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Overview

“WHAT IS its history - its judicial history? It is wrapt in obscurity and uncertainty.” Common-law copyright was the subject of inquiry. The question, asked in the landmark case of American copyright law, *Wheaton v. Peters*, was posed by Circuit Judge Joseph Hopkinson in the lower court opinion.¹ The obscurity and uncertainty of which he spoke extended back into sixteenth-century English history. It was manifest in the first major English decision on copyright, *Millar v. Taylor*,² in 1769, sixty years after the enactment of the Statute of Anne, the English copyright act of 1709.³

The Statute of Anne, a successor to sixteenth- and seventeenth-century legislation in England, served as a model both for the early American states’ copyright acts and for their successor, this country’s first federal copyright act in 1790.⁴ Construing the federal act in 1834, the U.S. Supreme Court in the *Wheaton* case followed the second major English decision on copyright, *Donaldson v. Beckett*⁵ rendered in the House of Lords sixty years earlier, in 1774. The English line of descent for American copyright law was thus confirmed.

1. 29 Fed. Cas. 862, 871. (No. 17 486) (C.C.E.D. Pa. 1832). The opinion is also re-printed in 33 U.S. (8 Pet.) 725, Appendix II. (Brightly’s 3rd ed.)

2. 4 Burr. 2303, 98 Eng. Rep. 201.

3. 8 Anne, c. 1.9. The statute was enacted in the calendar year 1709 and became effective in April 1710. At this time, however, the beginning of the year in England was March 25. It was not until 1752 that January 1st was designated as the beginning of the year in England by the Calendar Act of 1750. 24 Geo. II, c. 23. By modern reckoning, the statute was both enacted and became effective in 1710.

4. 1. Stat. 1.24.

5. 4 Burr. 2408, 98 Eng. Rep. 257, 2 Bro. P.C. 129, 1. Eng. Rep. 837; 17 COBBETT’S PARL. HIST. 953-1003 (1813).

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While modern American copyright law is descended directly from the Statute of Anne, it is the earlier period of English copyright, so little understood in the *Millar* and *Donaldson* cases, that is of primary interest here. A convenient beginning date for a study of this earlier period is 1557, the date the members of the book trade received a royal charter and became the Company of Stationers of London. The events of the hundred-and-fifty-year period from the incorporation of the Stationers' Company to the enactment of the Statute of Anne were a prelude to the decisive events from 1709 to 1774, which determined the course of modern Anglo-American copyright. The line of historical development prior to the Statute of Anne has three principal features: the stationer's copyright, the printing patent, and government press control.

The inevitability of a need for protecting published works after Caxton introduced the printing press into England in 1476 makes it almost certain that, in a manner not entirely clear, members of the book trade had developed some form of copyright prior to receiving their charter of incorporation in 1557. The grant of a royal charter, however, gave added dignity and powers which the company used in giving definitive form to its copyright.

The term "copy right," however, was not used in the Stationers' Company records until 1701, and then only twice.⁶ In the early days of printing, the term "copy" was used by the stationers to mean what today is called "copyright" and it was also used as signifying the manuscript in much the same way the term "copy" is used today.⁷ The term "stationer's copyright" identifies the "right to copy" issued and regulated by the stationers, and is to be distinguished from the later statutory copyright provided by the Statute of Anne. The term "common-law copyright" - that is, a copyright recognized by the common-law courts - distinguishes that concept from the statutory copyright and the stationer's copyright. One of the major contro-

6. III EYRE & RIVINGTON, A TRANSCRIPT OF THE REGISTERS OF THE WORSHIPFUL COMPANY OF STATIONERS, 1640 -1708 A.D. 494, 496 (1914), hereafter referred to as EYRE & RIVINGTON.

7. “ ... entred by commaundment from master warden newbery vnder his own handwryting on ye backside of ye wrytten copie.” I EDWARD ARBER, A TRANSCRIPT OF THE REGISTERS OF THE COMPANY OF STATIONERS, 1554-1610 A.D. 440 (1875), here-after referred to as ARBER.

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versies in copyright history centered on the meaning and existence of the common-law copyright, which the House of Lords defined as the right of first publication in the Donaldson case.

The name “stationer’s copyright” comes from its progenitor, the Stationers’ Company, and it was a private affair of the company. The common-law courts had no part in its development, for it was strictly regulated by company ordinances. The Stationers’ Company granted the copyright, and since it was developed by and limited to company members, it functioned in accordance with their self-interest. This early copyright was deemed to exist in perpetuity, and the owner could publish the protected work, or assign, sell or bequeath the copyright, but only in accordance with company regulations. The primary purpose of the stationer’s copyright was to provide order within the company, which in effect meant within the book trade, since all members of the trade - bookbinders, printers, and booksellers (in modern terms, publishers) - belonged to the Stationers’ Company. Authors, not being members of the company, were not eligible to hold copyright, so that the monopoly of the stationers meant that their copyright was, in practice and in theory, a right of the publisher only. Not until after the Statute of Anne did the modern idea of copyright as a right of the author develop.

The basis of the printing patent, an exclusive right granted by the sovereign to publish a work, was the royal prerogative. Except for its source and the fact that it was

limited in time, the printing patent was a copyright very similar to the stationer's copyright. Indeed, it may have served as the model for that copyright, which it apparently preceded. The printing patent, too, protected the right of exclusive publication, and in the early days of the Stationers' Company, it was more desirable than the company's copyright: as a grant of the sovereign, the printing patent contained its own sanctions and the patents covered the most profitable works to be printed - bibles, prayer books, and school books, most notably the ABC, the first reading book placed in the hands of Elizabethan children and probably the most profitable book on the market.⁸ Although printing patents were not limited to

8. For a history of the printing of this book, see Anders, *The Elizabethan ABC with the Catechism*, XVI THE LIBRARY, 4th ser., 32 (:1935).

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members of the company, stationers were the most frequent grantees, and the company itself was the grantee of valuable printing patents from James I in 1603 and 1616. Thus, the value of the printing patent to the stationers during the early years of the period here involved, when the royal prerogative was at its height, was great indeed. Gradually, however, as the prerogative was circumscribed and as English writers increasingly produced enduring works, the stationer's copyright, unlimited in time, surpassed the printing patent in importance, until, by the end of the period, the latter was of little significance.

The efficacy of the stationer's copyright depended upon the power of the company to control printing and publishing, which helps to explain the role of censorship and press control in the early development of copyright. During almost the whole of the period from 1557 to 1709, a time of continuous religious struggle, censorship was a major policy of the English government. This policy made it convenient for the government to give the stationers large powers, which it did in increasing measure, in order

to have them serve as policemen of the press. The stationers were eager to receive these powers - indeed, actively sought them - for they meant a more effective control of the book trade and thus stronger support for their copyrights.

Prior to the Licensing Act of 1662,⁹ the government's acts of censorship were the Star Chamber Decrees of 1566, 1586, and 1637, in addition to three acts in the 1640s during the Interregnum. These acts of censorship, sustaining the Stationers' Company's copyrights, became the main support of the company's monopoly; and the final lapse in 1694 of the Licensing Act of 1662, the last of the censorship acts, meant more than the end of censorship: it meant also the end of legal sanctions for the stationer's copyright. The Licensing Act, based on the Star Chamber Decree of 1637, was a comprehensive statute, and in addition to the censor's license, it required the stationer's copyright for published works. Without this latter requirement, there was no law to prevent one from printing published works at will. The Stationers' Company, in anticipation of the end of censorship, had strengthened its ordinances concerning copyright several years earlier,

9. 13 & 14 Car. II, c. 33.

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but the demise of the parliamentary statute created uncertainty as to the rights of copyright owners. Even so, fifteen years passed before those most affected by the absence of a copyright law, the booksellers, succeeded in securing new legislation from Parliament - the Statute of Anne - to protect published works.

Popular resentment against their monopoly, not lack of effort, explains the delay, for notwithstanding the end of the Licensing Act, the booksellers adhered to their trade customs. The strength of their monopoly, based on the perpetual nature of the stationer's copyright and its limitation to stationers, and their control of the trade were such that the absence of an effective copyright law was more of an irritation than a threat to their position.

Even after the Statute of Anne made copyright immediately available to anyone, it was over sixty years before the issue of the booksellers' monopoly was finally resolved. Part of the delay there was because the new legislation gave renewed protection for the old copyrights, as the stationer's copyrights were then called, for a period of twenty-one years from the effective date of the act, 1710. Thus, the Statute of Anne protected the monopoly of the booksellers until 1731, when they began extensive efforts to gain new protection, continuing all the while to exercise their monopoly. The result was the "Battle of the Booksellers," a battle the monopolists finally lost in 1774 in *Donaldson v. Beckett*, which limited the protection of published works to the statutory copyright.

Since this country's first federal copyright in 1790 was modelled after the Statute of Anne, the U.S. Supreme Court in *Wheaton v. Peters*¹⁰ naturally followed the *Donaldson* case as precedent, and American copyright descends directly from the stationer's copyright through the Statute of Anne.

The obscurity and uncertainty of the history of common-law copyright which plagued Judge Hopkinson in 1834 have remained. The Supreme Court, in following the *Donaldson* case, effectively blunted efforts to gain recognition in this country for a common-law copyright of published works and limited the protection of works after publi-

10. 33 U.S. (8 Pet.) 591 (1834).

cation to statutory copyright, as in England. It is not surprising, then, that subsequently little inquiry has been made into the origin of rights the Supreme Court had held not to exist. Even so, such an inquiry might have been helpful for it would have shed light on the nature of copyright.

The modern concept of copyright is difficult, complex, and on the whole, unsatisfactory. In 1961, the Register of Copyrights, in connection with the fourth

general revision of the copyright law in some one hundred and fifty years, defined copyright as “a legal device to give authors the exclusive right to exploit the market for their works. It has certain features of property rights, personal rights, and monopolies. The principles... [of which] are not always appropriate for copyright.”¹¹ This statement points up the basic and continuing weakness of copyright law in this country, the absence of fundamental principles for copyright. As it implies, “No workable, unifying concept of copyright has yet been formulated.”¹²

The failure to formulate a workable, unifying concept of copyright can be traced to the events in England during the eighteenth century, when the major development in copyright history occurred. This development was the change of copyright from a right of the publisher to a right of the author. The change is not often perceived, for the history of modern copyright begins with the Statute of Anne, and the earlier developments are generally ignored. Moreover, the idea of copyright as an author’s right is now so firmly fixed in Anglo-American jurisprudence that superficially it may appear always to have been this way. But as history shows us, copyright began as a publisher’s right, a right which functioned in the interest of the publisher, with no concern for the author. Indeed, it existed as such for over a hundred and fifty years before it was changed into an author’s right, a right deemed to function primarily in the interest of the author. To appreciate the significance of the change, it is necessary to understand the nature of the stationer’s copyright, the statutory copyright pro-

11. Staff of House Comm. on the Judiciary, 87th Cong. 1st Sess., Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law 6 (Comm. Print 1961).

12. MORRIS EBENSTEIN, Introduction to STANLEY ROTHENBERG, COPYRIGHT LAW xix-xx (1956).

vided for by the Statute of Anne, and the reasons for and the consequences of the change.

Any attempt to state the precise nature of the stationer's copyright calls for a word of caution. Since businessmen developed and shaped it to their own ends, there was little or no regard for underlying principles or a sound theoretical basis for copyright. The records of the company on which one must rely are incomplete, and even if they were complete, one could not expect to find a statement of the concept of copyright articulated with satisfying precision. Moreover, the stationer's copyright existed for over a hundred and fifty years regulated not only by the common law, but by guild ordinances and acts of censorship. And, during this time, growth and change, resulting from events and forces directed by persons concerned with copyright only as a means to an end for themselves, were inevitable. Still, there is sufficient information upon which to base dependable conclusions.

Of certain facts about the stationer's copyright we can be relatively certain. As it was granted by the company, limited to members and regulated by company ordinances, a record of it was maintained only in the company registers. Copyrights were often owned jointly, were the publisher in the company registers. Copyrights were often owned jointly, were frequently pledged as security, and disputes over the ownership of copyright were determined by the governing body of the Stationers' Company, the Court of Assistants. Works subject to copyright included not only writings, but also maps, portraits, official forms, and even statutes. Meager as these facts are, when considered in context, they reveal much.

The stationer's copyright was strictly a right of the publisher and, unlike today's copyright, was almost certainly limited in scope. At one time during the period of its greatest use, there was an analogous printer's right, a right of the printer as copyright was a right of the publisher. The obviously limited scope of the printer's right, merely a right to print a work, gives a clue to the limited scope of copyright, after which it was almost certainly patterned. The scope of copyright was the right to publish a work, and no more, for the stationer's

copyright was literally a right to copy. The copyright owner did not own the subject work as such and was not free to alter it any more than the grantee of a printing patent was free to alter the work he was

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privileged by the sovereign to publish. The stationer's copyright, then, was a right to which a given work was subject rather than the ownership of the work itself as it is today, a point which bears further explanation.

Ownership consists of a series of rights of control over the subject of ownership: the right to use it, to alter it, to give it away, to sell it, to destroy it, and to prevent anyone else from doing likewise. It follows, then, that the fewer the rights, the more limited the ownership. A lease of a building, for example, gives one certain rights, but we do not usually think of these rights as constituting ownership, because they are limited. Even so, a perpetual lease would probably create such rights in the lessee as to make them a form of ownership, although ownership of another kind remained in the lessor.

The stationer's copyright can be analogized to a perpetual lease of personal property, a manuscript or copy, as it was called, for one specific purpose, that of publishing.

The right of publishing, however, did not vest the ownership of a work itself in the ordinary sense, for this would have given the holder of the right of publishing other rights incident to ownership. Since these other rights did not exist, not having been recognized by the law, the stationers owned only the right to publish, not the work itself. Thus, copyright itself was subject to ownership, but it was only a right to which the copyrighted work was subject. This, of course, left the ownership of the work itself in abeyance, a consequence of the fact that copyright was a concept created not by the common law, but by a special group for a special purpose, under special conditions. Rights of ownership must be defined and recognized by law, and there was no occasion for the law

either to recognize or define other rights that would have constituted complete ownership of the copyrighted work.

It is not likely that the stationers gave this point much thought, for from their standpoint, there was no need to. To them, copyright was an economic property, a right which protected their investment from competitors. As businessmen, they would not feel any need to claim an ownership which gave them the right to alter a copyrighted work or change it in any way. The limited use to which they could put a copyrighted work, the variety of works subject to copyright which

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they could not change if they wanted to, the joint ownership of copyrights, and the practice of pledging copyright as security all point to one basic fact: the integrity of copyright as only a right to publish a work was of paramount importance to stationers. To have recognized the right of a copyright owner to change the copyrighted work and acquire a new copyright would have endangered this integrity. It would have established the basis for a dangerous precedent, facilitating a practice whereby rival stationers could more easily, by changing a work, acquire a competing copyright, as occasionally happened. Moreover, the laws of censorship were an inhibiting factor in this regard, for the stationer's copyright was essentially a trade-regulation device which functioned not only in the interest of the publisher, but also in the interest of the government.

To say that the stationer's copyright was a right of limited scope, a right to which a given work was subject rather than the ownership of the work itself is not very satisfying from a legal standpoint. It implies a continuing inchoate property, a type of property upon which the common law did not look with favor. But the stationer's copyright was not a common-law concept at all; and to the stationers, the limited scope of their copyright was sufficient. It is when that copyright is compared with the modern copyright that the limited scope of the stationer's copyright is significant. Present day copyright, as an

author's right, embraces the entire property interest in a work. It gives the copyright owner, theoretically the author, the right to publish the work, to alter it, to change it in any way he chooses, to prepare derivative works, and to prevent others from doing likewise. Thus, the limited scope of the stationer's copyright suggests the question of the nature of the author's right in the period when the stationer's copyright flourished.

The nature of the author's rights recognized by the stationers is even more difficult to ascertain than the nature of the copyright itself. Superficially, the author gave up his rights in his works when he sold the manuscript to the stationer. But the limited scope of the stationer's copyright implies that the stationers recognized that only the author had a right to change or alter his work. Such a recognition would have been consistent with the stationers' self-interest in maintaining the integrity of copyright, and it would have interfered not at

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all with their monopoly. At the time, however, the problem of authors' rights was not sufficiently important to be a significant issue. Since only stationers were free to publish, the problem of monopoly existed only within the company itself, where the wealth of individual members would give them more power and the control of more copyrights than less fortunate members. And since the copyright owner was not free to alter or change the work, the author had no concern for protecting the integrity of his work, as there was nothing to do with it other than to print it. The problem of authors' rights thus did not become a significant issue until the eighteenth century, and then only because the booksellers made it so in an effort to perpetuate their monopoly after the Statute of Anne.

The Statute of Anne can be understood only when it is related to the history of events which preceded its enactment. That this has been done seldom, if at all, is

indicated by the phrase which is often used to identify the statute: the first English copyright act.

The Statute of Anne was not the first English copyright act, for the earlier Star Chamber Decrees, the ordinances of censorship during the Interregnum, and the Licensing Act of 1662 were copyright as well as censorship acts.

The enactment of 1709 was the first Parliamentary English copyright act, except for the ordinances during the Interregnum; and it was the first copyright act without provisions for censorship. The relationship of the Statute of Anne to the acts of censorship is made clear by the fact that it is modelled after the copyright provisions of two of those acts, the Licensing Act of 1662 and the Star Chamber Decree of 1637, with modifications to deal with the problem of monopoly.

The importance of understanding this early eighteenth-century statute, long since superseded by other legislation, is that its provisions were the foundation upon which the concept of modern copyright was built. And notwithstanding the other forces and events which shaped copyright, it is impossible to study the Statute of Anne in the light of its historical perspective without feeling that it was never properly interpreted, and that had it been construed correctly, modern American copyright law would rest on much sounder principles than it does.

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The central problem in analyzing the Statute of Anne is to determine the nature of the statutory copyright it provided for. From the perspective of today, one would almost certainly say that it provided for an author's copyright which embraced all of the author's rights in his work after publication. Yet, from the perspective of events preceding the enactment of the statute, such an interpretation is wholly untenable.

The statutory copyright, save in two respects, was intended to be no different from the stationer's copyright. At the time the Statute of Anne was enacted, there was only one concept of copyright known to the legislators -

the stationer's copyright. Their problem was not to create a new copyright, but to limit the old, in order to destroy the monopoly of the book trade by the booksellers - who, incidentally, were the lobbyists for the legislation.

In such a context, it is not realistic to think that the legislators were intent on enlarging or changing the scope of copyright, and the provisions of the statute bear this out. The mechanics for obtaining the statutory copyright were substantially the same as for obtaining the stationer's copyright. There were only two major differences between the two copyrights, and both differences struck directly at the booksellers' monopoly: the statutory copyright was limited to a term of fourteen years, with a similar renewal term available only to the author; and statutory copyright was available to anyone, not to stationers only. Thus, the statutory copyright was not to be limited to the members of a guild, and it was not to exist in perpetuity.

It is these two provisions, however, that were to give color to the subsequent idea that the statutory copyright was an author's, rather than a publisher's right. They meant that only the author could have a renewal term, and that the author could, for the first time, own the copyright of his work himself. On the first point, the author was being used as an instrument against the monopolists, to prevent them from having the renewal term. On the second, the author could own the copyright only by virtue of the fact that anyone was now eligible to hold copyright. The steps an author took to obtain a copyright for his own work were no different from those required for anyone else.

Finally, it should be remembered that the Statute of Anne continued the existing copyrights, the stationer's copyrights, for a period of twenty-one years. This feature of the act was undoubtedly in re-

sponse to the booksellers' argument that without such continued protection they would suffer economic ruin - a questionable assumption, but a valid argument. The

booksellers were to use it again when they sought new legislation.

The Statute of Anne was not primarily a copyright statute. Rather just as prior acts involving copyright were basically censorship act, the Statute of Anne was basically a trade-regulation statute. It was designed to insure order in the book trade while at the same time preventing monopoly. In one respect, the statutory copyright was to share a fate similar to that of the stationer's copyright: it was to be shaped by events and forces directed by persons concerned with copyright only as a means to an end for themselves and not for the author. The irony is not that this should have been so, but that in the process copyright should have come to be known as an author's right.

The purpose of the Statute of Anne, then, was to provide a copyright that would function primarily as a trade regulation device - acting in the interest of society by preventing monopoly, and in the interest of the publisher by protecting published works from piracy, as did the stationer's copyright. Yet, it was construed as providing for an author's right.

There were several reasons for this. The precise nature of the stationer's copyright was never appreciated by the common-law courts, which had no part in its development. Moreover, the Statute of Anne was not given a definitive construction until some sixty-five years after its enactment, when the House of Lords was concerned primarily with making it an effective instrument in destroying the booksellers' monopoly. During this interval, the booksellers continually represented copyright to the courts as an author's right - a tenable position, since the statute was beneficial to authors, as almost any statute designed to destroy the booksellers' monopoly was bound to be. More significantly, however, the stationers apparently never claimed the ownership of a work, as opposed to the ownership of copyright; and the common-law courts readily assumed this ownership to exist in the author as creator. The common-law judges thus easily equated copyright with this ownership, for they could not conceive

of copyright based on the nonownership of the subject work. Thus, by presenting the copyright to the courts as an author's right, the booksellers so

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effectively tied in the author with copyright that copyright became known exclusively as an author's right.

The story of how and why they did this is the story of the Battle of the Booksellers. After the expiration of the twenty-one-year period of grace provided for the stationer's copyright by the Statute of Anne, the booksellers sought to perpetuate their monopoly. First, they lobbied for new legislation from Parliament, and failing in this, they resorted to litigation. Their argument in the courts was simple and appealing - the author, they said, had a perpetual common-law copyright in his work, based on his natural rights, since he had created it. Having this common-law copyright, which existed independently of the statutory copyright, the author could assign it to the bookseller. This invariably he was alleged to have done, as it was booksellers and not authors who were litigating. Since the custom was for the author always to assign his rights to the bookseller, their strategy was obvious. Once the courts accepted the author's common-law copyright in perpetuity, the booksellers would have succeeded in reviving the stationer's copyright under a different name, and their monopoly would be safe, despite the limitations imposed by the Statute of Anne.

In spite of the transparency of their strategy, the booksellers almost succeeded. They successfully tied in their rights with the rights of authors, and once this was done, their arguments as to the natural rights of the author as creator of the work were appealing and difficult to refute. They did succeed, in 1769, in getting the Court of King's Bench in *Millar v. Taylor* to accept their argument by a vote of three justices to one. The outstanding opinion of the three justices was that of Lord Mansfield, who based his recognition of the author's common-law copyright wholly on the natural rights of the author, because, as he said, "It is just."

The *Millar* case was not appealed, and it was overturned by the House of Lords in the *Donaldson* case, five years later. The importance of the *Millar* case, however, is greater than its short existence as precedent indicates, for it was this case that firmly fixed the idea of copyright as an author's right. Even more significant is the fact that it recognized copyright under the common law as a natural right of the author.

Except for the *Millar* case, the idea of copyright as an author's

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right might have gone by the board, for the opinions in the *Donaldson* case carefully avoided the use of the term copy or copyright. The judges spoke instead of the right of "printing and publishing for sale." The choice of language may or may not have been fortuitous, but it was consistent with an effort to avoid the dilemma the judges faced. They were faced with the oppressive monopoly, which continued in flagrant disregard of the limitations imposed by the Statute of Anne; and with the idea, so firmly and clearly delineated in the *Millar* case, that an author as creator has natural rights in his works which should be recognized by the law. Their solution was simple: they acceded to the author's natural rights in his work until publication by acknowledging for the first time the so-called common-law copyright. They then limited his protection after publication to the statutory copyright.

Even after the *Donaldson* case, it would have been possible to concede, independently of statutory copyright, rights in the author based on the fact of his creation. Such a closely analyzed interpretation of the case, however, was not feasible without a clear understanding of the history of copyright, for after the *Donaldson* case, copyright itself was deemed to be a monopoly of a work, rather than the basis of the monopoly of the book trade. Here, too, the *Millar* case had its effect, for Justice Yates in his dissenting opinion had argued that while an author does have natural rights in his works he voluntarily forfeits

those rights to the world if he publishes the work without statutory copyright.

The ownership of the work itself, a matter held in abeyance under the stationer's copyright, was coming to be recognized as existing in the author. The fiction of voluntary forfeiture, however, provided a facile escape from the dilemma which emerged as copyright became an author's right: the idea that copyright was both a natural right of the author and a monopoly. It also obscured the basic points that the monopoly with which the lawmakers were concerned was not a monopoly of authors but of publishers, and that the monopoly of the book trade owed its existence as much to the monopoly of the Stationers' Company as to copyright.

Little, if any, consideration was given to the fact that recognition of rights in the author as creator of a work did not make it necessary to allow those same rights to the publisher or copyright owner. Here

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emerges what is probably a major consequence of the fact that the common-law courts had no role in the early development of copyright. That the common-law courts, given the opportunity, would have recognized such rights of the author is strongly indicated by the cases in the first three-quarters of the eighteenth century, showing that the English courts were genuinely sympathetic to the rights of authors. Indeed, the *Millar* case and the closeness of the *Donaldson* decision are prime examples. Unfortunately, however, by this time, copyright had been in existence well over a hundred and fifty years without the aid of the common law. When the opportunity arrived, it was too late. The courts no longer had time to work out in the careful case-by-case method of the common law, the problem of distinguishing and de-fining the rights of an author as creator from those of the publisher as entrepreneur. The custom was for the author to convey all his rights to the publisher; the problem was the booksellers' monopoly. The custom was too strong, the problem was too pressing. And the idea of copyright as a

monopoly of the work itself together with the idea that copyright is a natural right of the author remained to create the conceptual dilemma of modern copyright. This dilemma is the idea that an author has a natural right in his work, combined with the idea that after publication he possesses only a monopoly conferred by statute.

Subsequent lawmakers in the United States gave greater weight to the idea of copyright as a monopoly than to the idea of it as an author's natural right. But the idea that copyright is an author's right, in some vague measure based on his natural rights, continued to exist and had a subtle effect on the concept, for it enlarged the scope of copyright. While the publisher's right in a book has no basis other than contract, an author's right in his work, whatever form that right takes, is based on the fact of his creation. Lawmakers, both legislative and judicial, could say, as they did, that an author forfeited all rights in his work after publication if he did not obtain the statutory copyright. It would have been going too far, however, to say that the author's rights in his work as protected by copyright were limited to the exclusive right of publication. After copyright became an author's right, it was inevitable that it cease to be merely a right to which a given work was subject and that it come to embrace the author's entire interest in his work.

Copyright, however, was not limited to the author, and since the rights embraced in copyright were those of the copyright owner and not the author, the publisher benefited by the enlarged scope of copyright. The result was that copyright gave the copyright owner complete control of the copyrighted work. The problem of one type of monopoly was substituted for another.

The major consequence of the change of copyright from a publisher's to an author's right, then, was this: instead of being a limited right in connection with a work for an unlimited period of time, it became an unlimited right for a limited period of time. Unfortunately, the lawmakers passed over the desirable alternative which the

Statute of Anne might have been interpreted to provide - a limited right for a limited period of time.

Acceptance of this alternative would have had two results: it would have enabled the courts to deal directly with monopoly as a problem of publishers rather than authors; and it would have given the courts an opportunity, which they never had, to develop a body of law in the interest of the author as creator, to enable him to protect the integrity of his work. Such a body of law, which exists in civil-law countries under the name of moral right, is warranted on its own merits, for any creative endeavor is an extension of one's personality.

If a more practical justification is needed, however, it exists. A body of law recognizing the author's creative interest in his work would require a limitation of the scope of copyright, for it would require recognition of rights in the author independent of copyright. By limiting the scope of copyright, such a body of law would provide an effective weapon against the problem of monopoly, which has continually plagued copyright. Thus, a law recognizing the author's creative interest would be not only beneficial to the author; it would also be beneficial to society, for it would effectively limit the absolute control of a work which the copyright owner has today.

These points are discussed more fully in the final chapters, after the developments here sketched have been traced in detail. It may be appropriate, however, to answer now Judge Hopkinson's question, "What is its history-its judicial history?"

The answer is that there was no common-law copyright in the sense

which he spoke. Copyright was not a product of the common law. It was a product of censorship, guild monopoly, trade-regulation statutes, and misunderstanding. Judge Hopkinson's problem was that he did not ask the right question. If the following materials do not provide any answers, it is hoped that they

will at least enable the reader to ask the right questions. The problem must be perceived before the solution can be provided.