LITERARY COPYRIGHT REFORM IN EARLY VICTORIAN ENGLAND

THE FRAMING OF THE 1842 COPYRIGHT ACT

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CAMBRIDGE
UNIVERSITY PRESS

PUBLISHED BY THE PRESS SYNDICATE OF THE UNIVERSITY OF CAMBRIDGE
The Pitt Building, Trumpington Street, Cambridge, United Kingdom

CAMBRIDGE UNIVERSITY PRESS
The Edinburgh Building, Cambridge, CB2 2RU, UK
http://www.cup.cam.ac.uk
40 West 20th Street, New York, NY 10011–4211, USA
http://www.cup.org
10 Stamford Road, Oakleigh, Melbourne 3166, Australia

First published 1999

Printed in the United Kingdom at the University Press, Cambridge

Typeset in Imprint 10/12 pt [CE]

A catalogue record for this book is available from the British Library

ISBN 0 521 62175 5 hardback

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INTRODUCTION

The subject of this book is Serjeant Talfourd's back-bench attempt to reform the law of copyright, an attempt which eventually produced the Copyright Act of 1842. The idea of reform is potent in the history of England in the nineteenth century. It would be impossible to write a general history of the period without giving an account of the major constitutional reforms concerned with popular representation, which eventually transformed parliament. Yet other contemporary legislative reforms are arguably as striking, both in terms of their volume, and in terms of the changes which resulted. The many attempts to improve the law and its mechanisms make this period a significant one for legal history. In the decade following the 1832 Reform Act, approaches to government in the widest sense were re-examined and transformed. This process had protean qualities: striking though the direction and velocity of the immediate changes could be, they often represented only the first phase of lengthy trajectories.

Nevertheless, it would be foolhardy (and unduly Whiggish) to regard these changes as inevitable; they were the product of many complex and conflicting forces. Although nineteenth-century legislators did create a battery of significant reforms, the antecedents and characteristics of individual measures varied considerably. To take the example central to this book, the changes to copyright law which resulted from the 1842 Copyright Act were not overtly typical of a reforming brief. However, the efforts to promote the various copyright measures (which began in 1836) were profoundly affected by the prevailing mood of reform, and the methods and mechanisms associated with it. Talfourd had originally envisaged a thoroughgoing consolidation of all aspects of copyright, an aim which might have been thought consistent with general reforming objectives. Such an assumption ignores the

complex and varied character of reforming activity at this time. Copyright instead became characterised as harmful by a significant body of popular opinion, and a campaign of resistance was organised. After a lengthy battle, the bill's sponsors were forced to settle for the compromise effected by the 1842 Act.

Although it is possible to reduce the principle of reform to little more than a Benthamite slogan, this is to ignore the subtlety and pervasiveness of the concept. The Great Reform Act of 1832 has (and had) a well-developed popular image as the keynote reform of the period. Its symbolic importance was certainly considerable. In terms of practical results, however, the 1832 Act's reputation bears only limited examination: later reform Acts, and related legislation, were arguably more significant.[1] Inevitably, the close link between the legislative and constitutional aspects of parliamentary reform ensured ample publicity for any statutory changes in this area. This should not be allowed to obscure the many other social and economic reforms of the period, which often required implementing legislation.[2] In addition, there were deliberate attempts to render the law itself more coherent and accessible; specific legislative reforms covered many aspects of practice and procedure.[3]

[1] For details of these see, for example, John Cannon, *Parliamentary reform, 1640–1832* (Cambridge, 1973); Michael Brock, *The Great Reform Act* (1973); Norman Gash, *Politics in the age of Peel* (1953); Francis B. Smith, *The making of the second Reform Bill* (Cambridge, 1966); Norman Gash, *Pillars of government and other essays on state and society, c. 1770–c. 1880* (1986); Andrew Jones, *The politics of reform: 1884* (Cambridge, 1972); Martin D. Pugh, *The making of modern British politics, 1867–1939* (1982).

[2] For example, the Municipal Corporations Act 1835 began a process of local government reform which continued throughout the century. In another sphere, the New Poor Law Amendment Act 1834 made controversial changes intended to reduce expenditure. Other measures addressed a range of issues including public health and education, and also dealt with more general matters such as financial and administrative efficiency. Geoffrey B. A. M. Finlayson, 'The politics of municipal reform, 1835', *English Historical Review* 81 (1966), 673–92; Gillian Sutherland (ed.), *Studies in the growth of nineteenth-century government* (1972); Derek Fraser (ed.), *The new poor law in the nineteenth century* (1976).

[3] For example Peel's Acts, which consolidated the criminal law and reduced the use of capital punishment. A considerable programme of reforms resulted, both before and after the 1832 Reform Act. For confirmation see Holdsworth's catalogue of statutory changes (vol. XIII, ch. 4) which details an extraordinary list of interventions, large and small. Sir William Holdsworth, *A history of English law*, 16 vols. and index (1903–52); Leon Radzinowicz, *A history of English criminal law* (1948); William R. Cornish and Geoffrey de N. Clark, *Law and society in England, 1750–1950* (1989).

The notion of law reform is certainly not peculiar to the nineteenth century. It has always been necessary for the law to respond to society's needs, sometimes willingly, sometimes under pressure. Nevertheless, this period provides a unique presentation of this process. We are repeatedly offered a vision of reform as the 'spirit of the age', with conscious emphasis on utility, efficiency and humanitarianism. Such generalisations are in some ways helpful, yet can become parodic if attention to detail is lost. On a more technical level, it should be observed that the governments of this period were ground breaking in their extensive resort to statute law. The job of developing and adapting the law to a changing society had previously been left largely to the courts, which had gone about their task with subtlety and quiet skill. The process of legal reform by judicial precedent is a slow but constant process, usually gradual, and necessarily piecemeal. In this it is quite different from statute, which can change the face of the law in an afternoon. For grand schemes of consolidation or codification, statute law is essential. Talfourd's plans for copyright reform were, therefore, dependent on the passage of a bill.

The legislative history of literary copyright in England may be summarised fairly briefly. The sixteenth-century licensing system was born of Tudor desires to control the press. In 1557 Mary granted the Stationers' Company a charter, which allowed its members an effective monopoly on legal printing.[4] The system was remarkably resilient, and even survived throughout the Civil War, in form if not in fact. In 1662 Charles II restored the licensing system to strength, again with a view to maintaining Crown power over the press, but let it lapse in 1679. After a brief revival under James II, in 1695 parliament finally refused to extend the life of the licensing system, and chaos in the book trade was threatened. After repeated trade efforts, in 1710 the first English copyright statute was passed, often referred to as the Act of Anne. Described as an 'Act for the Encouragement of learned Men to compose and write useful Books', this gave a fourteen-year

[4] An entry in the Stationers' Registerer originally indicated that the book had been properly licensed, but soon came to indicate a quasi-proprietary right to the 'copy'. Thus 'copy' came to mean the sole right of printing publishing and selling (hence 'copy-right'), although the word is also used to refer to the work incorporated in the manuscript, and to the physical copy. For a fuller account see John Feather, *A history of British publishing* (1988).

term to all books registered with the Stationers' Company, with an additional fourteen years if the author was still living at the expiry of the first term. Although the right was granted to 'authors and their assigns', in practice it was invariably held by the bookseller. It was at first thought that the Act of Anne offered rights which were supplementary to a perpetual common law right of literary property, but in 1774 the famous case of *Donaldson* v. *Beckett* decided otherwise. The decision was followed by a long period of stagnation, broken in 1814 by a new Copyright Act which set the term at twenty-eight years, or the author's life if this was longer. It was this Act that Talfourd sought to change.

It is easy enough to describe copyright reform in a way which would suggest a parallel with a general Whiggish trajectory of reform. It is possible to see the 1814 Act as a breakthrough in terms of the author's place in copyright law, because for the first time the author's lifespan is an important element in the calculation of term. On this line of reasoning, the 1842 Copyright Act provided further improvement, setting the term to the author's life plus seven years, providing this was not less than forty-two years in total. The 1911 Copyright Act, enacting the Berne Convention's minimum requirement of the author's life plus fifty years, might then be the pinnacle of a reform movement to provide author-centred copyright legislation, where entrepreneurs at last rate second to the creative individual. However, such an analysis would be dangerously wrong, revealing sharply the dangers of isolating the law from its context. The influence of the reform movement was powerful, but not so crude.

Certainly many of the mechanisms of protest used in the parliamentary and other reform struggles were used again in the copyright campaign; both sides sought to lobby MPs and other influential figures, newspapers and the periodical press provided publicity, and the use of petitions was crucial. Yet there were other, distinct, sources of pressure. It is important to realise that the resistance to the early copyright bills came largely from print workers and publishers, because the changes to copyright were perceived as a threat to the print trade. It took time for this simple trade dispute to escalate, but eventually the debate encompassed a wider and far more explosive mixture of issues, including taxes on knowledge, popular education and free trade. Some of these issues had been linked to copyright previously, notably

copyright and censorship; other themes, at least in their presentation, were new.

As has been suggested, in some ways copyright law was an ideal target for reform. It was fragmented, incomplete, sometimes unclear, and it lacked the international dimension which was needed more and more urgently. The rapid changes in social and economic conditions were having a profound effect on the book trade. Markets were increasing significantly, but so was competition: the book trade had to adapt if it was to survive. Authors too were changing: their status increased as the popular market grew. Copyright was the bargaining counter which passed between the artist and the entrepreneur. A re-examination of copyright's aims and mechanisms might well have been timely.

Yet it is here that further parallels may be drawn between parliamentary reform and copyright reform. The process of parliamentary reform continued for decades, as different ideological models jostled for political primacy. Although a series of compromises were achieved, the concept of effective representation remained a matter of fierce disagreement. Similarly, there was no single goal for copyright reform, and even if agreement had been reached as to copyright's purpose, there was no obvious or guaranteed method of achieving this. Talfourd himself was certain that the author's role should be pre-eminent in literary copyright, and he tried to maintain this principled stance. Others disagreed fundamentally. Copyright was characterised by some as a state-sanctioned monopoly, and Talfourd's proposals came to be perceived as contrary to Benthamite doctrine. The complex and technical bill was judged largely on the single issue of copyright term, and the deeper issues of principle were put aside. Trade and radical interests were more numerous, more vocal and more organised than Talfourd's supporters, and they prevailed.

Talfourd argued indefatigably that genius should be prized above all else, and that the immeasurable, indefinable needs of culture should prevail over what he termed the 'freezing effects' of the radicals' position. In a post-reform parliament, few MPs felt able to argue for what was perceived as special treatment for authors, particularly in a trade-related matter. The bill's sponsors, caught in a storm of lobby groups, understandably salvaged the best compromise they could. It is arguable that Talfourd's vision

– of copyright as a recognition of cultural worth and not a commodity – deserved closer attention.

THE 1842 ACT – PASSAGE AND POSITION

The 1842 Copyright Act was the product of five years of heated public and parliamentary debate. It resulted in an extension of term: copyright was to last for the author's lifetime plus seven years, or for a minimum of forty-two years from the date of publication. The 1814 Copyright Act had provided for a twenty-eight-year term, or the author's lifetime if this was longer, so the change is now regarded as of little real significance. Brief histories of copyright often gloss over the 1842 Act altogether, although the introduction of a post-mortem term may be noted. Much more attention is paid to the eighteenth-century great cases, *Millar* v. *Taylor*, and *Donaldson* v. *Beckett*. Such treatments underestimate the historical significance of the 1842 Copyright Act, and in particular the circumstances surrounding its passing.

The struggle to pass a copyright Act began in 1837, when the first bill was introduced by Serjeant Talfourd. Versions of the bill were presented every year after this, under the gaze of two monarchs and two prime ministers, until 1842. The bill became hugely controversial, and provoked great public interest. It was perceived as being of great significance, as several influential groups became involved in either promoting or blocking its passage. Some of these groups included those directly affected by changes to copyright law, such as publishers, print workers and authors. However, the bill was also regarded as having considerable political significance, because of the wider issues raised. The various bills were therefore very heavily and noisily contested, both in and out of parliament. A striking feature of the campaign was the use of petitions, both mass petitioning to oppose the measures, and more selective petitions in support. Analysis of these, and other lobbying measures, reveals the contemporary mechanisms of popular protest.

A reassessment of the 1842 Act's place in copyright history is therefore overdue. The Act formed the basis of modern copyright law: it provided the groundwork for the domestic aspects of the 1911 Act, and this foundation was to a significant extent carried

forward in the 1956 and 1988 Acts. In addition, there were consequences for the lobbying groups, and these, too, had an effect on the development of copyright, albeit rather more indirect.

That conventional approaches to copyright do not acknowledge the wider significance of the 1842 Act is in part due to their particular and limited aims. Standard copyright works, such as Copinger, have only brief space for history.[5] Understandably they focus on contemporary positive law, and its direct and practical consequences in case law. Feather's historical study of copyright in Britain provides a helpful narrative that does explore the circumstances surrounding copyright, in particular its interaction with the book trade.[6] However, this history, too, has limitations of space and dimension, imposed by the decision to cover copyright law from its origins to the current governing Act. The linearity of these approaches obscures the extent to which nineteenth-century domestic copyright interconnects with contemporary issues – and results in an underestimation of its importance.

Other accounts of copyright are provided by related historical disciplines, particularly the history of aesthetics. Here the focus on the author, and the imposition of a Romantic trajectory, can sometimes act to distort and simplify situations where obscurities and difficulties remain. The post-structuralist approach to authorship adds a further agenda, hostile to positivity and dominant meaning, which cuts across any familiar history of copyright law.

This book aims to provide a more rounded account of the 1842 Act, situating it in the many contexts in which it operated, and freeing it from the linearity imposed by standard accounts. This is achieved through a comprehensive analysis of a wide range of contemporary sources, a luxury permitted by the choice of a limited time period. The remainder of this introductory chapter presents the main themes and problems of copyright law during this period, and provides an overview of the bill's progress. The book is then structured to reflect the adversarial nature of the debate: the first half is concerned principally with opposition and opponents, the second half with those in favour of Talfourd's proposals. The bills themselves were long and detailed. Some of

[5] Edmund P. Skone James *et al.*, *Copinger and Skone James on copyright*, 14th edn (1998).

[6] John Feather, *Publishing, piracy and politics* (1994).

the clauses underwent considerable change as the bills developed, whether for political or legal reasons. Talfourd's original plans included revision and clarification of various matters which, although of practical and legal significance, were generally regarded as specialist and technical. These included some striking ideas (such as a 'fair use' clause), many still of interest and relevance today. A detailed account of these is given in Appendix II. However, attention was largely focused on a few of the most disputed clauses: as will be seen, these achieved a more general currency, both in debates and petitions. There is an extended discussion of the mechanisms available to and used by each side.

Mass petitioning was one of the main weapons used against the bill, provoked by the radicals' characterisation of copyright as a monopoly which acted as an intolerable fetter on the diffusion of knowledge. This technique is examined first in its parliamentary context. The petitions themselves are then explored in detail. These show that the book trade's hostility to copyright extension came from both print workers and publishers, and highlights the differences in their mechanisms of protest. The organised and well-established trade bodies proved to be of great importance. Analysis of the petitions also reveals a progressive widening of the debate beyond trade boundaries, adding to its political significance. Heavy-weight parliamentarians became more embroiled in the debate as a result. Contemporary newspapers provide reports of the proceedings and act as a benchmark of public opinion.

Authors did not have the ready-made organisational structures of the print trade, and had to rely on individual campaigners. However, the literary world was cohesive in its own way, and eventually roused itself to make full use of the levers available to it. Although discreet lobbying was preferred at first, authors helped to disseminate the debate through the printed word. As the stakes grew higher, they overcame their distaste for the public petition, and provided Talfourd with an array of petitions which rivalled the trade's for completeness, although not in number. The copyright issue drew the literary world together in a way not seen before.

The detailed narrative is important in itself, and allows consideration of how far the 1842 Act provided a resolution to the conflict between these two entrenched sides. Parliament was set a considerable task. The importance of copyright in the international

context was becoming clearer, and the commercial implications of legislation were considerable for trade both at home and abroad. The links between copyright and wider topics such as free trade and education did not make the process of reconciliation any easier. Copyright became caught between those who valued intellectual property only prosaically and those who wished to associate its intangible qualities with the intangible in literature.

In addition, since Talfourd's Act had such influence on modern copyright law, it is appropriate to assess the legislative foundation it provided. In particular, it is necessary to consider what, if anything, the 1842 Act contributed towards a functioning and resilient rationale for copyright law. The book will conclude with an attempt to set this question in its theoretical context.

COPYRIGHT – ITS NATURE AND HISTORY

Copyright is a broad and flexible form of intellectual property. It covers, for instance, an enormous range of subject-matter. In the United Kingdom, contemporary copyright law protects what might be regarded as the 'conventional' forms of aesthetic expression – literary, dramatic, artistic and musical works – although these categories include some perhaps unexpected items, such as photographs and computer programs. Broadcasts, recordings, films and published editions are likewise protected. These additions reflect the acute sensitivity of copyright to certain areas of technology, particularly those which relate to recording and copying. This is to be expected, given copyright's nature and history.

The pressure for a general right to prevent the copying of works grew out of the development of the printing-press. Early demands came from printers and publishers, and not from authors. Rights to print tended to be granted by the Crown, and for individual works or types of work. The Crown could use these grants as a form of control, and clearly saw and exploited the possibilities of censorship. Eventually, demand by the Stationers' Company for a general right resulted in the Statute of Anne 1710. This gave the 'sole right and liberty of printing books' to authors and their assigns, for fourteen years from first publication; although if the author was still living at the expiry of this period, the right was 'returned' to him for a further fourteen years. These provisions

reveal some of the drafting difficulties which arise in any attempt to frame a general copyright law: the subject-matter has to be determined, as does the term; and the definition of an infringing act has to be clear.

Without these basic parameters a right to prevent copying is of little use. The problem lies in the decisions made as to how to set them. The decisions taken depend on the view taken of the purpose and nature of copyright, a view which is in turn dependent on a sense of the place and worth of the artistic objects of protection. The answers to these questions are not uncomplicated, and broaden the context of the discussion to include contemporary issues and ideas. The Act of Anne's preamble appears to give a simple solution – 'the Encouragement of learned Men to compose and write useful Books' – but in fact the answer is much more complex.

The twentieth century has come to regard copyright as, broadly, an economic right. In fact, twentieth-century law is heavily based on nineteenth-century law, with the obvious changes needed to take account of developments in technology. The nineteenth century saw one of the fullest discussions of the problems of domestic copyright law, provoked by Serjeant Talfourd's repeated attempts to shepherd a comprehensive copyright bill through parliament. Talfourd was a key figure. This book will examine the process of evolution which eventually resulted in the Copyright Act 1842. It also aims to show how the wider social, economic and philosophical forces present in the first half of the nineteenth century changed the nature of copyright, transforming it from a parochial system of rather limited significance, into a highly prized economic right. This newly defined copyright would come to stand as the basis for twentieth-century copyright law, and helped to provide impetus for the discussion of international measures.

How, then, should copyright be defined? In a legal context, it is often helpful to consider the various elements of a right; its subject and duration, for instance. The initial definitional problem for any copyright law is its subject-matter. The Act of Anne refers only to books, whereas modern copyright statutes cover many forms of expression. In the eighteenth century, books remained the single most important product in this area, and there was little attempt to widen the range of copyright.

By the early nineteenth century, however, new technology was driving demand for new forms of protection. When it came, protection tended to be piecemeal; engravings, lectures, dramatic works and designs were protected by individual statutes. This diffusion of subject-matter blurred the focus of copyright somewhat, particularly as some of these processes had an industrial element which brought them closer to the field of patent protection than 'conventional' copyright material. Talfourd had hoped to consolidate the various domestic copyright laws into one single statute: his 1837 attempt to include some rudimentary international protection was blocked by the government by 1838.

The international dimension of copyright was to become of increasing importance. Early copyright laws usually protected only nationals of the relevant state or, at best, works first published in that state. An increase in the reading public coupled with advances in communications meant that it was worthwhile to publish 'continental' editions, for which a British author was entitled to nothing. Protection could only be obtained by bilateral treaties, slowly and painfully negotiated, or by informal agreements amongst the various publishers. The strength of feeling with regard to free trade had a direct impact on Talfourd's bill, as will be seen.

Even within the accepted boundaries of copyright, the subject-matter could be challenged. A modern copyright lawyer will be very familiar with the distinction between ideas, which (broadly) copyright law does not protect, and expression, which copyright does protect. As Pritchard J has said, the idea/expression dichotomy is probably the most difficult concept in the law of copyright:

> The difficulty, of course, is to determine just where the general concept ends and the exercise of expressing the concepts begins . . . There can be no general formula by which to establish the line between the general idea and the author's expression of the idea. The basic idea (or concept) is not necessarily simple – it may be banal. The way the author treats the subject, the forms he uses to express the basic concept, may range from the crude and simplistic to the ornate, complicated – and involving the collation and application of a great number of constructive ideas. . . . It is in this area that the author expends the skill and industry which (even though they may be slight) give the work its originality and entitle him to copyright.[7]

[7] *Plix Products* v. *Frank M. Winstone* [1986] FSR 92, 93.

Talfourd, himself a lawyer, understood this dichotomy well, but his opponents often could not, or would not, accept that this line between idea and expression could be satisfactorily drawn. Popular access to education was a contentious and hotly debated issue during this period, and there were genuine fears that a strengthened copyright law would halt the dissemination of knowledge.

These concerns were based in part on another confusion – between patent and copyright. The rationale for the grant of a patent is relatively easy to grasp: an inventor incurs expense in developing an invention; if others are permitted to exploit the invention without having first incurred a share of the development costs, there will be no incentive to invent. Assuming that innovation is regarded as beneficial, this absence of motivation is unsatisfactory. Therefore, most legal systems protect a novel invention, by granting a patent which prevents competitors from using the invention without the inventor's consent. However, the monopoly is limited in time, after which the inventor is regarded as having had a sufficient head start, which should have enabled a reasonable reward to be extracted.

Thus a patent grant is firmly based in a system of economic reward, a system which is regarded as of benefit both to patentee and state. There is therefore no particular need to argue that the basis for protection is a moral one, as the practical and economic arguments are sufficiently convincing. The fact that patents are already restricted to a relatively short time period is also relevant: there would be little justification for curtailing a property right to an invention which was based on a moral entitlement.

In contrast, the rationale for copyright remains far from clear. There was certainly always an economic element: the demands for protection grew stronger as publishing markets enlarged, and the potential for exploitation grew with them. However, the aesthetic element could never be dismissed, although putting a value on this aspect of a work is extremely difficult. Historically, there was no attempt to protect ideas as such, as it was the expression, the product, which required protection. So the form of protection which naturally arose was a protection against copying, and not against use.

Talfourd made this point during one of the debates on the 1838 copyright bill, although the distinction is not one that seems to

have been commonly made or understood: 'the law of literary property of necessity accommodates itself to the nature of its subject – when the work is properly a creation, leaving it preserved in its entirety – when it is mere discovery, rendering the essence of truth to mankind, and preserving nothing to its author but the form in which it is enshrined'.[8] It was therefore much easier to argue for a longer period of protection than was the case with patents: patents by definition resulted in a much stronger monopoly, preventing use even of an independently invented device.

The dispute as to the true basis of copyright is seen most clearly in the great eighteenth-century cases, *Millar* v. *Taylor*[9] and *Donaldson* v. *Beckett*.[10] There was division between those seeking to base copyright in a moral right to the fruits of one's own labour, and therefore demanding a perpetual copyright, and those who regarded it purely as a privilege granted by statute.

Both cases involved disputes between rival booksellers. London booksellers enjoyed powerful control over distribution and sales, reinforced by various long-standing trade practices. For instance, a system of customary cooperation allowed the owners of each title to print without competition from other booksellers. The mutual benefits which ensued ensured that the London trade was generally glad to maintain the scheme, and English provincial booksellers lacked the power to challenge it. However, the Scottish booksellers were not so hampered, and gradually began to send more and more reprints south of the border, in flagrant breach of the customary London privileges.

The London booksellers responded with legal action both in Scotland and in London.[11] These preliminary legal skirmishes were inconclusive, although the Scottish courts were noticeably hostile.[12] The first result was to come in 1769, when the London bookseller Andrew Millar sued Robert Taylor in the Court of King's Bench, for having published and offered for sale James Thomson's *The Seasons*. Millar had bought the copyright from Thomson in 1729: it had been legally assigned to him, and duly

[8] *Hansard, Parliamentary debates* (3rd series), xlii, 566 (25 April 1838).
[9] (1769) 4 Burr 2303. [10] (1774) 2 Bro PC 129.
[11] This account draws on Feather, *Publishing*, ch. 3; Mark Rose, *Authors and owners: the invention of copyright* (1993), chs. 5 and 6.
[12] For a helpful account of these see Richard S. Tompson, 'Scottish judges and the birth of British copyright', *Juridical Review* 37 (1992), 18–42.

registered at Stationers' Hall. Taylor's edition appeared in 1763, well past the twenty-eight-year statutory protection of the Act of Anne. In *Millar* v. *Taylor* the majority, including the lord chief justice, Lord Mansfield, found that the author did have a common law right of property in his works. Lord Mansfield relied on a Lockean argument: 'it is just, that an author should reap the pecuniary profit of his own ingenuity and labour', and doubted whether the abrogation of the common law right could be implied into the Act of Anne.[13] There was, however, a strong dissent from Yates J who considered that only the statutory copyright was available once a work was published.[14] His view was later to prevail in *Donaldson* v. *Beckett*.

Donaldson v. *Beckett* again involved an 'unauthorised' edition of Thomson's poetry. Millar's copyrights had been sold on his death in 1769, and *The Seasons* had been divided up between several London booksellers. A preliminary injunction was obtained against Donaldson, then made permanent in 1772. Donaldson appealed to the House of Lords. The case caused unprecedented interest; the spectators apparently included various literary figures, and hundreds were turned away from the House. Five questions were put to the twelve law lords for their opinions, although these were not binding on the House. Lord Mansfield, although present in the House, remained silent throughout. On the crucial question, as to whether the Act of Anne had abrogated the author's common law right of printing, Lord Mansfield's silence resulted in a majority decision that the statute prevailed.

The reasons for Lord Mansfield's silence have been much discussed.[15] It was generally attributed to a heightened sense of delicacy in what was in effect an appeal from his own judgment in *Millar* v. *Taylor*. Further complications arise from Rose's assertion

[13] (1769) 4 Burr 2303, 2398.

[14] The decision in *Millar* v. *Taylor* was predictably unpopular in Scotland, where many doubted that a right of literary property existed there apart from statute. This was confirmed by the Court of Session in *Hinton* v. *Donaldson* (1773). Thus, for a time, literary property was perpetual in England, but of limited term in Scotland.

[15] Tompson observes that the appeal was against a Chancery decree, and not (technically) against a judgment of Lord Mansfield's. His tentative hypothesis is that *Millar* v. *Taylor* might have involved collusion which Mansfield did not wish to expose: Tompson, 'Scottish judges'. Rose's conjecture is that Mansfield lacked the spirit for further bruising conflict with Lord Camden, a fierce political opponent and a powerful legal figure: Rose, *Authors and owners*.

that, on the same crucial question, there is 'good reason to believe that the clerk of the house of Lords made an honest error in recording the opinion of one of the judges'.[16] This would have made the decision six to five *in favour* of the common law right, or even seven to five with Mansfield's silent voice. It is very possible that this would have affected the votes of the eighty-four lay peers present. There appears to have been no formal division, but in what was probably a voice vote, the House of Lords decided to reverse the judgment granting Beckett an injunction against Donaldson.

Thus the dramatic decision in *Donaldson* v. *Beckett*, with all its attendant complications, ended the perpetual common law right of literary property. It was a very close contest, and it was quite understandable that Serjeant Talfourd felt able to revisit the issues. In the nineteenth-century debate, those opposed to an extension to the copyright term argued for equality of treatment between patents and copyrights. This type of argument highlights the strong differences of opinion as to the 'correct' basis of copyright privileges. Although it is possible to see Talfourd's reliance on moral and aesthetic arguments as old-fashioned and idealist, or even irrelevant after *Donaldson* v. *Beckett*, Talfourd's rationale cannot be dismissed in this way. The fact that the copyright issue became controversial at all is an indication that it was affected by even deeper currents of thought than Talfourd probably envisaged when he brought the bill forward. The relatively limited question of authors' rights to literary property was quickly set in a national (and later global) context.

Notwithstanding *Donaldson* v. *Beckett*, the rationale of copyright was in many ways still fluid, and the discussion that Talfourd's bill provoked had a profound effect on it. Very wide terms of reference were eventually set as the context for the debate. The question is perhaps whether this was helpful. Although parliament was offered the freedom to reach a sound and broadly based conclusion, the contextual issues, such as free trade and education, were of such magnitude that it proved impossible to keep the main issue in focus: the opportunity was to some extent thrown away.

[16] Rose, *Authors and owners*, p. 99 and App. B. The judge was Nares J. See also H. B. Abrams, 'The historic foundation of American copyright law: exploding the myth of common law copyright', *Wayne Law Review* 29 (1983), 1120–91.

TALFOURD AND HIS AIMS

Talfourd's persistence in bringing forward copyright bills in the teeth of all the opposition was remarkable. It can be attributed to a combination of enthusiasm and character. Literary copyright stood at the intersection between Talfourd's two main interests, law and literature, which he combined throughout his life. Born in Reading in 1795, he was a promising student, publishing a volume of poetry while still at school. He chose law as a profession, apparently at the suggestion of Brougham, and became a pupil of the celebrated Joseph Chitty. He funded himself with literary work, of which the most famous was 'An attempt to estimate the poetical talent of the present age'.[17] Talfourd was a close friend of Lamb, knew Godwin, Leigh Hunt, Wordsworth, Coleridge and many other writers. His criticism was based on a genuine love of literature, and his continual praise of contemporary poetry was thought by many to have been instrumental in bringing it to eventual popularity.

Once Talfourd's pupillage had expired he became a special pleader, but continued his literary work, particularly for the *London Magazine* and the *New Monthly*. He was called to the Bar in 1821, where he was a member of the Oxford Circuit, and married Rachael Rutt the following year. He became a serjeant in 1833, and was elected member for Reading in 1835. His literary activity continued: his tragedy *Ion* was printed for private circulation in 1835, and was played at Covent Garden with Macready in the title role. The play was one of the brilliant successes of the 1836 season, Macready attributing this to his acting, and Talfourd to the play itself. Talfourd was certainly inordinately proud of *Ion*, and could not bear to hear anything against it. Most of his friends regarded this as an isolated vanity, although some (notably Mary Russell Mitford and William Macready) were less generous.

The play reflects the florid eloquence for which Talfourd was known, both as an advocate and as a friend. He was very sociable, loved societies, dinners and company. His name appears often in literary letters and diaries of the period, and he is almost always spoken of fondly. He seems to have been considered generous and full of heart, more solid than sparkling, but a good friend. A

[17] *Pamphleteer* 5 (1815).

similar description applies to his advocacy. He seems to have had an efficient, although not brilliant, understanding of the law, and although eloquent and earnest, he was 'above all chicanery. . .and neither would nor could puzzle an honest witness in cross-examination'.[18] This is said to have limited his practice. However, he became a judge in the court of common pleas in 1849, and died on the bench at Stafford in 1854, while delivering a charge to the grand jury.

Literary interests and friendships were Talfourd's first love, and this probably explains his taking up the copyright question. He was certainly encouraged by Wordsworth, although there is no evidence that it was originally Wordsworth's idea. Talfourd would have liked to be the instrument through which justice (as he saw it) was achieved for authors. He would also have felt himself an important author, following the success of *Ion* the previous year: he wrote two more tragedies during this period. On a more practical note, Talfourd was unusually well qualified to speak on both literary and legal matters. His genuine belief in the cause, and his stubbornness of character, allowed him to continue bringing the matter before the House even when things seemed hopeless. It was easy for the radicals to mock Talfourd's idealism and flowery language, and, although he returned for more punishment, the onslaught took its toll. His journal for the beginning of 1842 reveals how downcast he felt: 'For five years I have worked the Copyright Bill in the House of Commons – to see it thrown out in one night by Macaulay.'[19] Given Talfourd's early hopes for copyright legislation, his misery is easy to understand.

Talfourd had originally planned a grand, consolidated scheme, and the 1837 bill reflected this. He wanted to make a fresh, considered approach, and to replace the existing statutes which had been enacted piecemeal.[20] Not only did he intend to bring the various types of subject-matter under one single statute, he also sought to provide some sort of international dimension to copyright. However, there was strong government resistance to this ambitious plan: international copyright was regarded as a matter

[18] 'The late Mr Justice Talfourd', *Law Magazine* 51 (1854).

[19] Quoted in Vera Watson, 'The journals of Thomas Noon Talfourd', *Times Literary Supplement*, 8 February 1957, p. 88.

[20] For instance, Engraving Copyright Acts 1734 and 1766 (and further enactments in 1777 and 1836), Dramatic Copyright Act 1833, Lectures Copyright Act 1835.

of foreign policy and unsuitable for back-bench treatment. By 1838 Talfourd had been forced to confine himself to literary copyright.

Even within this limited remit, Talfourd was determined to rationalise and improve. The existing system of registration and assignment had grown up from the old privileges of the Stationers' Company, and had defects. The number of deposit copies associated with the registration had long been controversial: already in the nineteenth century it had been the focus of a bad-tempered debate in which Edward Christian was one of the leading figures.[21] The 1836 Act had cleared the air considerably, but the reopening of this issue was possible.[22]

The subject-matter of copyright needed proper definition: even if paintings and engravings were to be separately treated, problems had arisen regarding the ownership of the copyrights of periodical and encyclopaedia articles, and of part-works. It was not always clear what constituted infringement, abridgements being a controversial case in point. The growth of the publishing markets had made the resolution of these questions essential, and clearly the answer given would depend on the perceived nature of copyright. Appropriate penalties also had to be devised. The existing system of fines, laid down in the Act of Anne, was effectively worthless; the question of damages was dependent on case law.

However, the aspect of Talfourd's bill which was most discussed, and which came to be regarded as its identifying characteristic, was his attempt to increase the *term* of copyright from the existing twenty-eight-year term, to last for the author's life and then sixty years after death.[23] By the time that the 1842 Copyright Act was finally passed, it was widely regarded as a single-issue

[21] For reasons of control, the Act of Anne had required that nine copies of new books, or new editions of old books, should be sent to Stationers' Hall, from where they were deposited in various named libraries. The predictable reluctance of the book trade led to very poor observance of the provision. See Feather, *Publishing*, ch. 4; Robert Partridge, *The history of the legal deposit of books* (1938).

[22] 6 & 7 Wm. 4 c. 110.

[23] The 1814 Act (15 Geo. 3 c. 53) gave a twenty-eight-year term at the outset, and extended it for the remainder of the author's life if still living on the original term's expiry. The Act of Anne had granted a fourteen-year term (from publication), which was 'returned' to the author for another fourteen years if still living at the end of the first term.

piece of legislation. The other details of the bill were scarcely considered, and the coherence (or otherwise) of Talfourd's original plan became of secondary importance.

CONFLICTING RATIONALES

It was perhaps inevitable, given the complex and technical matters addressed, that the ideas in the bill should become stereotyped and simplified during parliamentary and public discussions. Nevertheless, this process can be seen as fatal to any serious discussion of the true basis of copyright. Talfourd's position was founded on a belief in the value of literary works to society in general. His arguments could be subtle, and were vulnerable to misrepresentation. Once the bill was perceived to turn solely on the question of the length of the term which would constitute an appropriate reward for an author's effort, the argument became largely economic.

Talfourd regarded the term as primarily something of symbolic importance, and not as a parameter to be determined by economic argument. At the heart of Talfourd's plan was the 'life-plus' element; the author was to have the right during his lifetime, and for a sixty-year period after that. This combination of variable and fixed elements was important. Firstly, the life term recognised each author as an individual creator, and a maturing one. The fixed period that followed acknowledged the author's natural desire to provide for his family and heirs, and to ensure the continuing integrity of his work. However, these aims were not universally accepted as desirable, or even as legitimate. The resulting discussions provoked many anecdotal accounts of authors' lives and habits, some of it damaging to Talfourd's cause, and all of rather doubtful evidential value.

Talfourd had seen the life plus sixty year term as a fundamental clause which expressed the concentrated weight of all the moral arguments for protecting authors' works. Instead, the 'appropriate term' came to be regarded as a point on a sliding scale, to be arrived at by compromise in the light of the prevailing economic considerations. The special role for authors, which Talfourd had argued deserved special recognition, was regarded as being of less importance than the 'objective' criteria of fairness and equality,

and than the measurable, though often anecdotal, evidence of sales and profits.

The final decision as to the length of the copyright term was the result of a suggestion made in a parliamentary speech by Thomas Babington Macaulay. In over five years the House had seen eleven versions of the copyright bill, and was heartily sick of it. Macaulay's compromise plan of a forty-two-year term was welcomed with relief by the House, and adopted on the spot. Yet, although this was a solution of sorts, it provided no answers regarding the purpose of copyright. Talfourd had asked and answered this question with some consistency, and never denied that his aim was to increase the rewards available to authors. On one occasion he reaffirmed what he termed 'the principle of the bill': 'the present term of copyright is much too short for the attainment of that justice which society owes to authors, especially to those . . . whose reputation is of slow growth and enduring character'.[24]

Talfourd took particular pride in the fact that this was the first copyright bill to be devised unashamedly to reward authors, in contrast to previous bills driven by interest groups and publishers. He was unabashed in his idealism, and valued literature highly as a cultural essential. He saw copyright as the minimum reward that society should bestow on authors in recognition of their special contribution and abilities. He thought that copyright law's function should be to provide formal, legal recognition of a self-evident right to one's literary output, with the added justification of an indirect public benefit resulting from the products of authors' special talents. He therefore presented the bill as a claim to a right unwittingly revoked by the Act of Anne, an error not evident until the decision in *Donaldson* v. *Beckett*:

> In truth, the claim of the author to perpetual copyright was never disputed, until literature had received its first fatal present in the first act of Parliament for its encouragement – the eighth 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.[25]

Talfourd knew that there was little to be gained in arguing for a statutory 'right perpetual' following *Donaldson* v. *Beckett*. In

[24] *Hansard, Parliamentary debates* (3rd series), xlii, 556 (25 April 1838).
[25] *Hansard, Parliamentary debates* (3rd series), xxxviii, 868 (18 May 1837).