42–55.

249. Although, Lord Campbell had at least one supporter. Speaking from the bench in 1852, Talfourd J. interrupted to contradict counsel's argument that since *Donaldson v. Becket* it was probable that authors had only a statutory right: "The great majority of the judges in that case thought that there was copyright at common law, and that it was limited by the statute of Anne; and so the House of Lords held. Copyright was dealt with as property long before the statute of Anne." *Novello v. Sudlow*, (1852) 138 Eng. Rep. 869 (C.P.) 871; 12 C.B. 177, 181. Jervis C.J. intervened, instructing counsel to assume, for the purposes of argument, that there was no copyright at common law. *Id.*

250. *Jefferys v. Boosey*, (1854) 10 Eng. Rep. 681 (P.C.) 752; 4 H.L.C. 815, 996 (appeal taken from Exch.).

251. *Id.* at 748–49, 4 H.L.C. at 986–88.

never been a common law right, and Lord St. Leonard's opinion indicated the same.²⁵² The Lord Chancellor, Lord Cranworth, was more ambivalent, but the decision to allow the appeal was unanimous.²⁵³ Nevertheless, this strong decision did not prevent further discussion of the common law right. It seemed as if nothing would end that debate.²⁵⁴ However, a more positive attitude to foreign authors emerged in *Routledge v. Low* (1868).²⁵⁵ This case, unlike *Jefferys*, was decided on the 1842 Copyright Act. The Lord Chancellor, Lord Cairns, considered that the policy and wording of that more recent Act clearly covered the first publication of work by an alien, wherever resident, and of whatever nationality.²⁵⁶ He explained away *Jefferys* thus:

[I]t is impossible not to see that the *ratio decidendi* in that case proceeded mainly, if not exclusively, on the wording of the preamble of the statute of *Anne*, and on a consideration of the general character and scope of the legislation of *Great Britain* at that period. The present statute has repealed that Act, and professes to aim at affording greater encouragement to the production of literary works of lasting benefit to the world. And accepting the decision of this House as to the construction of the statute of *Anne*, it is, I think, impossible not to see that the present statute would be incompatible with a policy so narrow as that expressed in the statute of *Anne*.²⁵⁷

Lord Westbury agreed, emphasising (as had Lord Cairns) that the benefit to the foreign author was incidental to the primary benefit conferred on the British public.²⁵⁸ Lord Cranworth and Lord Chelmsford both preferred a narrower reading, which required residence within the U.K. or its dominions (this being the area in which the legislation had conferred copyright).²⁵⁹ This narrower view was preferred in *Low v. Ward* (1868).²⁶⁰

In these cases, decided a century and a half after the Act of *Anne* was passed, the Statute's preamble was made to function in a new context. These questions had not been anticipated in 1709. It became necessary to consider whether "the encouragement of

252. *Id.* at 741, 744, 4 H.L.C. at 969, 977.

253. *Id.* at 692, 4 H.L.C. at 841–42.

254. See DEAZLEY, *supra* note 12, at 64–97 (surveying the literary works published after *Donaldson v. Becket* and *Jefferys v. Boosey* on the issue of a common law right).

255. *Routledge v. Low*, (1868) 3 L.R.E. & I. App. 100 (H.L.) (appeal taken from Ch.).

256. *Id.* at 111.

257. *Id.* at 111–12.

258. *Id.* at 119.

259. *Id.* at 112–13, 115–17.

260. *Low v. Ward*, (1868) 6 L.R.Eq. 415 (Ch.) 418.

learning” should be interpreted narrowly or expansively in these novel circumstances. Did this phrase cover only the learning of individuals producing copyright works, or did it include the public more widely? Could foreign authors be brought under this umbrella, and, if so, by what means? Some judges were willing to offer a more purposive reading than others, for reasons of policy or even of principle. The preamble was sufficiently flexible, potentially to accommodate all of these readings. The outcome of this line of case law was far from certain and was dependent on judicial construction. The Act of Anne here served more as a general guide than as an accurate yard stick.

V. CONSOLIDATION OF COPYRIGHT LAW—THE WORK OF THE ROYAL COMMISSION AND BEYOND

The need for a coherent and comprehensive copyright law was evident long before it could be achieved. Talfourd’s 1837 bill sought to consolidate all the then-existing copyright statutes and to add international copyright law to the package. His ambitions were seriously curtailed (for a number of reasons), and the 1842 Copyright Act was largely limited to literary copyright. The 1842 Act also bore the marks of the compromises necessary to achieve its passage. Although the Act was generally welcomed by contemporary commentators, it was never a vehicle intended to be viable for the long term. Nevertheless, it had to serve as such and was not repealed until 1911.

Throughout the second half of the century, several efforts were made to improve matters. The 1857 Copyright Bill was a government-sponsored measure, consolidating all fourteen pre-existing copyright Acts, including international copyright.²⁶¹ Customs officers had been facing difficulties as they attempted to enforce conflicting and contradictory enactments.²⁶² Felix Hamel, Solicitor for Her Majesty’s Customs, was asked to draw up a bill, which sought merely to consolidate the existing law.²⁶³ Other events preoccupied the government, and the project was deferred. In 1864 Adam Black announced his intention to bring in a private copyright consolidation bill.²⁶⁴ Black was a successful

261. Copyright Acts Consolidation Bill, 1857, H.C. Bill [142], cl. 1, sch. A.

262. *Minutes of Evidence*, H.C. (1864), in SELECT COMMITTEE ON THE COPYRIGHT (NO. 2) BILL, REPORT, 1864, H.C. 441, at 7 [hereinafter *1864 Minutes of Evidence*] (statement of Felix John Hamel).

263. FELIX JOHN HAMEL, *THE LAWS OF THE CUSTOMS* 38–39 (London, Butterworths 1854).

264. MEMOIRS OF ADAM BLACK 221 (Alexander Nicolson, ed., 2d ed. Edinburgh, Adam & Charles Black 1885).

publisher; he held the copyright of the *Encyclopaedia Britannica* and of Sir Walter Scott's novels.²⁶⁵ Although an interested participant with a keen practical knowledge of the issues, Black found the problems more complex than he had envisaged. He withdrew his original bill and focused on a version of the 1857 consolidation.²⁶⁶ This reached a select committee, chaired by Black himself, but nothing was achieved. The report noted "the difficulty and complication of the inquiry involved in the Bill."²⁶⁷

Some of these complications may be attributed to the undoubted problems posed by the subject matter being considered. For example, there was wide disagreement as to whether, and, if so, to what extent, fine art, architecture, and photography should be protected by copyright.²⁶⁸ But other difficulties sprang from the uncertainties regarding the nature and purpose of copyright, which remained unresolved and highly contentious, as can be seen in the Report of the Royal Commission, published in 1878. The report noted that:

The common law principles which lie at the root of the law have never been settled. The well-known cases of *Millar v. Taylor*, *Donaldson v. Becket*, and *Jefferies v. Boosey*, ended in a difference of opinion amongst many of the most eminent judges who have ever sat upon the Bench.²⁶⁹

The report did not discuss the history of copyright law at any length, nor was it willing to reflect on the "principle" of copyright law. The Commissioners were in "no doubt that the interest of authors and of the public alike requires that some specific protection should be afforded by legislation to owners of copyright."²⁷⁰ This position might be seen as an attempt to draw a line under customs and arguments of the past, and instead to insist on a forward-looking legislative strategy—one drafted according to the needs of the modern world. Several of those who gave evidence to the Commission took this view. Sir Charles Trevelyan was a distinguished British administrator, trustee of Macaulay's copyrights, and an author in his own right.²⁷¹ In the

265. *Id.* at 156.

266. *1864 Minutes of Evidence*, *supra* note 262, at 7–8 (statement of Felix John Hamel); *MEMOIRS OF ADAM BLACK*, *supra* note 264, at 221.

267. SELECT COMMITTEE ON THE COPYRIGHT (NO. 2) BILL, REPORT, *supra* note 262, at 3.

268. FEATHER, *supra* note 13, at 192–93.

269. COPYRIGHT COMMISSION, REPORT OF THE COMMISSIONERS, *supra* note 7, at vii.

270. *Id.* at viii–ix.

271. *Minutes of the Evidence Taken Before the Royal Commission on Copyright*, H.L. & H.C., at 1 (1878) [hereinafter *1878 Minutes*] (statement of Charles E. Trevelyan); *Trevelyan, Sir Charles Edward (1807–86)*, in CHAMBERS'S BIOGRAPHICAL DICTIONARY 924, 924–25 (David Patrick & Francis Hindes Groome eds., Philadelphia, J.B. Lippincott Co. 1898).

early 1870s, Trevelyan had backed proposals that local colonial publishers should have a right to republish British copyright works on payment of a fixed royalty and had met fierce opposition from the publishing establishment.²⁷² He remained of the opinion that fundamental change was necessary: “From the example of England monopolies of copyright works were generally established. It seemed a simple and obvious way of remunerating authors by means of a monopoly, but it does not suit the present time.”²⁷³

Thomas Henry Farrer was another witness who preferred to look forwards rather than backwards. Trained as a barrister, now Permanent Secretary to the Board of Trade, Farrer was exceptionally familiar with the recent political and legislative history of copyright, having made it one of his particular interests.²⁷⁴ He was appointed a member of the Commission initially, but the demands of his office led to his resignation. Instead, he acted as an adviser. A committed free trader, Farrer was heard at length by the Commissioners. He described the history of the law as “very curious,” and, though clearly well aware of the debates regarding the nature of literary property, described the controversy as “exhausted”:

It is . . . quite unnecessary to enter upon a discussion of these abstruse points of history and jurisprudence. It is quite clear that the law can create and has created a property in a monopoly of this kind . . . and can create a limit to that monopoly. The real question is how to give to authors the amplest encouragement and reward without imposing on the public a higher price or more onerous conditions than are necessary for that purpose.²⁷⁵

Farrer believed that the wider reading public would benefit from cheap editions, which would sell in high volume.²⁷⁶ Like Trevelyan, he would have liked to see a right of publication subject to a royalty anywhere in the world.

Others continued to look to history for their ideas. One of the most discussed topics within domestic law was the appropriate length of term for copyright in books. Several witnesses were willing to declare themselves in favour of perpetual copyright.

272. *1878 Minutes*, *supra* note 271, at 1–2 (statement of Charles E. Trevelyan); see ALEXANDER, *supra* note 17, at 144 (discussing publishers’ opposition to the Foreign Reprints Act and similar schemes).

273. *Id.* at 4.

274. *Id.* at 146–47.

275. *Id.* at 203.

276. *Id.* at 202.

Alexander Macmillan, a well-known and powerful publisher, stated: “I think a perpetual copyright is the best remedy for the evils which exist.”²⁷⁷ Macmillan believed that literary property should be treated in just the same way as all property.²⁷⁸ Charles H. Purday, another publisher, expressed the same view:

I think that all the laws connected with copyright are unjust, on this ground, that the property in a man’s brains should be equal to that in land or in money. I think it should be perpetual, and he should be enabled to lease it at certain periods, he and his family. You see the law has literally stopped the perpetual right of an author. The Act of Anne took away that which the author had before.²⁷⁹

The chairman, Sir John Manners, appeared a little irritated by this historical complaint and asked whether the common law right, “which it is supposed existed,” was really as valuable to an author as the present statutory right—the implication being that the former was not readily enforceable. Purday responded robustly, “I think it was more valuable to him to do as he liked with his things.”²⁸⁰ The point is not whether the positions of these particular witnesses were well argued or even tenable. What is striking is that interested witnesses continued to articulate such opinions, even though the law had apparently resolved these matters against them many decades previously. Those holding these views proved remarkably stubborn in defence of them.

The Commission took evidence for an entire year, and their report was not issued for a full year after that.²⁸¹ It was a thorough and careful investigation of the topic. The Commission made a number of important recommendations. With respect to domestic copyright, their first recommendation was that “the law on this subject should be reduced to an intelligible and systematic form.”²⁸² Its view was that copyright term should be based on the life of the author plus a fixed term of years; thirty was thought “[u]pon the whole” most suitable.²⁸³ However, a number of Commissioners were unwilling to concur with this recommendation, preferring a fixed term from registration.²⁸⁴ Other domestic matters were also appraised with a view to

277. *Id.* at 17.

278. *Id.*

279. *Id.* at 195.

280. *Id.*

281. *Id.* at iii–iv.

282. COPYRIGHT COMMISSION, REPORT OF THE COMMISSIONERS, *supra* note 7, at viii.

283. *Id.* at xi.

284. *Id.* at liv, lviii–lvii.

improvement: performing right, dramatisation right, and abridgements.²⁸⁵ The existing system of registration, still in the hands of the Stationers' Company, was criticised.²⁸⁶ The Commissioners proposed combining registration and deposit at the British Museum and reducing the obligation to a single copy.²⁸⁷ Colonial and international copyright were also extensively discussed, with associated recommendations.²⁸⁸ Although all except one of the Commissioners was willing to sign the report, nine of the fourteen signatures were qualified by a dissent, note, or a separate report.²⁸⁹ Yet again, strong differences of opinion on fundamental aspects of copyright had been made evident.

Nevertheless, there was broad agreement that something needed to be done and that the Commission's carefully considered conclusions offered the best route forward. Lord John Manners did attempt to implement the Commission's recommendations in the 1879 Copyright Bill.²⁹⁰ But this fell with Disraeli's government. Difficulties with colonial and international copyright postponed further action until 1890.²⁹¹ Hoping that recent developments in these fields might make the moment opportune, the Society of Authors' Copyright Committee drafted a bill to amend and consolidate copyright.²⁹² It was based on Lord John Manners's 1879 bill, and thus on the Royal Commission's recommendations. It was given to Lord Monkswell, an eminent and distinguished lawyer, to present in the House of Lords.²⁹³

Introducing the second reading of what became the 1891 Copyright Bill, Lord Monkswell remarked unfavourably on the length of time that had elapsed since the Royal Commission's

285. *Id.* at xv–xvi.

286. *Id.* at xxiii–xxiv.

287. *Id.* at xxiv.

288. *Id.* at xxx–xliv.

289. *Id.* at iii, xlv.

290. 248 PARL. DEB., H.L. (3d ser.) (1879) 1628–29.

291. See FEATHER, *supra* note 13, at 193–95 (observing that while the Commission's report touched on colonial and international problems it was only after the Berne Convention of 1886 and the American Chase Act in 1891 that these international difficulties were resolved).

292. G.H.T., *The Work of the Society: A Retrospect*, THE AUTHOR, Oct. 1, 1901, at 4, 5, reprinted in 12 THE AUTHOR (Walter Besant ed., 1903).

293. *Literary Property*, THE AUTHOR, Jun. 1, 1897, at 4, reprinted in 7 THE AUTHOR (Walter Besant ed., London, Horace Cox 1897). Robert Porrett Collier, 1st Baron Monkswell, had been Solicitor-General, then later Attorney-General, and was at this time a member of the Judicial Committee of the Privy Council. Collier, *Robert Porrett, Lord Monkswell (1817–1886)*, in 11 DICTIONARY OF NATIONAL BIOGRAPHY 353, 353–54 (Leslie Stephen ed., New York, MacMillan & Co. 1887).

report.²⁹⁴ Although he acknowledged that copyright law was bristling with points of difficulty, he considered this no reason to shirk the necessary task of consolidation and amendment. He reviewed the legislative history very dryly:

Now, I have said that the muddle began with the Statute of Anne. One would have thought it was not very easy to begin with a muddle, because that was the first Statute passed, but the muddle began in this way, that the Statute of Anne was apparently passed by a Legislature who had evidently not the slightest idea that there was any Law of Copyright in existence at all, and it so happens that it was more than 60 years before the lawyers could decide whether the Common Law of Copyright was superseded by the Statute of Anne, or whether the Statute of Anne was in addition to the Common Law rights. At least this question was finally settled by the House of Lords, when it was settled, on the opinion of six Judges against five, in favour of the former view; but Lord Mansfield, who was one of the Judges, being a Member of your Lordships' House, did not give his opinion with the other Judges; if he had, the opinion of the Bench would have been absolutely equally divided, as he agreed with the minority. One would have thought that the Legislature would have taken warning by that, and that after an episode of that sort, draftsmen would have been employed, who at all events, knew something of the law which they sought to modify by Statute. But we find that the draftsmen in the time of Queen Victoria show absolutely and precisely the same ignorance as the draftsmen of the time of Queen Anne, and that they fell into precisely the same error as the draftsmen of the former reign.²⁹⁵

Yet again, the same familiar presentation of the narrative was offered: common law copyright was taken away by the Statute of Anne, although the matter was determined on the basis of a majority so close as to introduce doubt as to the validity and worth of the result.²⁹⁶ Lord Monkswell in effect sought to

294. See 353 PARL. DEB., H.C. (3d ser.) (1891) 442–43 (noting that “since this Report of 1878 was issued, nothing has been done to amend the Law of Copyright,” outside of international and musical copyright).

295. *Id.* at 439. By “the same error” Lord Monkswell meant, lack of clarity in the relationship between any common law right and the statutory right. In the 1842 Act, this affected dramatic copyright. See generally Lord Monkswell, *Copyright Reform*, 23 L. MAG & REV. 195 (1898) (discussing copyright reform and the principal recommendations of the Royal Commission).

296. Consider the characteristically rebarbative summary of author Charles Reade: “Thus these lucky knaves, the pirates, got a sham majority of the judges to defy the contemporaneous and continued interpretation of a statute sixty years old.” Charles

begin again, taking the Royal Commission's report as the measure's baseline, rather than tracing the history of the provisions back to their legislative roots.²⁹⁷ The 1891 bill did not progress, however. There was strong government resistance to any measure.²⁹⁸ The difficult topics of colonial and international copyright were matters under live consideration, and, in deference to these considerations, Lord Monkswell agreed to proceed no further with his bill.²⁹⁹ With hindsight this was generally agreed to be a good thing, given its inherent defects.

No government bill was offered in its stead, though, and in 1896 the Society of Authors decided to draft a small amending bill, leaving the task of consolidation for another day. It was a short shopping list of the most urgent changes, each not materially different from its equivalents in Lord John Manners's 1879 bill and Lord Monkswell's 1891 bill. This became the 1897 Copyright (Amendment) Bill.³⁰⁰ Lord Monkswell was again in charge, and the bill was referred to a select committee. There was no mention of the Statute of Anne either in the evidence or the debate. This was presumably because specific changes to detailed points of substantive law were being discussed, rather than large principles. The bill was amended to take account of points made, and it was hoped that it would pass in the following session. It was reintroduced, but faced competition from a new consolidating bill drafted by the Copyright Association.³⁰¹ Both bills were referred to the same select committee (1898). Much evidence was taken, and witnesses were examined clause by clause on technical matters. There were many detailed references to the 1842 Act and how its provisions might be amended or improved. The Act of Anne was mentioned in passing only and,

Reade, Letter to the Editor, *The Rights and the Wrongs of Authors III*, PALL MALL GAZETTE, July 20, 1875, at 4.

297. But see the persisting doubts of the legal author, Daniel Chamier:

[B]oth authors of writings and the public have learned to regard it as just and desirable that property in published literature should pass from the rightful owner and original creator to the public, after a certain limited and prescribed period of enjoyment has elapsed.

The desirability may be admitted; but it is difficult indeed to reconcile to one's sense of justice a system of deprivation of personal rights, even when, as in this case, the object is to ensure to the public a certain and perpetual access to all writings worthy of perusal.

D. Chamier, *The Ethics of Copyright*, WESTMINSTER REV., Jan.–June 1891, at 124, 126–27.

298. See 353 PARL. DEB., H.C. (3d ser.) (1891) 450–54, 457–59 (detailing objections to Lord Monkswell's introduction of his bill).

299. *Id.* at 451–52, 458–60.

300. G.H.T., *supra* note 292, at 4.

301. *Id.* at 5.

on this evidence, appeared to have been superseded.³⁰² There is no entry for the Act in the index to evidence.³⁰³ The select committee could not complete its work during the session. In 1899 another select committee considered another pair of copyright bills, this time split thematically. Again, much detailed evidence was heard and discussion of the clauses was technical. The Act of Anne was not even mentioned, and again does not appear in the index.³⁰⁴ This is perhaps unsurprising, given that there was broad agreement that a copyright term of life plus thirty years, as recommended by the Royal Commission, was satisfactory.

During this period of deliberation, Augustine Birrell, as Quain Professor of Law at University College London, was giving a series of lectures on the law and history of copyright in books.³⁰⁵ Birrell was supportive of authors' rights, but he did not consider that perpetual copyright made any sense, particularly if the author and the author's heirs could assign copyright. He was unconvinced by its pedigree, describing it as "a thing faked up . . . for the benefit of the smug citizens . . . of the Stationers' Company."³⁰⁶ Nor did he believe that perpetual copyright would enhance the price paid in the market for literary works.³⁰⁷ Birrell was content with copyright as a creature of statute, with its duration set at a fixed term of years. He disliked the dual arrangement of the 1842 Act and thought the "life plus" element unfair.³⁰⁸ As to the length of the fixed term, he was flexible within a reasonable margin of choice. This position allowed him to view the Act of Anne with detachment, and even levity:

This well-meaning statute spoilt all. It gave away the whole case of the British author, for amidst all the judicial differences during the last century on copyright there was a steady majority of judges in favour of the view that but for the Statute of Anne an author was entitled to perpetual copyright in his published work. This right (if it ever existed) the Act destroyed.

302. See *Minutes of Evidence*, H.L. (1898), in SELECT COMMITTEE OF THE HOUSE OF LORDS ON THE COPYRIGHT BILL [H.L.] AND THE COPYRIGHT (AMENDMENT) BILL [H.L.], REPORT, 1898, H.L. 393, at 97 (statement of the Viscount Knutsford).

303. See SELECT COMMITTEE OF THE HOUSE OF LORDS ON THE COPYRIGHT BILL [H.L.] AND THE COPYRIGHT (AMENDMENT) BILL [H.L.], REPORT, *supra* note 302, app. at 303–04.

304. See SELECT COMMITTEE OF THE HOUSE OF LORDS ON THE COPYRIGHT BILLS [H.L.], REPORT, 1899, H.L. 362, app. at 38.

305. See BIRRELL, *supra* note 6, at 1 (describing the lectures in an introductory note to the publication).

306. Augustine Birrell, *Copyright*, 191 EDINBURGH REV. 141, 143 (1900).

307. *Id.* at 145.

308. *Id.* at 147.

Whether this judicial opinion as to the existence at Common Law of perpetual copyright in an author and his assigns was sound may well be doubted, and possibly if the House of Lords had held in *Donaldson v. Becket* that perpetual copyright had survived Queen Anne, an Act of Parliament would, sooner or later, have been passed curtailing the rights of authors. But how annoying, how distressing, to have evolution artificially arrested and so interesting a question stifled by an ignorant Legislature, set in motion not by an irate populace clamouring for cheap books (as a century later they were to clamour for cheap gin), but by the authors and their proprietors, the booksellers.³⁰⁹

Birrell may have thought that perpetual copyright was a phantom whose time had passed, but still there were loud voices willing to advocate it. In 1900 the House of Lords appointed yet another select committee.³¹⁰ Samuel Clemens—the celebrated author, Mark Twain—was the first witness.³¹¹ Asked to make a statement, Clemens immediately launched into a principled defence of perpetuity:

I think that the copyright laws of England and America are now so nearly what they ought to be that they need only one commercially trifling but morally gigantic amendment in order to become perfect; that emendation, I think, would be the removal of the 42 years' limit and the return to perpetual copyright.³¹²

His argument was founded on the parallel with tangible property. Clemens did acknowledge the potential weight of public policy, but argued that on expiry of a limited copyright term the public did not receive the book “as a free gift,” as many believed; instead only the author’s profit was transferred to the public, whilst the

309. BIRRELL, *supra* note 6, at 21–22. Compare Lord Thring’s reading:

Notwithstanding the passing of the Act of Anne, the illusion that a publisher had a perpetual right to the copyright in a book published by him still lingered in the minds of the trade, till the decision in the famous case of *Donaldson v. Beckett*, in 1774.

In that case it was decided that the perpetual right existed at common law, but was destroyed by the statute.

Lord Thring, *The Copyright Bills, 1900*, 47 NINETEENTH CENTURY: A MONTHLY REV. 1005, 1010 (1900).

310. SELECT COMMITTEE OF THE HOUSE OF LORDS ON THE COPYRIGHT BILL [H.L.] AND THE COPYRIGHT (ARTISTIC) BILL [H.L.], REPORT, 1900, H.L. 377, at v [hereinafter 1900 REPORT]. It was considering two copyright bills: the Copyright Bill 1900 (which was broadly the same as the previous version, though with some changes to International and Colonial provisions) and the Copyright (Artistic) Bill. *Id.* at iii.

311. *Minutes of Evidence*, H.L. (1900), in 1900 REPORT, *supra* note 310, at 2.

312. *Id.* at 3.

publishers retained their profits.³¹³ Later in his evidence, however, he characterised his position as “merely an ornamental piece of sentimentality,” and described the term proposed in the bill (life plus thirty years) as “qualified perpetuity itself.”³¹⁴ Clemens was the only witness to refer to the Statute of Anne, and then only obliquely.³¹⁵ Again, the Act of Anne does not appear in the index to the evidence.³¹⁶

None of these attempts at consolidation and improvement came to anything. The political problems seemed too great, and the differences on each side too entrenched. However, the government’s hand was forced by the Berlin revision of the Berne Convention.³¹⁷ Ratification seemed to be a necessity, whatever the potential difficulties. The task of shepherding a copyright bill through successfully was a considerable one, and this was well understood by the government. Lord Gorell was asked to chair a departmental committee to advise on the legislative changes necessary.³¹⁸

The Gorell Report began with explicit and respectful reference to the Royal Commission’s own report.³¹⁹ It restated the general observations which appeared at the beginning of the 1878 report:

7. The first observation which a study of the existing law suggests is that its form, as distinguished from its substance, seems to us bad. The law is wholly destitute of any sort of arrangement, incomplete, often obscure, and even when it is intelligible upon long study, it is in many parts so ill-expressed that no one who does not give such study to it can expect to understand it.

8. The common law principles which lie at the root of the law have never been settled. The well-known cases of *Millar v. Taylor*, *Donaldson v. Becket*, and *Jefferies v. Boosey*, ended in a difference of opinion amongst many of the most eminent judges who have ever sat upon the Bench.³²⁰

313. *Id.*

314. *Id.* at 7.

315. Clemens stated, “I believe there is only one book in the world which was been justly and fairly treated since Queen Anne’s time. The English Bible is the only existing book, so far as I know, which possesses the fair and honourable grace of perpetual copyright.” *Id.* at 4.

316. See 1900 REPORT, *supra* note 310, app. at 9–22.

317. See Greg Victoroff, *The Other Curse of the Werewolf: Interpreting Copyright Transfers Under U.S. and English Law*, 17 WHITTIER L. REV. 215, 226 (1995) (“Berlin Revision of the Berne Convention in 1908 eventually led to the adoption in 1911 of a single term of protection.”).

318. FEATHER, *supra* note 13, at 199.

319. LAW OF COPYRIGHT COMMITTEE, REPORT OF THE COMMITTEE ON THE LAW OF COPYRIGHT, 1909, [Cd.] 4976, at 3 [hereinafter 1909 REPORT].

320. *Id.*

This prominent citation of the 1878 report indicated solid agreement with the Commission's conclusion that copyright law should be made "intelligible and systematic" and also indicated that too much time had been allowed to elapse without progress towards this end. But further, this citation acknowledged an uncertainty and instability affecting the basic principles of copyright law. This continuing insecurity had hampered all attempts to reform copyright law since *Donaldson* was decided. The Gorell Committee's clear message was that it was time to move forward.

The question of copyright term was central to the committee's work because the Berlin revision of the Berne Convention required a term extending to the author's life plus fifty years.³²¹ A substantial number of the witnesses were in favour of this, and the committee as a whole was prepared to endorse their view.³²² However, one member, William Joynson-Hicks, dissented on this question. He objected that all but two of the witnesses called had a direct interest in the extension of copyright. Those opposing the extension he regarded as representing "the non-copyright division of the community."³²³ He regarded himself as part of this sector and said that he had seen no evidence, "after giving due allowance to the requirements of the general public," to support the proposed extension of term.³²⁴ Another member of the committee, E. Trevor Ll. Williams, also dissented.³²⁵ He remained unconvinced that the author's life should form part of the calculation, preferring a fixed term. He asked two senior publishers, Reginald Smith and William Heinemann, why their organisations did not advocate "absolute right in literary work, as opposed to copyright."³²⁶ Smith, evidently amazed at the question, thought that they would not consider this "within the origin of practical politics."³²⁷ But although Heinemann agreed it

321. Revised Berne Convention for the Protection of Literary and Artistic Works art. 7, Nov. 13, 1908, 16 U.S.T. 47, 51. The requirement was qualified by the rule of the shorter term. *Id.* at 51.

322. See 1909 REPORT, *supra* note 319, at 2–3, 16–17, 29.

323. *Id.* at 30–31.

324. *Id.* at 31.

325. *Id.* at 32.

326. LAW OF COPYRIGHT COMMITTEE, MINUTES OF EVIDENCE, 1910, [Cd.] 5051, ¶¶ 3160, 3187 [hereinafter 1910 MINUTES OF EVIDENCE]. Reginald Smith, K.C. was head of Smith, Elder & Co. In giving evidence to the Commission he was representing the Copyright Association, and he was also on the Council of the Publishers' Association. *Id.* ¶ 3141. William Heinemann was founder of the Heinemann publishing house. Linda Marie Fritschner, *Heinemann, William*, in 26 OXFORD DICTIONARY OF NATIONAL BIOGRAPHY 249, 250 (H.C.G. Matthew & Bryan Harrison eds., 2004). He gave evidence on behalf of the Publishers' Association, of which he was President. 1910 MINUTES OF EVIDENCE, *supra* ¶ 3164.

327. 1910 MINUTES OF EVIDENCE, *supra* note 326, ¶ 3161.

was “so far outside any practical achievement” that the Publishers Association had not even thought of it, he observed: “I think it has always been and always will be the ideal towards which we shall go, and which I think is in the minds of all those who attend the congresses.”³²⁸ Yet again, the question of literary property—at least, in some minds—resisted final decree.

The Gorell Committee endorsed the Convention’s approach on virtually all points and described the Berlin revision as “a very great advance” on the earlier texts.³²⁹ Copyright law had changed irrevocably from a domestic to an international context. The Act of Anne was not mentioned either in the report or the index to the evidence, and the committee did not look back beyond the Royal Commission.³³⁰ A similar approach was taken by Sydney Buxton, President of the Board of Trade, when introducing the second reading of the 1911 Copyright Bill. He emphasised three urgent reasons for reform: the need for domestic amendment, codification, and simplification; the need for changes to colonial copyright; and the need to embrace the international context by ratifying the Berne Convention.³³¹ Conceptually and structurally, these aims flow from the 1878 Royal Commission and not from the Statute of Anne or its consequences.

Nevertheless, some way through the debate, Joynson-Hicks referred to the Statute of Anne for the first time:

The first Copyright Act in England was passed in 1709, and from that time onwards there has been this perpetual struggle between an attempt on the part of the author to secure perpetual copyright and the right of the public to insist on having as far as possible a very early determination of the copyright.³³²

As has been mentioned, Joynson-Hicks was a member of the Gorell Committee and had disagreed with its conclusion on copyright term.³³³ His arguments bore a striking resemblance to those used against Talfourd’s proposals; in particular, that an author’s early works were protected for longer than his mature works, that it would prevent the publication of cheap editions and extracts in school books, and that authors should not be treated more favourably than inventors. He thought that extension of term was not only unnecessary, but, worse,

328. *Id.* ¶¶ 3187–3188.

329. 1909 REPORT, *supra* note 319, at 29.

330. 1910 MINUTES OF EVIDENCE, *supra* note 326, app. at 263, 268.

331. 23 PARL. DEB., H.C. (5th ser.) (1911) 2588–91.

332. *Id.* at 2615.

333. 1909 REPORT, *supra* note 319, at 30.

“a still further approximation to perpetual copyright, contrary, as I believe, to the interests of the public and the public domain.”³³⁴ The arguments put to the U.S. Supreme Court in *Eldred v. Ashcroft* are clearly prefigured here.³³⁵

VI. THE STATUTE OF ANNE—ICON OR RELIC?

In a recent case concerned with the nature of originality in copyright works, the Australian High Court observed:

[I]t is worth recollecting the longstanding theoretical underpinnings of copyright legislation. Copyright legislation strikes a balance of competing interests and competing policy considerations. Relevantly, it is concerned with rewarding authors of original literary works with commercial benefits having regard to the fact that literary works in turn benefit the reading public.

In both its title and opening recitals, the Statute of Anne of 1709 echoed explicitly the emphasis on the practical or utilitarian importance that certain seventeenth century philosophers attached to knowledge and its encouragement in the scheme of human progress. The “social contract” envisaged by the Statute of Anne, and still underlying the present Act, was that an author could obtain a monopoly, limited in time, in return for making a work available to the reading public.³³⁶

This gloss of the Statute of Anne’s aims is received as the truth by many commentators on contemporary copyright policy.³³⁷ It seeks to elevate and validate one view of copyright—as a legislative bargain—by appealing to what it presents as a venerable authority. But it is far from clear how far the Act of Anne should be treated as a reliable model for present day purposes, except in the most general sense. Even in its own day, the Act’s aims and purposes were hotly contested.

334. 23 PARL. DEB., H.C. (5th ser.) (1911) 2616. Joyson-Hicks referred to Samuel Clemens’s evidence to the 1900 Select Committee, and William Heinemann’s evidence to the Gorell Committee, both supportive of perpetual copyright. His point was that there were voices in favour of what he considered an even more extreme and unwelcome position than the proposed extension, and thus to emphasise the concrete nature of the dangers he perceived. *Id.* at 2615–16.

335. See *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (challenging the constitutionality of the 1998 Copyright Term Extension Act).

336. *IceTV Pty Ltd v Nine Network Austl. Pty Ltd* (2009) 254 ALR 386, 392 (Austl.) (footnotes omitted).

337. See, e.g., 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, 139 (2009) (“The new regime of the Statute of Anne . . . was a three-way bargain between author, booksellers, and the reading public.”).

When passed, the Statute of Anne did act as a new base line, and it did seek to recalibrate the interests of booksellers, authors, and the public. However, it became clear with hindsight that those passing the Act did not fully appreciate either the manner in which they had executed this or its consequences. One widely held understanding, relied on in commercial transactions for decades, was that the new Act offered copyright proprietors additional remedies and not replacement remedies.³³⁸ This reading was approved in *Millar*, but held to be incorrect in *Donaldson*. What Lord Camden termed “universal benefit” was favoured over the natural rights of authors and risks of a booksellers’ “monopoly.” However, there was no genuine resolution, in terms of the appropriate equilibrium, to be struck. The battle over common law copyright raged fiercely before and during these two great cases, and grumbled on for centuries, despite judicial determination at the highest level.

Early in the nineteenth century, the agitation concerning deposit copies reopened the debate about the Act of Anne’s purposes. One obvious reading was the literal one: “the encouragement of learned men to compose and write useful books.”³³⁹ But there was dispute as to precisely how this mechanism had been intended to work. Some claimed that the Act simply confirmed an author’s literary property. Some considered that copyright was a reward and inducement offered in return for authors’ labours. Some argued that the deposit requirement showed that there was a quid pro quo for the rights granted to the author. Others saw deposit as an aspect of “the encouragement of learning,” in the sense of making books accessible through public libraries. It should be emphasised that those who would have benefited at this time were members of a narrow, scholarly public—not a general reading public.

In the mid-nineteenth century, Talfourd’s attempts to increase copyright term restarted the same arguments, albeit in a different historical and political context. Justice to authors was again set against the public good, although now the reading public was significantly wider. On the whole, the particular precedent of the Act of Anne was less relevant in the debate than the various policy issues. A comparatively modest extension of

338. See Tyler T. Ochoa & Mark Rose, *The Anti-Monopoly Origins of the Patent and Copyright Clause*, 84 PAT. & TRADEMARK OFF. SOC’Y 909, 916–17 (2002) (describing the belief amongst London booksellers throughout much of the eighteenth century that the Statute of Anne provided only “supplemental remedies to an underlying common-law right that was perpetual”).

339. Statute of Anne, 1710, 8 Ann., c. 19.

term was granted, although the original request had been for the author's life plus sixty years. The issue of copyright for foreign authors again raised these questions. In this different context, the advancement of *British* learning, in particular, was held to be one purpose of the Act of Anne. This reading offered yet a further interpretation of public good.

As can be seen from the work of the Royal Commission on Copyright, towards the end of the nineteenth century the Statute of Anne was generally seen as having little direct relevance, although the disagreements regarding copyright policy continued, and reform was as problematic as ever. It was not until the Berlin revision of the Berne Convention offered a new and international context for copyright law, that legislative movement was again possible. A different balancing of interests was enacted, establishing a new term of copyright nearly as long as that refused to Talfourd because of fears for the reading public. The 1911 Copyright Act owes far more to the Berne Convention and to the Royal Commission's report than it does to the Statute of Anne.

Throughout three centuries of history, the Act of Anne and its preamble have been interpreted in many ways. Judicial readings have varied according to the context. Legislative readings have been adapted to meet prevailing circumstances or to support a particular point of view. The Act of Anne was just one legislative response to a perennial discussion. It offers no detailed blueprint to modern legislators and no easy resolution to the continuing challenges faced by those determining copyright policy in a digital world.