On 27 July 1773 the Court of Session in Edinburgh pronounced its decision in the case of *Hinton v Donaldson and others*. The case was between book publishers (or ‘booksellers’, as they were known in the eighteenth century). It concerned the ‘literary property’ or ‘copy-right’ in Stackhouse’s *New History of the Holy Bible*, which had been first published in London in 1733. The rights in Stackhouse’s book were claimed by the pursuer, John Hinton, a highly successful and prominent bookseller based in London. Stackhouse (who died in 1752) had sold the rights in his *History* to the publisher, Stephen Austen, in 1740. Austen died in 1750, bequeathing the rights to his widow, Elizabeth; and her subsequent marriage with Hinton transferred them to him. The defenders – Alexander Donaldson, and two others – were all Scottish booksellers. Hinton’s claim was that they had each printed, published and
sold editions of Stackhouse’s *History* without his permission and so had infringed his exclusive rights. The remedies sought by Hinton were, first, an order against the defenders ‘to cease and desist from all further, printing, publishing or selling’ of the Stackhouse book; second, delivery up of the already printed but unsold copies (amounting, it was claimed, to some 10,000 in number); third, a sum of £1-10/- for each copy sold and each copy less than the 10,000 of which delivery up was sought; and damages.

But the Court of Session held against Hinton and in favour of the Scottish booksellers’ liberty to publish. In doing so, the judges decided expressly in opposition to the view then prevailing in the English courts. Seven months later, their decision was instrumental in persuading the House of Lords in *Donaldson v Becket*, decided on 22 February 1774, to overturn the previous English approach. Alexander Donaldson was to the fore again in this second case, first as losing defendant and then as triumphant appellant. The law was henceforth settled in both Scotland and England: copyright in published works
depended on the relevant statute, and not on the common (or judge-made) law. The courts could not extend the basic exclusive right beyond what Parliament laid down.

*Hinton v Donaldson* has been mainly studied as a preliminary to the momentous decision in *Donaldson v Becket*, rather than its own particular context of Scottish law and legal culture. The main purpose of this paper is to provide a perspective from within that context, which in turn may help to focus certain aspects of the wider history that have not yet received the detailed attention they probably deserve. In particular, the differences between ideas of Natural law and equity in Scotland and Equity in England may have played a more significant role than has hitherto been appreciated in contemporary understandings of the concept of ‘literary property at common law’.

In 1773-1774 the statute in force on copyright was the ‘Statute of Anne’ 1709-10. As I have tried to show in more detail elsewhere, the statute also came not long after, and at least partly as a result of, the Anglo-Scottish Union of 1707.
The prior Scottish system depended on the Scottish Privy Council, but was undermined when that body was abolished by statute from 1 May 1708. The Statute of Anne introduced a novel system for the newly united kingdom. It declared that an author or a bookseller had ‘the sole liberty’ of publishing a book for a period of fourteen years from first publication, with authors (but not booksellers) being entitled to a further fourteen years of exclusive right after the expiry of the initial period of protection.

The Statute further provided penal monetary sanctions for infringement of these exclusive rights, half payable to the Crown and the other half to the plaintiff, so long as, prior to publication, the title to the book was registered at Stationers Hall. The Act did not require registration for the exclusivity of the author or bookseller to arise, but only for the enforceability of its penalties for infringement. What was therefore left unclear was whether the Statute actually conferred the exclusivity, or rather merely recognised and then in some respects confined it. The Scottish dimension was specifically provided for in the Statute, however. In particular, the Court of
Session was given jurisdiction ‘if any person or persons incur the penalties contained in this Act, in that part of Great Britain called Scotland’.

In the mid-eighteenth century, however, London and Scottish book-sellers fell into conflict over a number of issues about literary property. The conflict has become known as ‘The Battle of the Booksellers’; but in some ways it was more like a war, lasting for over thirty years and involving not just court battles but other forms of struggle. *Hinton v Donaldson* was the penultimate battle of this booksellers’ war.

The issues arose from the making and sale in Scotland by its booksellers of cheap reprints of works with subsisting registrations in Stationers Hall, along with the export of these reprints to England and, indeed, to North America and Continental Europe. The London booksellers first began to take legal action against such reprints in the late 1730s. The initial question to be debated was whether the Statute’s very limited sanctions against infringement – forfeiture of the infringing publications and payment of one penny for every
infringing sheet, with only half the money going to the person suing - could be supplemented by other remedies available generally from the courts.

Well before 1740, the Court of Chancery in England had decided that, provided the party bringing the action first waived his claim to the penalties provided by the Statute of Anne, it could grant the equitable remedies of injunctions and requiring infringers to hand their profits over to the right-holders by way of damages. These entitlements were generally seen to arise because the rights infringed arose under, or at least in the shadow of, the Statute rather than recognising rights that arose quite independently (although the latter position would be argued in the subsequent development of the law). But the basis of Chancery’s jurisdiction in these cases was never debated before or explained in any depth by the court or by contemporary writers on Equity. What seems to have happened was that the London booksellers saw far greater practical utility in the equitable remedies of the injunction and account of profits than in those provided by the Statute, and
neither defendants nor the Chancery judges chose to place doctrinal difficulties in their path.

The Scottish judges, on the other hand, after some wavering, ultimately refused in 1748 to allow the supplementation of the Statute of Anne in this way. The case of Midwinter v Hamilton involved a number of leading London, as well as an even larger number of Scottish booksellers. The action began in 1743. The London booksellers’ claim was for the penalties in the Statute of Anne plus damages and an accounting of profits, with the latter remedies being justified on the basis that the statutory ones ‘were being found attended with such Difficulties, that in no one instance … have the same ever been prosecuted or recovered’. Although reference was made in the pleadings to Chancery’s use of the equitable remedy of the injunction, at this stage the Court of Session does not seem to have much developed what would become its equivalent remedy of ‘suspension and interdict’ as a preventative measure against prospective or ongoing wrongdoing of all kinds. While the remedy of suspension was
long established, it had hitherto been largely confined to preventing the enforcement of wrongfully obtained court decrees.

An appeal to the House of Lords against the Court of Session’s refusal to grant the London booksellers a remedy in *Midwinter v Hamilton* failed in 1751, although not by upholding the court below, but rather through a technical finding that the action ‘was improperly and inconsistently brought’. The appellant booksellers had illegitimately cumulated non-statutory with statutory remedies (recall here that in Chancery the plaintiff had to waive the statutory penalties in order to gain the protection of the court), as well as suing several defenders in one action when the points at issue against each were about separate and distinct books and rights therein. The case was remitted back to the Court of Session, but no further litigation ensued there.

The pleadings for the London booksellers in *Midwinter v Hamilton* noted that ‘the Court of Session in Scotland [is] a mixt Jurisdiction of Law and Equity’. There was no formal division of
legal and equitable jurisdictions in Scotland, but that did not mean that the court was disabled from fashioning a remedy to meet a situation where otherwise injustice might result from the strict application of the law. It was well-established that the Court of Session administered law and equity together in its procedures, and no doubt this power was what the London booksellers sought to invoke; it may also explain, at least in part, the waverings of the court before it reached its final decision. Towards the end of the seventeenth century, the position, and its limits, had been explained by the institutional writer Viscount Stair (a Lord President of the Court of Session) in terms of the privileges, or nobile officium, enjoyed by any superior or sovereign court in contrast with the officium ordinarium (or mercenarium) of the inferior courts:

The Lords of Session have both the officium ordinarium and nobile. For it is only in some cases, that they may proceed, not according to the ordinary forms, which custom hath determined, for any case which hath formerly occurred: But in new cases, there is necessity of new
cures, which must be supplied by the Lords, who are authorized for that effect by the institution of the College of Justice. And if they might in other cases extend their officium nobile, it would render the subjects unsecure, and the power of the lords too arbitrary. But, in many cases, it is necessary wherein they may have recourse from strict law to equity, even in the matter of judgment; and in more cases they may recede from the ordinary form and manner of probation, whereof there are many instances commonly known.

Stair acknowledged that matters were differently arranged in England, with the courts of common law disabled from the administration of equity by the existence of a distinct court for the purpose. But England was exceptional: ‘Other nations do not divide the jurisdiction of their courts, but supply the cases of equity and conscience, by the noble office of their supreme ordinary courts, as we do.’ Passages similar to these remarks of Stair can be found in later institutional writings, especially those of Lord Bankton and John Erskine of Carnock, both of
whom were writing between *Midwinter v Hamilton* to *Hinton v Donaldson*.

Why did the Court of Session not follow the example of the Court of Chancery when it clearly had the power to do so and when, perhaps, there might have been thought to be, in Stair’s language, a ‘necessity for new cures’ to meet a new case? At least one reason was the far more vigorous debate on the matter in the Scottish compared to the English court. Proceedings in Edinburgh lasted for five years. The formidable Henry Home, later raised to the Court of Session bench as Lord Kames and a leading figure in the Scottish Enlightenment, was one of the counsel appearing for the Scottish booksellers in *Midwinter*. His arguments seem essentially to have been, first, that the pursuers’ right depended entirely upon the Statute of Anne, not on any pre-existing right, and could not be extended beyond what the legislation laid down; second, that the statutory right was at best analogous with property; and, third, consequentialist or *reductio ad absurdum* reasoning that if
authors had rights beyond the Statute, why should this not also apply to inventors who had not taken out letters patent?

Kames referred to his past triumph at the bar in his monumental book, *Principles of Equity* (first published in 1760). He there implicitly criticised the handling of the Statute of Anne by the English equity courts when he argued that ‘monopolies or personal privileges cannot be extended by a court of equity; because that court may prevent mischief, but has no power to do any act for enriching any person, or making him *locupletior*, as termed in the Roman law.’ The context for this criticism was a discussion of the court’s equitable powers in relation to statutes ‘preventative of wrong or mischief’. He distinguished between such statutes and those directed to the ‘positive good of the whole society, or of some part’, in that with the latter the court had no power to ‘supply’ answers to any defects in them: ‘it belongs to the legislature only to make laws or regulations for promoting good positively’. The Statute of Anne was clearly such a piece of legislation in Kames’ view. In another chapter on the ‘powers of a court of equity to remedy what is imperfect
in common law with respect to statutes’, he drew another
distinction, between statutes prohibiting ‘noxious evils’
absolutely (which courts might use all means within their
powers to enforce as well as the statutory penalty), and those
regarding ‘slighter evils, to repress which no other means are
intended to be applied but a pecuniary penalty only’. The
Statute of Anne, he said, plainly belonged in this second class.

The significance of Kames’ remark about Chancery’s role
in the copyright debate is thus that, while in general he
favoured the expansion of the equitable aspects of the Court of
Session’s jurisdiction, he also thought that equity should
operate within certain limits. It was not simply a matter of doing
justice between individuals coming before the court; it needed
to be reduced to a rational system of rules as far as possible
without, however, depriving it of its flexibility and
responsiveness to injustice; and above all, perhaps, equity had
to yield to utility, or the greater good of society as a whole.
These themes, especially the last, would emerge strongly when
he came to give judgment in *Hinton v Donaldson.*
Alexander Donaldson, the defender in *Hinton v Donaldson*, first came to prominence in the 1750s in a firm which published some of the most significant works of the Scottish Enlightenment in philosophy, medicine and law. But they also reprinted literary works previously published in England, such as the poetry of Milton. It has been suggested that Donaldson’s initial move into cheap reprints was prompted by a realisation of the business opportunity that had been created by the failure of the London booksellers to make any headway with their mid-century litigations in Scotland. The truth of the matter seems to be, however, that reprinting became Donaldson’s primary activity only after 1760.

In April 1763 Donaldson set up business inside enemy territory on the Strand, centre of the world of London booksellers. Joining initially in a partnership with his brother John, he there set about developing a very successful business of making and selling cheap reprints. There can be little doubt that Donaldson’s move was a direct challenge to the London booksellers. The Strand office became known as ‘the shop for
cheap books’, and later he marketed his stock as ‘Books Sold Cheap’, with his prices ‘thirty to fifty per cent cheaper than the usual London prices’. Moreover, within a year of his arrival on the Strand Donaldson published a pamphlet exposing damning evidence of the illicit combination of the London booksellers against Scottish reprints.

Unsurprisingly the response of his rivals and competitors to all this was hostile, with (Donaldson later claimed) eleven actions apparently being raised against him in the Court of Chancery by around 100 London booksellers. He also attracted the disfavour of the great Dr Samuel Johnson. Back in Edinburgh, however, Donaldson had many friends and supporters, not least amongst them the lawyers in Parliament House, the Edinburgh home of the Court of Session. He patronised young advocates with literary pretensions such as James Boswell, publishing their poetic effusions and entertaining them to dinner. Donaldson also published in 1767 a pamphlet by another advocate, John MacLaurin. The argument supported the lawfulness of Donaldson’s reprint
business with much learning. The pamphlet was reprinted the following year along with an appendix containing ‘a letter to Robert Taylor, bookseller, in Berwick’, Taylor being also the printer on this occasion. Sitting only just inside England’s northernmost bounds, Taylor’s interest was exactly the same as Donaldson’s. He seems to have been an active reprinter and reseller of reprints in both England and Scotland, and was the defender in the ongoing case of Millar v Taylor. That case arose because he sold Donaldson’s allegedly infringing 1761 edition of James Thomson’s poem, The Seasons. Taylor had been subjected to a Chancery injunction, but new legal issues had been raised on which the opinion of the judges of the King’s Bench had been sought and which in 1768 was still awaited. The reprint of MacLaurin’s pamphlet in England was thus clearly connected to events there rather than back in his home jurisdiction.

The issue for the King’s Bench as a court of law, rather than of equity, was whether there were any rights at all in Thomson’s Seasons. The work had first been published in
parts between 1726 and 1730, the complete set being finally published together in the latter year, and Thomson had died in 1748. The maximum period of protection for the work under the Statute of Anne – 28 years from first publication – had thus clearly elapsed. Even if there were rights outside the statute, were they not the author’s rather than the publisher’s, and could they survive him? The King’s Bench decision in Millar v Taylor was finally handed down on 20 April 1769. A majority was firm for the view that there was indeed a common law right to literary property, which vested in authors pre-publication and revived after the expiry of the privileges conferred by the Statute of Anne. This common law right could be assigned to the author’s publishers and so continue to be used by them even after the author died.

Alexander Donaldson responded to Millar v Taylor with another pamphlet dated 8 May 1769, arguing once more the case against any literary property beyond the Statute of Anne. Nevertheless, the English common law having been determined by the King’s Bench, the case returned to
Chancery, which in July 1770 granted a perpetual injunction against Taylor. Just three months later, the London booksellers renewed their legal campaign in Scotland by raising their action in the Court of Session against Alexander Donaldson and the two other Scottish booksellers who had reproduced Stackhouse’s *History*. Early in 1771 Thomas Becket, another London bookseller filed a bill in the Court of Chancery against the Donaldsons brothers, seeking both an injunction against their further reprinting of Thomson’s *Seasons* and an account of profits from the sales already made. The war of the booksellers was moving towards its climax.

The legal issue in the Scottish case against Donaldson was exactly the same as the one in England. The statutory rights in the *History* had expired some time earlier, and Stackhouse himself had been dead for nearly twenty years. It seems too that the power of the Court of Session to compel a defender to ‘cease and desist’ from wrongful activity in general, and not just the enforcement of wrongly granted court orders, had become much more fully recognised than quarter of a
century before. Although when *Hinton v Donaldson* was finally argued before the Inner House of the Court of Session in the summer of 1773 counsel for the defenders could say of equitable Chancery injunctions, perhaps disingenuously, that ‘they are something of the nature of a sist upon a bill of suspension in Scotland’, John Erskine, Professor of Scots Law at Edinburgh University 1737-65, wrote in his *Institute* (posthumously published in 1773):

> [S]uspension is a process authorised by law for putting a stop, not only to execution of iniquitous decrees, but to all encroachments either on property or possession, and in general to every unlawful proceeding.

This suggests further recognition of the potential power and value of a general prohibitory remedy such as was sought in *Hinton v Donaldson*.

The case began in 1771, and various proceedings then followed over the next two years. Overall pressure certainly intensified meantime: a number of other Court of Session actions were raised by London booksellers against Edinburgh
counterparts in 1772 in respect of various alleged infringements of the Statute of Anne. Meantime in London, the Court of Chancery had granted a perpetual injunction in *Becket v Donaldson* in November 1772, and the Donaldsons had lodged an appeal to the House of Lords the following month.

The oral debate on the written pleadings in *Hinton v Donaldson* began before the Inner House judges on Tuesday 20 July 1773, and lasted for the rest of the week. The parties were represented by some of the cream of the contemporary Scottish bar. All of Hinton’s counsel were destined for the Scottish bench. Donaldson and his colleagues were represented by his friends, James Boswell and John MacLaurin (later raised to the bench as Lord Dreghorn), as well as a future Lord President in Ilay Campbell. The work of this team, oral and written, certainly carried the day with the court. After a long weekend’s reflection on the debate they had heard, ten of the eleven judges declared that literary property, or copyright, had no existence in relation to published works except under the Statute of Anne. There was no such thing as copyright at
common law in Scotland. The court refused to follow *Millar v Taylor*. Only the famously eccentric (and diminutive) Lord Monboddo dissented.

The style of argument supporting the majority decision in *Hinton v Donaldson* has a flavour quite distinct from those in the earlier English case law. For the Scots lawyer the ‘common law’ was closely linked to European ideas of the *ius commune* as the *ius gentium*, Roman law and, ultimately, the *ius naturale*. Natural law was not something separate from, but was rather the foundation, or at least one of the foundations, of Scots law. Stair had stated this idea in its strongest form when he argued in Aristotleian mode that equity, in the sense of the equality of persons, was part of the law of nature and thus informed the whole of the law, rather than being only a means of moderating the rigour of strict law. Hence equity, ‘as the first and universal law’, was the recourse when other more formal sources – ancient custom, statutes and recent custom in the practice of the court – ran out. This was tempered, however, by ‘expediency, whereby laws are drawn in consequence *ad*
similes casus’. Later writers modified Stair’s approach significantly, especially in relation to the equitable extension of statute. We have already noted Kames’ argument on this point in *Principles of Equity*, directly addressing the interpretation of the Statute of Anne. Bankton and Erskine likewise provided a series of limitations on judicial powers, with the former saying that only the legislature itself had the power to moderate the rigour of a statute with considerations of equity, while Erskine thought ‘correctory’ statutes fell to be strictly interpreted and added, with an echo of Kames:

> Laws which carry a dispensation or privilege to particular persons or societies receive a strict interpretation; because, though they are profitable to the grantee, they derogate from the general law, and most commonly imply a burden upon the rest of the community; for which reason they reach no further than to the person or society privileged.

The judges in *Hinton v Donaldson* made little direct reference to such issues, however. Without any real discussion
of the point in general, they applied a strict approach to the Statute of Anne in order to determine that the legislation showed no recognition of any rights in authors beyond its own terms. The single exception to the strict approach was the dissentient Lord Monboddo, who applied considerations of justice for authors to support his view that the Statute did recognise the existence of their right:

As to the alleged inconveniences of literary property, the clearest principles of law may be attended with inconveniences; but that consideration belongs not to us, but to the legislature. Here, however, I see no inconveniences; on the contrary, were there not such a property, such a right, there would be great inconveniences, great injustice. I think it would be very hard, and much to the discouragement of literature, if an author, after spending a laborious life in composing a book, did not provide by it, not only for himself, but also for his family: Nor is the remedy in the statute against this evil sufficient; for the best books may be twenty years
published, without having their merit known, and afterwards have a great and universal sale.

For the majority the question thus came to be, was there any right at all apart from the Statute itself? The Natural law starting point was to look at what men in general understood and accepted as well as the laws of other peoples and nations – the *ius gentium*. As Lord Gardenstone put it, ‘the most substantial and convincing evidence of what is really just and rational, in a matter of public concern to all countries, is the concurring sense of nations.’ For this purpose the law of England could of course be considered, but if that law was the only system to recognise a right of literary property outside statutory provision or the grant of a special privilege, then it was not very powerful support for the existence of such a right in Scots law. Certainly the mere fact that the English courts had held that such a right existed was not decisive for the Scottish courts. Lord Auchinleck noted that the laws of England were ‘in many particulars special to itself’, while Lord Hailes commented
that ‘English law, as to us, is foreign law; foreign law is matter of fact’, i.e. it was not law in Scotland.

In Stair’s view, Roman law could be considered as a source of guidance in determining equity. But as several judges noted, there was no trace of literary property in Roman law.

A further point of significance in the *Hinton* opinions is a distinction referred to by several of the judges, and also drawn by contemporary jurists: one between the real right of property – outright ownership – and the real right of exclusive privilege, also good against the world but not to be regarded so much as property as the product of policy. In essence this came down to saying that literary property (and indeed patents for inventions) were grants of special privilege made by the Crown in the exercise of the royal prerogative. The monopolies were created for specific periods designed to encourage and reward useful or beneficial activity in a way that the market, left to itself, would not. While the rights conferred were good against the
world while they lasted, they were not to be likened at all to the ownership of land or goods.

A final important feature of the opinions in *Hinton v Donaldson* is that most were careful to distinguish between unpublished and published books. With the former, the judges were much more ready to recognise the existence of a property right. While the judges were careful to distinguish this power or interest from property, they did not otherwise seek to define what if any legal effects arose from it.

The judgments in *Hinton v Donaldson* are indeed very largely a product of the Civilian or Natural law tradition as it had developed in Scotland over the previous century. In their conceptual reasoning and reliance on the authority of the formal sources of law – or rather the lack of such authority - they can be seen, in the language of Sherman and Bently’s thoughtful analysis of the rise of the idea of intellectual property in the eighteenth century, as having an *a priori* and reflexive, or ontological, or ‘pre-modern’ character which contrasts in significant ways with the more consequentialist approach to be
found in the judgments in *Donaldson v Becket*. In *Hinton v Donaldson* it is only with Lords Kames and the dissentient Monboddo that we can see the Enlightenment mind at work, taking legal development away from past authority and immanent Natural law towards consideration instead of the social effects and general policy objectives of positive law, and to the public interest.

We have for the eighteenth century an unusually large amount of detail about the judges’ opinions in *Hinton v Donaldson* because James Boswell took the trouble to gather and publish them in full text in a booklet of not quite 40 pages. The publication was not simply the product of a successful advocate’s vanity. It appeared early in 1774, ‘printed by James Donaldson, for Alexander Donaldson, and sold at his Shop, No 48 St Paul’s Churchyard, London, and Edinburgh; and by all the Booksellers in Scotland’. It is thus clear that this was part of Donaldson’s preparation for his appeal to the House of Lords in *Donaldson v Becket*, material that could be laid before the court for the Scottish judges’ reasoning on the general question
to be determined. Perhaps also the publication would help demonstrate through the judicial discussion of comparative law that English law was alone if *Millar v Taylor* was correctly decided. Certainly this latter point was picked up in the arguments for Donaldson in the House of Lords:

[I]n Scotland the *jus gentium*, or laws and customs of other nations, were pleaded in the courts of that kingdom, and from a diligent search into the laws and customs of every nation, ancient or modern, the Scotch lawyers, when the question concerning literary property was lately agitated in that kingdom, found themselves justified in affirming that no such property ever existed or ever was claimed in any civilized nation, England excepted, under the canopy of heaven.

The House of Lords’ eventual decision in *Donaldson v Becket*, that there was no right of literary property in published works outside the Statute of Anne, was greeted with ‘great rejoicings in Edinburgh … bonfires and illuminations, ordered though by a mob, with drum and two pipes’. Boswell,
describing the outcome as ‘great news’, went to have ‘tea with Lord Monboddo to triumph over him’. He does not record Monboddo’s reaction to either the news from London or the jubilant advocate’s visit.

Alexander Donaldson for his part had clearly succeeded in commanding popular support for his cause in Scotland; in part, no doubt, because his struggle had been against London domination, but also because he enabled the rapidly growing class of readers to indulge their pleasures and intellectual interests at far less cost than would otherwise have been the case. As an establishment figure in the Scottish literary and intellectual world, in 1783 he would become one of the founding Fellows of the Royal Society of Edinburgh, alongside such other Enlightenment notables as Adam Smith and James Hutton. Donaldson’s approach to literary property, of course, was not a wholly disinterested one, driven by notions of the public good; he died a wealthy man in 1794. But his wealth also laid the basis for the fortune of his son, James, whose
public benefactions included the endowment of Donaldson’s Hospital for deaf and poor children in Edinburgh.

In some ways Alexander Donaldson and the war of the booksellers can be compared with the Google Books saga. Google set out to make generally available books that the company took to be out of copyright or to which no active claim was made by any copyright-holder; the organisation’s accompanying rhetoric of putting all human knowledge in the hands of those who want it has grandiose echoes of Donaldson’s ‘books sold cheap’. Like Google’s success in its litigation in New York, Donaldson’s two cases left legal issues unresolved. Since the authors and booksellers in the circumstances of the cases had had no rights, there was no need to take a view on the availability of remedies against infringement of copyright beyond those in the Statute of Anne. Nor was there determination of the position of a book which had been published but not registered. There was also the status of unpublished works; although the judges in *Hinton v Donaldson* had shown sympathy to the idea of giving these
some protection, the form that might take was left unclear. These issues would be tackled in the courts over the next thirty years. But, while these gaps remained, the understanding of copyright itself had been transformed thanks to Donaldson’s energy, determination and entrepreneurship, and that new understanding has lasted down to the present. Copyright is a creature of statute. While judges, lawyers and legal writers may work creatively with the statutory wording that happens to be in force, real expansion (or contraction) of copyright law is the job of the legislator, who is, perhaps, better placed (or at least has more legitimacy) than a court dealing with disputes between individuals to assess where the overall balance of interests should lie in law. It remains to be seen, however, whether that now long-held view is in turn about to be overthrown by the ‘creative destruction’ being wreaked by the global market force that is Google.