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September 4, 2011

Copyrighting Shakespeare: Jacob Tonson, Eighteenth Century English Copyright and the Birth of Shakespeare Scholarship

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“He was not of an age, but for all time!”¹

“All our learning will be locked up in the hands of the Tonsons ... of the age.”²

Who “owns” Shakespeare? Today this is a metaphysical question suitable for deconstruction. On April 10, 1710, the question had an answer: Jacob Tonson.³ Tonson, the most significant publisher of his time, had previously secured the rights to most of Shakespeare’s plays,⁴ and on April 10, the newly effective Statute of Anne, the first modern copyright statute, protected his exclusive right to publish those works.⁵ Tonson and his family held the “copyright” to Shakespeare.⁶

¹ Ben Jonson, *To the memory of my beloved, The Author Mr. William Shakespeare: and what he hath left us*, Preface to the First Folio (1623).

² Quote from Lord Camden, an influential Whig politician, during debate in the House of Lords in *Donaldson v. Beckett* (with apologies to Barnaby Bernard Lintot, another major bookseller of the time, who was also mentioned by Lord Camden.) The issue in *Donaldson* was whether Booksellers, including Tonson and Lintot, held a perpetual common law copyright in works they controlled. Lord Camden went on to state that “knowledge and science are not things to be bound in such cobweb chains.” Quoted in Ronan Deazley, *Rethinking Copyright: History, Theory, Language* 19 (2006). See *infra* notes 48-56 and accompanying text for a discussion of *Donaldson v. Beckett* and the claim of common law copyright.

³ Jacob Tonson is the hero of this piece, and he has been described as the “doyen publisher of the Augustan Age.” H. L. Ford, *Shakespeare 1700-1740* 1 (1935). In his own time, he was described as “Chief Merchant to the Muses.” Gary Taylor, *Reinventing Shakespeare: A Cultural History from the Restoration to the Present* 52 (1989)(quoting Edward Ward, *The Secret History of Clubs* (1709), 306)). Jacob Tonson’s life is described below. See *infra* notes 56-66 and accompanying text.

But he is not the only Jacob Tonson involved. As discussed below, Jacob Tonson, often referred to as Jacob Tonson I, was succeeded in his business by his nephew, Jacob Tonson II, and then his grand-nephew, Jacob Tonson III. Each of these Jacob Tonsons was involved in publishing activity regarding Shakespeare. See *infra* notes ?? and accompanying text. This article is somewhat cavalier in its references to “Tonson” or “the Tonsons.” Unless otherwise specified, any reference to “Tonson” up to 1720 refers to Jacob Tonson I, between 1720 and 1735, to Jacob Tonson II, and after 1735 to Jacob Tonson III.

⁴ See *infra* notes 67-89 and accompanying text for the status of the Tonsons’ copyrights in Shakespeare.

⁵ See *infra* notes 36-47 and accompanying text for a discussion of the provisions of the Statute of Anne.

A note on dates is warranted. The Statute of Anne is frequently referred to as the Copyright Act of 1709. That date is subject to controversy. The Act received the Royal Assent of Queen Anne on April 1, 1710, and by its express terms applies to preexisting works “from an after the tenth day of April One thousand seven hundred and ten.” 8 Ann. Ch. 19. John Feather states that it is simply error to describe the Statute of Anne as an act of 1709. See John Feather, *The Book*

The Tonsons made the most of their copyright. Starting with the 1709 collected *Works of Mr William Shakespear* edited by Nicholas Rowe, the Tonsons published a series of editions of Shakespeare, edited by the likes of Alexander Pope and Samuel Johnson. These editions were major components of an evolving critical scholarship into the text and context of Shakespeare. Through his efforts as publisher, literary tastemaker and editor, Jacob Tonson can be seen as the “father” (or at least midwife) of serious Shakespearean scholarship concerning both the plays and the playwright.

The Tonsons’ efforts also brought the name and life of Shakespeare to the public. In 1709, Shakespeare was an important, but not widely known, Elizabethan and Jacobean playwright,⁷ but by the second half of the century, Shakespeare had become Britain’s national poet.⁸ Part of the Tonsons’ contribution to the creation

Trade in Politics: The Making of the Copyright Act of 1710, 8 *Publishing History* 19, 19 n. 3 (1980). Ronan Deazley, however, states that the Act “as was the convention at the time, was considered to have effect as if it had been passed at the start of the regnal year, that is September 1709. Deazley, *supra* note 2 at 13 n.1. However, the date of the statute is characterized, it became effective on April 10, 1710.

⁶ In this piece, the word “copyright” is used generally to refer to the host of rights, including the exclusive right to publish, held by the proprietor of the copyright. Prior to the printing press, manuscripts were “copied” by scribes, and during the period of the Stationers’ Company rights to the “copy” were held by proprietors. The use of the word “copyright” apparently originated at the beginning of the Eighteenth Century. Patterson notes the term’s use as early as 1701. L. Ray Patterson, *Free Speech, Copyright and Fair Use*, 40 *Vand. L.Rev.* 1, 22 n. 63 (1987). In advertisements printed in 1734 Tonson referred to the injurious effect of unauthorized publication on the holders of the “copy-right” to the works. *See infra* note and accompanying text.

⁷ *See generally* Arthur H. Scouten, *The Increase in Popularity of Shakespeare’s Plays in the Eighteenth Century: A Caveat for Interpreters of Stage History*, 7 *Shakespeare Quarterly* 189 (1956). As Hume notes:

In all probability, no play of Shakespeare's was performed in the seventeenth century with the playwright's name attached - a state of affairs that changed only very slowly during the eighteenth century.

Peter D. Hume, *Before the Bard: “Shakespeare” in Early Eighteenth-Century London*, 64 *English Literary History* 41, 43 (1997).

⁸ In 1769, the actor David Garrick staged the “Shakespeare Jubilee” at Stratford-upon-Avon and thousands swarmed the streets, and braved heavy storms, in celebration of the Bard’s life and work. Garrick, echoing *Romeo and Juliet*, recited a poetic paean to Shakespeare that ended, “Tis he, tis he, the god of my idolatry.”

of “bardolatry” was their publication of large quantities of cheap editions of individual Shakespeare plays, and this popularity, in turn, fueled the publication of new scholarship into his work.

This article considers the role of copyright in the Tonsons’ contributions to the growth of Shakespeare scholarship. The Statute of Anne was entitled “An Act for the Encouragement of Learning,” and if copyright significantly contributed to the development of Shakespeare scholarship it would be a stellar example of the importance of copyright to intellectual growth. Certainly Tonson and his family claimed a copyright in Shakespeare, both under the Statute of Anne and common law, during the period in which they published their significant works of Shakespeare.

This article suggests, however, that any Tonson copyright did not significantly “encourage” their contributions to Shakespeare scholarship. First, Jacob Tonson could not have relied on statutory copyright for protection of his seminal 1709 Rowe edition. Tonson, quite simply, did hold the copyrights at that point, and the Statute of Anne had not yet been introduced, let alone passed, by Parliament. Second, the Tonsons’ publication of later editions would not, as some have asserted, have perpetuated any copyright claim Tonson might have to the works of Shakespeare. Third, although the textual notes and comments contributed by his editors may have been copyrighted, most of the significant editorial contributions to Shakespeare scholarship would not themselves have been subject to copyright protection. Selection of plays in the legitimate Shakespeare canon, for example, and selection of the appropriate text from earlier quarto and Folio editions would not have been subject to copyright protection. Fourth, the expansion of public access to cheaper, more widely available editions of the Shakespeare plays arose in spite of, rather than because of, copyright protections. It was a challenge by a book “pirate” that caused the Tonsons, not to seek legal protection through their claimed copyright, but to flood the market with their own cheap editions of the plays. Finally, the article suggests a reason why the Tonsons, whose name appears as plaintiff in many of the early copyright cases, never sought to litigate their claim to

Michael Dobson, *The Making of the National Poet: Shakespeare, Adaptation and Authorship* 6 (1992).

For a discussion of the growth of Shakespeare’s reputation, *see also* Samuel Schoenbaum, *Shakespeare’s Lives* (1991); Louis Marder, *His Exits and his Entrances: The Story of Shakespeare’s Reputation* (1963); Taylor, *supra* note 3.

For a discussion of the history of the presentation of Shakespeare on the stage in the seventeenth century, *see* Don-John Dugas, *Marketing the Bard: Shakespeare in Performance and Print 1660-1740* 22-59 (2006)(discussion of seventeenth century Shakespeare adaptations). Dugas states that between 1660 and 1709, eleven “unaltered” Shakespeare plays were published compared to 44 “adapted” plays. *Id.* at 91.

a copyright in Shakespeare. Simply put, litigating a claim to copyright in Shakespeare would have been a poor “test case” to secure what the Bookseller’s sought at that time—a perpetual common law copyright based on the natural rights of authors.

This article suggests that copyright issues, although certainly important, were ancillary to the Tonsons’ publication decisions. Market forces, the protections from competition afforded by a Bookseller cartel, and a respect for Shakespeare’s works, more than copyright protections, appeared to drive the Tonsons’ actions and therefore the growth of Shakespeare scholarship.

This article begins with the basic legal background to the Tonsons’ claims of copyright in Shakespeare. The Tonsons’ claims would have been governed by a series of quite distinct legal regimes for copyright that existed in England between 1554 and 1774. Part II describes the life and publication efforts of Jacob Tonson and the Tonson family of publishers that influenced, if not created, modern Shakespeare scholarship. Part III analyzes the significance of copyright in the Tonsons’ publication decisions that contributed to this growth of Shakespeare scholarship and popularity. Part IV discusses the Tonsons’ response to Shakespeare “pirates” whose publications challenged the Tonsons’ claim of copyright.

I. The Legal Regimes of Copyright in England: 1554-1774

The history of the copyright to Shakespeare properly begins on February 6, 1594. On that day, John Danter registered *Titus Andronicus* with the Stationers’ Company. This was the first of Shakespeare’s plays to be entered into the Stationers’ Registry, and, as discussed below, registration of the “copy” with the Stationers’ Company secured what we would consider to be copyright in the work. Control of publication by the Stationers’ Company effectively ended in 1695 when the legal authority of the Stationers’ Company to control publication lapsed.

During the Tonsons’ periods of publication, three successive copyright “regimes” prevailed.⁹ These included the period of lapse from 1695 to 1710, the period of protection under the Statute of Anne beginning in 1710, and the period until 1774

⁹ Copyright could also be secured in other ways less significant to Tonson’s publications. Since the seventeenth century copyright could also be secured by Royal Patent. See L. Ray Patterson, *Copyright in Historical Perspective* 78-113 (1968). The monarch, in fact, granted the Stationers’ Company the exclusive right to certain religious and legal works. These rights were held by the Stationers’ Company as a whole and not by individual registrants, and it was known as their “English Stock.” See Cyprian Blagden, *The English Stock of the Stationers’ Company in the Time of the Stuarts*, 3 *Library* 167 (1957). Additionally, the two major English Universities, Oxford and Cambridge, were granted certain rights of publication. See F. E. Halliday, *Shakespeare and his Critics* 199 (1949).

when English Booksellers asserted a claim to a perpetual common law copyright. The status of “copyright” during each of these periods is relevant to evaluating the impact of copyright on the Tonsons’ publication decisions.

A. The Period of the Stationers’ Company

The original scope of “copyright” in Shakespeare was defined by the controls implemented by the Worshipful Company of Stationers.¹⁰ The Stationers’ Company began in the early fifteenth century as a printers’ guild, but in 1557 the guild received a Royal Charter and became one of a series of “livery companies,” or chartered monopolies, authorized by the English monarch to administer a variety of trades.¹¹ The Charter of the Stationers’ Company not only conferred a monopoly over publishing, but it also ensured that the government held substantial

¹⁰ Plays were originally purchased from the author by acting companies, “when it would become their property, the author losing all financial interest in it.” See Halliday, *supra* at 200. See James J. Marino, *Owning William Shakespeare: The King’s Men and Their Intellectual Property* (2011) for a discussion of the interests of Shakespeare’s company, the King’s Men, arising from their ownership and possession of the play copy. Although plays might be owned by the acting companies, the right to publish was controlled by members of the Stationers’ Company. See *infra* notes 15-22 and accompanying text.

¹¹ See generally Patterson, *supra* note 99 at 28-77; Leo Kirschbaum, *Shakespeare and the Stationers* 25-86 (1955); Mark Rose, *Authors and Owners: The Invention of Copyright* (1993); Helen Smith, *The Publishing Trade in Shakespeare’s Time* in *The Concise Companion to Shakespeare and the Text* (Murphy ed. 2007); H.G. Aldis, *The Book-Trade, 1557-1625*, in *IV The Cambridge History of English Literature* (A. W. Ward and A.R. Waller, eds. 1919). A copy of the charter of the Stationers’ Company, in addition to other important historical copyright documents, can be viewed online. See http://www.copyrighthistory.org/database/identityhtml/static_link_core_uk.html.

The guild was composed of text writers, illustrators (lymners or illuminators), book binders, and booksellers who operated from fixed, “stationary” positions around St. Paul’s Cathedral. Until the Great Fire of London in 1666, the focus of the Bookseller trade remained the stalls around St. Paul’s. To protect its publishing stock during the Great Fire, the Booksellers placed virtually all of their copy in the crypts of the cathedral, and when the ceiling collapsed during the fire, most of the books, together with much of the publishing presses were lost. See Harry M. Geduld, *Prince of Publishers: A Study of the Work and Career of Jacob Tonson* 5 (1969); Paul Collins, *The Book of William* 51-53 (2009).

powers of censorship since no work registered with the Company could be printed without government approval.¹²

Through their Charter, the Stationers' Company essentially had control over publishing within England,¹³ and pursuant to a series of "ordinances" that it adopted, the Stationers' Company established mechanisms for implementing its monopoly control over publication.¹⁴

First, copyrights only existed following registration of the work in the Company's Register.¹⁵ Upon registration, the registrant became the "proprietor" of the "copy," and only these proprietors were allowed to publish the work.¹⁶ Registration was not, however, without cost, and works were presumably registered only if there

¹² The approval for publication as a means of censorship was one of the primary reasons for Queen Elizabeth's incorporation of the Stationers' Company. *See* Kirschbaum, *supra* at 32; Aldis, *supra* at 379.

This approval for publication should not be confused with a separate requirement that a play could only be performed with the permission of the government, exercised during Shakespeare's time by the wonderfully titled "Master of the Revels." *See* Smith, *supra* at 26.

¹³ It was a control that was resented by writers. George Wither, an English poet of the Elizabethan era, wrote:

the meere Stationer is a dangerous excrement, worthy to be cut off by the State; to be detested by all Schollers; to be shun'd of all the people, and deserves to be curst.

Quoted in Cyril Bathurst Judge, *Elizabethan Book Pirates* ix (1934).

The relationship between authors and publishers has apparently not changed significantly in over four hundred years.

¹⁴ *See* Raymond Astbury, *The Renewal of the Licensing Act in 1693 and its Lapse in 1695*, 33 *Library* 296, 297 (1978); Patterson, *supra* note 9 at 31.

¹⁵ Patterson suggests that although registration clearly established copyright, it may not initially have been necessary. *See* Patterson, *supra* note 99 at 56-59.

¹⁶ This requirement was a blessing for historians since the registers of the Company largely exist and provide a record of the publishing trade in the Seventeenth and Eighteenth centuries. *See* Edward Arber, *Transcripts of the Registers of the Company of Stationers' of London (1554-1640)*(5 vols.,1875-94).

was a prospect of profits from publication.¹⁷ Only about one-half of Shakespeare's plays were registered during his lifetime, and it is widely assumed that this reflected the lack of publishing interest in "mere" plays, as opposed to much more profitable religious, political and trade books.¹⁸

Second, copyright could apparently only be secured by members of the Company.¹⁹ Copyright at this time was clearly not an expression of the rights of authors or even theater companies. Rather, copyright was an exclusive right of publication that was held by the members of the Stationers' Company.²⁰

Third, the copyright provided by the Stationers' Company had no fixed duration and was conceivably indefinite or perpetual.²¹ The copyright held by a Stationer could be assigned, however, and Tonson's copyrights in Shakespeare can be traced through a series of assignments discussed below.²²

Fourth, enforcement of the copyright was largely under the control of the Stationers' Company and administered through internal procedures of the Company.²³ The result was that there was little litigation in English Courts of Law or Chancery regarding copyright until the mid-eighteenth century.

The legal authority exercised by the Stationers' Company was confirmed through a variety of means. These included orders of the Star Chamber, and, following elimination of the Star Chamber in 1641, by the Licensing Order of 1643 and the Licensing Act of 1662, all of which confirmed the substantial powers of censorship that the government retained over the publication of books and the emerging venue of newspapers.²⁴ Although the 1662 Licensing Act was initially limited to two

¹⁷ The registration fee originally was 4d, later raised to 6d (4 and 6 pennies). *See* Halliday, *supra* note 9 at 199.

¹⁸ *See, e.g.,* Giles E. Dawson, *The Copyright to Shakespeare's Dramatic Works* 14, in *Studies in Honor of A.H.R. Fairchild* (1946).

¹⁹ *See* Patterson, *supra* note 9 at 47.

²⁰ *See* Rose, *supra* note 11 at 14.

²¹ *See* Kirschbaum, *supra* note 11 at 56-57.

²² *See infra* notes 67-89 and accompanying text.

²³ Regulatory and enforcement power was largely in the hands of the "Court of Assistants" of the Company. *See* Patterson, *supra* note 9 at 32-34.

²⁴ *See Id.* at 46-47.

years, it was renewed several times.²⁵ Controversy over the censorship powers of the government, however, led to the final lapse of the Licensing Act in 1695.²⁶ This lapse effectively ended the period of copyright control by the Stationers' Company.

B. The Period of Lapse

Following the lapse of the Licensing Act, the status of the copyrights was uncertain; whatever claim the "proprietors" might have had to protection through the Stationers' Company was now gone. As Patterson describes the period:

[t]he death of the private-law copyright [protections under the Stationers' Charter] in theory meant that no law – neither statutory nor judicial – protected anyone's right to publish a book, either in perpetuity or otherwise.²⁷

Although there were claims that "common law" copyright existed,²⁸ there were no rulings by English courts regarding the existence of any such common law copyright.²⁹

²⁵ The Act did lapse between 1679 and 1685, but was renewed and continued in effect until 1695. *See* Astbury, *supra* note 14.

²⁶ *See* Ronan Deazley, *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth-Century Britain (1695-1775)* 1-6; Rose, *supra* note 11 at 31.

²⁷ L. Ray Patterson, *Copyright and "the Exclusive Right" of Authors*, 1 J. Intell. Prop. L. 1, 11 (1993).

²⁸ The Booksellers themselves, in their petition to Parliament to enact the Statute of Anne stated that it should be passed because it "confirms common law rights." *See* Feather, *supra* note 5 at 34.

²⁹ For a discussion of the history of English copyright during this period, *see generally* Patterson, *supra* note 9; Rose, *supra* note 11.

Gomez-Arostegui, referring to the periods of lapse in the Licensing Act, states that '[b]y all accounts, only a single attempt was made during those times to enforce a Stationers' copyright in a common-law court, but it was a nonstarter, as it appears the case did not proceed beyond the pleadings. *See* H. Tomas Gomez-Arustegui, *What History Teaches Us about Copyright Injunctions and the Inadequate-Remedy-at-Law Requirement*, 81 S.Cal.L.Rev. 1197, 1221 (2008).

Rose states that there were no English cases relating to author's rights in the sixteenth and seventeenth century, and he notes only one case in the Stationers' Court of Assistants that involved a prohibition on the printing of the King's Men's

The politically powerful group of London Booksellers, facing the threat of loss of their publishing monopoly and profits from their “copy,” immediately began petitioning Parliament to reestablish protection of their right to publish.³⁰ Although the Booksellers were concerned with protecting their publishing monopoly, the debate over copyright also involved other issues. One set of concerns involved government censorship of the press, and perhaps the major issue in the debate over copyright legislation was the connection between copyright protection and censorship.³¹ It was over this issue that renewal of the Licensing Act had foundered.³²

But another set of voices was also influential. Political figures and philosophers, including John Locke and Daniel Defoe, were fighting monopoly control by the booksellers and advocating the rights of authors.³³ Copyright, it was argued, was

plays without permission of the players. *See* Rose, *supra* note 11 at 21. He does, however, note several cases in which challenges to a royal patent involved arguments relating to author’s rights. Rose states that in both such cases the claim of royal patent won. *Id.* at 23.

However, in *Wheaton v. Peters*, 33 U.S. 591 (1834), the U.S. Supreme Court, reviewing the debate over common law copyright in England, stated:

In the reign of Charles II. there were several cases in the courts, in which the ownership of the copy by authors, is treated as the ancient common law: and in one case, the case in Croke's Reports, the right of the author was sustained, even against the claim of the king's prerogative to publish all law books. Chief Justice Hale presided. Maugham 19; 4 Burr. 2316.

Id. at 597.

Prior to the Battle of the Booksellers in the mid-eighteenth century, however, it is undisputed that there was no serious discussion of a common law right of copyright in the English courts. *See infra* notes 48-56 and accompanying text.

³⁰ *See* Feather, *supra* note 5 at 23-25; Deazley, *supra* note 26 at 1-6.

³¹ *See Id.*

³² *See Id.*

³³ *See Id.* at 2-4; Rose, *supra* note 11 at 32-36; Andrew Murphy, *Shakespeare in Print* 102 (2003). Astbury, assessing Locke’s objections to censorship and control of printing by the “ignorant and lazy stationers” concludes that “most of his complaints reveal directly or by implication his concern for the intellectual, economic and social freedoms of the individual.” *See* Astbury, *supra* note 14 at 308.

appropriate to reward and encourage the production of new scholarship and new thought. The concept of authorial voice and authorial rights was emerging.³⁴

During the period of 1695 to 1710, a series of “copyright” bills were debated, but not adopted, by Parliament.³⁵

C. The Statute of Anne

In 1710 Parliament considered and ultimately enacted the Statute of Anne.³⁶ This statute, the first modern statutory copyright act, was introduced in January 1710 and received royal assent in April 1710.³⁷ The statute, entitled “An Act for the Encouragement of Learning,” was a significant victory for the Booksellers: it divorced copyright from government censorship and provided legal protection for their copy.

The Statute of Anne had a number of elements that distinguished it from previous protections by the Stationers’ Company.³⁸ First, and perhaps most important, the

³⁴ Rose notes that “in the first decade of the eighteenth century the conception of the author as proprietor was still in an early phase of development.” Rose, *supra* note 9 at 37. See also Peter Jaszi, *Toward a Theory of Copyright: The Metamorphosis of “Authorship,”* 1991 Duke L.J. 455, 468-471. See *infra* notes 195-203 and accompanying text for a discussion of the implications of claims of authorial rights to the Tonsons’ assertion of copyright in Shakespeare.

³⁵ See Feather, *supra* note 5 at 30.

³⁶ 8 Anne, c. 19. For a discussion of the circumstances surrounding the adoption of the Statute of Anne, see Feather, *supra* note 5; Patterson, *supra* note 9 at 143-150; Deazley, *supra* note 26 at 31-50; Rose, *supra* note 11 at 31-48.

³⁷ Rose states that the “parliamentary records” relating to the Statute of Anne begin on December 12, 1709 when the booksellers petitioned for leave to bring in a bill. See *Id.* at 42. He also notes attempts to introduce the statute starting in “Autumn 1709.” *Id.* at 36.

³⁸ For a description of the provisions of the Statute of Anne, see generally Deazley, *supra* note 26 at 38-50 and Appendix I (containing the text of the statute); Feather, *supra* note 5 at 19-20.

The statute had a number of other provisions including limits on the setting of “high or unreasonable” prices by booksellers and printers. This purported price control was repealed in 1735. *Id.* at 20. The statute had a “deposit” provision that required publishers to provide copies of published works to nine universities.

Statute of Anne established fixed, limited terms of copyright protection.³⁹ For works published after its effective date of April 10, 1710, copyright was for 14 years. If the author was alive at the end of that period, the copyright returned to the author for an additional 14 years. For works published prior to April 10, 1710, the copyright period was a fixed 21 years. The Booksellers had sought perpetual protection for their copy, but the statute was altered during its progress through Parliament to establish these finite terms for protection.⁴⁰

Second, the statute purported to place the copyright in the author rather than the bookseller; one need not be a Stationer to obtain copyright. Indeed, the Statute gained political support, in part, because it seemed to be based on the rights of authors, rather than monopoly control by publishers.⁴¹ Whatever these political atmospherics, the statute expressly authorized the assignment of copyright, and the booksellers, in effect, preserved their exclusive rights.⁴²

Third, the statute established methods of enforcement including actions in English courts to enjoin publication of books violating copyright. Books published in violation of copyright could be seized and destroyed and monetary penalties imposed.⁴³ Legal actions for violation of the statute began almost immediately.⁴⁴

Finally, the Statute of Anne contained an ambiguous “savings clause” that seemed to preserve pre-existing non-statutory claims to copyright.⁴⁵ The clause could be read only to preserve certain pre-existing printing rights of Universities.⁴⁶ The

³⁹ The original proposed bill had no limits on the duration of copyright. *See* Rose, *supra* note 11 at 43.

⁴⁰ *See Id.*

⁴¹ *See Id.* at 45-46.

⁴² *See* Patterson, *supra* note 9 at 145-147.

⁴³ *See* Gomez-Aruestegui, *supra* note 24 (interesting discussion of the legal mechanisms available for protection of copyright in seventeenth and eighteenth century England.)

⁴⁴ *See* H. Tomas Gomez-Aruestegui, *The Untold Story of the First Copyright Suit under the Statute of Anne in 1710*, 25 Berkley Tech. L.J. 1247 (2010).

⁴⁵ The statute expressly stated that it did not “prejudice or confirm any right that the said Universities, or any of them, or person or persons have, or claim to have, to the printing or re-printing any book or copy already printed.”

⁴⁶ *See* Deazley, *supra* note 26 at 22.

Booksellers, however, would use this clause to bolster their claim for a pre-existing common law copyright.⁴⁷

D. The Battle of the Booksellers over Common Law Copyright

The English Booksellers lost the battle for inclusion of a perpetual copyright in the Statute of Anne, but they continued the war. Faced with the loss of their copyright at the end of the statutory period, a group of powerful English Booksellers, known as “the Conger” or “the Trade,” developed strategies to protect their copyright.⁴⁸ One part of the strategy appears to have been monopolistic practices through which they protected one another from competition. These included a “tacit understanding” not to interfere with each other’s lapsed copyrights.⁴⁹ The Conger also operated as a combine that limited competition from non-participating booksellers by purchasing all published books at wholesale and sharing the profits on resale.⁵⁰ Additionally, this group of Booksellers unsuccessfully petitioned Parliament for an extension of statutory protections of their copyright.⁵¹

The English Booksellers, including the Tonsons, also turned to the courts in an effort to establish a “common law” perpetual copyright independent of the statutory protections.⁵² The claim was uncertain but not frivolous. Under the

⁴⁷ *Id.*; Patterson, *supra* note 9 at 148.

⁴⁸ Patterson states that “[i]n the eighteenth century, the power of the book trade had passed from the Stationers’ Company to the hands of a few booksellers, called the Conger, who controlled the trade through their monopoly of copyrights.” Patterson, *supra* note 9 at 151-152. *See also* Terry Belanger, *Publishers and Writers in eighteenth-century England* 14, in *Books and their Readers in Eighteenth-Century England* (Isabel Rivers ed. 1982).

⁴⁹ *See* Patterson, *supra* note 9 at 152, quoting Gray, Alexander Donaldson and the Fight for Cheap Books, 2, 38 *Juridical Review*. 180, 193 (1926)

⁵⁰ *See* John Feather, *Publishing, Piracy and Politics: An Historical Study of Copyright in Britain* 65-66 (1994); Belanger, *supra* note 48 at 13-14.

⁵¹ *See* Patterson, *supra* note 9 at 154-158; Rose, *supra* note 11 at 52-56.

⁵² In 1758, the Booksellers instituted a “collusive” suit, *Tonson v. Collins*, 1 Black. W. 301, 96 Eng. Rep. 169 (1761), to aid in establishing their common law claim.. As one commentator describes it:

The Stationers planned to have a sympathetic court rule on a bogus claim, a collusive suit, in which one member would intentionally republish another’s work, and the plaintiff would claim perpetual copyright at common law. One bookseller named Tonson agreed to sue another, Collins, who had agreed in advance to lose and decline to appeal.

regime of the Stationers' Company, the courts of law never had occasion to rule on the existence of a common law copyright, but the Booksellers were developing theories and strategies to convince courts to confirm a common law copyright independent of the Statute of Anne.

The "Battle of the Booksellers" raged in English courts for decades, and the outcome of the war was a near thing. In the years following the expiration of copyright protections under the Statute of Anne, the Booksellers sought relief in the courts based on an evolving set of theories.⁵³ An early series of cases had seemed to find a right in authors to control the first publication of their work,⁵⁴ but the Booksellers wanted more - a common law copyright in their printed 'copy.' In *Millar v. Taylor* and initially in *Donaldson v. Beckett*, the courts seemed to find such a copyright.⁵⁵ In 1774, however, the House of Lords issued the final ruling in

Siva Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity* 42 (2001).

The suit was dismissed when the court learned it was collusive. *See* Patterson, *supra* note 9 at 165.

Additionally, the major Booksellers, in 1759, jointly funded a pool of money to used to prosecute violators of their claimed perpetual copyright, and Jacob Tonson III "headed the list with a contribution of 500 pounds." *See Id.* at 167.

⁵³ Prior to 1761, the case law is confused about the extent to which the courts were addressing claims of common law copyright. *See* Patterson, *supra* note 9 at 161-162. Deazley states that "As to the cases taken before the courts in this period, they spun off in numerous and variegated directions. Different themes and arguments flew out from the epicenter of the Act like so many ribbons of the maypole. It was these disparate legal threads, which would be picked up by so many booksellers, lawyers and judges throughout the next half-century." Deazley, *supra* note 26 at 52.

⁵⁴ *See, e.g.,* *Webb v. Rose*, 1 Black. W. 30-31, 96 Eng. Rep. 184 (1732); *Forrester v. Walker*, 4 Burr. 2331, 98 Eng. Rep. 184 (1741); *Pope v. Curll*, 2 Atl. 342, 26 Eng. Rep. 608 (1741). *See* Patterson, *supra* note 9 at 158-160.

⁵⁵ *Millar v. Taylor*, 4 Burr. 2303, 98 Eng. Rep. 201 (1768) was the first case in which a majority of the judges found a perpetual common law copyright. *See* Patterson, *supra* note 9 at 168-172. As discussed below, *Millar* was based on theories relating the natural rights of authors. *See infra* notes 195-198 and accompanying text.

In *Donaldson v. Beckett*, a "panel" of twelve judges upheld the issuance of an injunction prohibiting the publication of a work that was no longer protected by copyright under the Statute of Anne. *Donaldson v. Beckett*, 2 Bro. PC 129 (1774).

the case of *Donaldson v. Beckett* that rejected the claim of perpetual common law copyright following first publication of the work.⁵⁶ After 1774, the scope of copyright in printed works rested on the statutory protections conferred by Parliament.

III. Jacob Tonson and the Copyright to Shakespeare

A. Jacob Tonson, Kit-Cat Publisher

Jacob Tonson was born in 1655 or 1656.⁵⁷ His father was a member of the Barber-Surgeons' Company⁵⁸ and his mother was the daughter of a successful publisher. At the age of 14 or 15, Jacob became an apprentice to a London bookseller, and he became a member of the Stationers' Company in 1678. Tonson had a good education, but it was during his work as an apprentice that he may have, through his own efforts, obtained the breadth of knowledge which allowed him to impress some of the major intellectual figures of his day.⁵⁹

By 1705 Tonson was recognized in a list of the 59 "master printers" in London,⁶⁰ and in his years as a publisher, he worked with and obtained copyright to some of the most important writers of his time, including John Dryden and Alexander Pope. Tonson also obtained the copyright to much of John Milton's work and was an

This case is seen as having supported the existence of a common law copyright. *See* Deazley, *supra* note 2 at 17. On review by the House of Lords, the judgment was not accepted and this final judgment is seen as the death of any Booksellers' claims to common law copyright. *See* Patterson, *supra* note 9 at 172-179.

⁵⁶ The precise holding of the House of Lords in *Donaldson* is the subject of some dispute. *See* Patterson, *supra* at 174-175; Deazley, *supra* note 2 at 19-20. However the holding is characterized, *Donaldson* marks the end of any claim to perpetual common law copyright to control a work after its initial publication. *Id.* at 24.

⁵⁷ For a discussion of Jacob Tonson's life and works, *see* Kathleen M. Lynch, *Jacob Tonson: Kit-Cat Publisher* (1971); Harry M. Geduld, *supra* note 11.

⁵⁸ Although his father was a member of the company of "chirurgeons" or barber-surgeons, Lynch states that he actually was employed as a shoemaker. *See* Lynch, *supra* at 3.

⁵⁹ *See Id.* at 9-10.

⁶⁰ Tonson initially operating out of a shop near Fleet Street in London, known by its sign as the "Judge's Head," but, in 1710, he moved his shop to a location near the Strand and, presumably reflecting his role as the publisher of Shakespeare, replaced the sign and began operating at "Shakespeare's Head." *See Id.* at 112.

early champion, and publisher, of *Paradise Lost*.⁶¹ Through a combination of good taste, fair dealing with his authors and ruthless protection of his “copy,” Jacob Tonson rose to become one of the most important and powerful publishing figures of his day, or, as one scholar describes him, “the greatest wheeler-dealer British bookselling has ever produced.”⁶²

Jacob Tonson was an important member of the group of powerful London booksellers who operated as a monopoly to protect their interests from Scottish and foreign publishers and from other book “pirates” who threatened their copy. As discussed above, this group of booksellers was instrumental in passage of the Statute of Anne, and they financed the “Battle of the Booksellers,” their unsuccessful decades long effort to secure a perpetual common law copyright in the English courts.⁶³

Tonson also was an important figure in literary and political circles. If not the founder, he was certainly one of the central figures in the Kit-Cat Club, a well-known group of authors and politicians who met regularly for food, drink and conversation.⁶⁴ Its membership included powerful Whig politicians and a group of established and rising literary figures, and there is a suggestion that Tonson used his involvement in the Kit-Cat Club to secure the publishing rights to promising authors.⁶⁵

Jacob Tonson never married, but he was joined in his publishing business by relatives. Jacob Tonson I, following the death of his brother, took his nephew Jacob Tonson II, in as a partner in his publishing business. When Jacob Tonson I retired in 1720, Jacob Tonson II took over the business. When Jacob Tonson II died in 1735, the business passed to his sons, Richard and Jacob Tonson III. These later Tonsons were also deeply involved in publication of Shakespeare.⁶⁶ Indeed it was this family of Tonsons’ that was responsible for the remarkable record of Shakespeare publications begun by Jacob Tonson I.

⁶¹ See Geduld, *supra* note 11 at 113-132. Important early copyright case law involved Tonson’s efforts to protect his copyright in Milton. See *infra* notes and accompanying text.

⁶² Collins, *supra* note 11 at 61-62 (2009).

⁶³ See *supra* notes 48-56 and accompanying text.

⁶⁴ See Ophelia Field, *The Kit-Cat Club: Friends who Imagined a Nation* (1990); Lynch, *supra* note 57 at 37-66; Geduld, *supra* note 11 at 151-171.

⁶⁵ Lynch, *supra* note 57 at 37-38.

⁶⁶ See *Id.* at 174-177.

B. The Tonsons' Shakespeare Copyrights

Throughout their publishing careers, Jacob Tonson and his family claimed a "copyright" in virtually all of Shakespeare's plays, and tracing the basis for this claim is, at best, complicated and confusing.⁶⁷ The trail begins several years after Shakespeare's death, when John Heminges and Henry Condell, Shakespeare's partners and fellow actors, began the work of publishing a "folio" edition of his plays.⁶⁸ The "First Folio," published in 1623, contained thirty-six of Shakespeare's plays, eighteen of which had never previously been published.⁶⁹ To publish this work, the publisher, Edward Blount, and the printer, Isaac Jaggard, both members of the Stationers' Company, had to secure the rights to these plays.⁷⁰ Sixteen had never been entered into the Stationers' Register before, and Blount and Jaggard obtained the copyright to these plays when they registered the plays at the time of publication of the First Folio.⁷¹ Nine or ten other Stationers held the rights to the

⁶⁷ The basic work tracing the copyright in Shakespeare's plays and collected works is Giles E. Dawson, *The Copyright to Shakespeare's Dramatic Works*, in *Studies in Honor of A.H.R. Fairchild* (1946).

⁶⁸ See generally W. W. Greg, *The Shakespeare First Folio* (1955).

This may be the time for an aside on some relevant publishing terminology. "Folio" refers to the format of a book when the printed page is folded in half, producing two "leaves" with four printed pages. This produces a very large book. The First Folio has 908 pages and measures approximately 12 by 15 inches. Folio editions are not books that one can comfortably hold, and they were presumably read from stands.

A Quarto edition refers to a print page is folded twice, producing four leaves and eight printed pages. It is still substantial but smaller than a Folio. An Octavo edition involves folding the paper into eight leaves or 16 pages. A Duodecimo edition has been folded into sixteen leaves with 32 pages. The modern paperback may trace its size to Duodecimo editions.

⁶⁹ Without the First Folio, these 18 plays, including *Macbeth*, *Julius Caesar* and *As You Like It*, would have been lost to history and literature. Thank you John Heminges and Henry Condell.

⁷⁰ Although the company of players may have "owned" the plays, the right to publication resided in the member of the Stationers' Company that first registered the plays. See *supra* notes 15-23 and accompanying text.

⁷¹ Blount and Jaggard entered these plays, by name, in the Stationers' Register on November 8, 1623. See Dawson, *supra* note 18 at 15.

other previously registered plays,⁷² and it is not clear what arrangements that Blount and Jaggard made with these people to secure the right to publish.⁷³

After publication of the First Folio, the interests in the plays were further fragmented by inheritance and assignments, but, by 1685, it appears that the rights to twenty-two or twenty-three of the plays were held jointly by Henry Herringman and John Martin, the publishers of the Fourth Folio.⁷⁴ The ownership of the copyrights to the other plays at this point is uncertain, but it is possible that Herringman separately held the copyright to four or five plays, including *Hamlet* and *Romeo and Juliet*.⁷⁵

May 20, 1707 was an important day for the Tonsons and for Western literature. It was on that day that Jacob Tonson II, presumably operating on his Uncle's instructions, purchased the rights to over 100 "copies" previously held by Henry

⁷² See Murphy, *supra* note 33 at 44, Table 2.2 (a chart containing, among other things, the ownership interests of each of the plays in 1623); Dawson, *supra* note 18 at 16.

⁷³ Smethwick and Aspley, holders of the copyright to six of the plays, were included as "undertakers" of the First Folio and presumably shared in the costs and profits. There is no evidence in the Stationers' Register that Blount and Jaggard acquired the rights of other rights holders, and it is possible that they were paid for the right to include their plays. *Id.* at 17.

⁷⁴ Identifying the precise number of Shakespeare plays to which Herringman and Martin held the "copyright" is tricky. First, they had obtained rights to a group of twenty-five plays that included at least three "apocryphal" plays not attributed to Shakespeare. See *Id.* at 22. Second, although Dawson states that Herringman and Martin held the rights to twenty-two Shakespeare plays, he includes *Sir John Oldcastle* and *The Yorkshire Tragedy* among this list. *Id.* These two plays are also not considered to have been authored by Shakespeare. Third, although Herringman and Martin may have each held equal shares to the rights to twenty-two plays, Herringman may have separately acquired the rights to other Shakespeare plays, including *Hamlet*, *Timon of Athens*, *Taming of the Shrew*, *Love's Labour's Lost* and *Romeo and Juliet*. *Id.* at 22.

⁷⁵ Dawson suggests that in 1685, Herringman and Martin each held ½ interests in twenty-two plays, Herringman had the interest in four plays, and *Othello* was owned by another. He states that "[t]hese twenty-seven are all the plays to which, in 1685, owners can on any grounds be assigned." *Id.* Dawson is confusing on this point since he later states that the assignment from Herringman's heirs to Jacob Tonson gave Tonson rights to twenty-three plays. See *id.* at 26.

Herringman.⁷⁶ The assignment expressly referred to a number of Shakespeare plays including *Timon of Athens*, *Hamlet* and *Julius Caesar*. It also referred to a “moiety of Mr. William Shakespeiers Playes bought of Mr. Andrew Clarke.” The “moiety” previously obtained from Clarke probably refers to Herringman’s one-half interest in twenty-two plays.⁷⁷ Thus, through the 1707 Herringman assignment, Tonson obtained a one-half or full interest in at least twenty-two Shakespeare plays.⁷⁸ The assignment of the rights to the 100 copies cost Tonson £140.⁷⁹

On October 22, 1709, Tonson obtained the other one-half interests in the twenty-two plays from George and Mary Wells, successors to John Martin’s interests.⁸⁰ The Wells assignment included approximately 380 “copies and parts of copies,” and the document of assignment is interesting. The specific assignments are listed in five columns that identify the “copy” and the percent interest assigned. In an unassuming position at the bottom of the fourth column, the document lists the assignment of “the half part in the Copies of ffive and Twenty of Mr William Shakespeares Playes.”⁸¹ Although the document refers to “ffive and twenty” plays, the Wells’ assignment apparently included a one-half interest in twenty-two plays that would now be attributed to Shakespeare.⁸² This assignment cost £100.⁸³

⁷⁶ See *Id* at 25. The assignment of the “copies” also included, among others, rights to works by Beaumont and Fletcher, Davenant, Jonson, Dryden and Donne. See Dugas, *supra* note 8 at 133-134.

⁷⁷ In 1674 Herringman and Martin had obtained interests in 22 Shakespeare plays from Andrew Clarke. Clarke was the executor of the will of Ellen Cotes, who was the widow of a publisher of the Second Folio. Clarke apparently succeeded to Cotes’ interests in the plays, and the “moiety” referred to in the 1707 assignment is Herringman’s one-half interest in the plays obtained from Clarke. See Dawson, *supra* note 18 at 25-26.

⁷⁹ *Id.* at 25.

⁸⁰ Who were George and Mary Wells? Dawson “conjectures” as follows: John Martin, Herringman’s partner in publishing the Fourth Folio, left his one-half interest in the twenty-two plays to his widow. She transferred this interest to Robert Scott who was a partner with his brother-in-law, William Wells. George and Mary Wells were apparently the son and widow of William. *Id.* The implication is that William Wells somehow received Martin’s one-half interest which then was passed to George and Mary. And thence to Tonson.

⁸¹ *Id.* The 1709 Tonson-Wells assignment document is at the Folger Shakespeare Library. Assignment of George Wells and Mary Wells to Jacob Tonson, Jr., Bib. Record ID: 2220555.

⁸² See Dawson, *supra* note 18 at 25.

Although the full scope of the Tonsons' Shakespeare copyrights is not free from doubt, it is clear that during their publishing career the Tonsons claimed all or most of the interests in virtually all of Shakespeare's plays. Through the Herringman and Wells' assignments, the Tonsons had by October 1709 acquired the full rights to at least twenty-two plays, and at some point they apparently acquired interests in all but three or four other Shakespeare plays.⁸⁴ Another publisher, Richard Wellington, apparently held or acquired the copyright to these other plays.⁸⁵

It is possible that the Tonsons later assigned some of their interests in the plays. The Tonson Shakespeare editions through 1728 list Jacob Tonson as the sole publisher, but later editions list the publisher as Jacob Tonson "and the rest of the proprietors."⁸⁶ Claims by others to a partial interest in the copyright to

⁸³ *See Id.*

⁸⁴ Giles Dawson states "there is reason to believe that Tonson later [i.e., after the October 1709 Wells' assignment] possessed the copyrights to all but three or four of Shakespeare's plays." *Id.* at 26. Dawson is unclear on the date at which the Tonsons' may have obtained the rights to these other plays. In a 1964 article, Dawson states that Tonson "had, by 1709, acquired the copyrights of all of Shakespeare's plays except three or four." Giles E. Dawson, *Four Centuries of Shakespeare Publication*, at 5 (1964) (emphasis added), <http://kuscholarworks.ku.edu/dspace/bitstream/1808/5865/1/libseries.num22.pdf>.

⁸⁵ *See* Terry Belanger, *Tonson, Wellington and the Shakespeare copyrights*, in *Studies in the Book Trade in Honour of Graham Pollard* (1975); Dawson, *supra* note 18 at 28.

Dawson states, based on publication of editions of individual plays, that "the Wellingtons owned the whole of *Hamlet*, *Othello*, and *King Lear* and an interest in *Julius Caesar* and possibly in *Macbeth* and *1 Henry IV*." *Id.* at 29. In 1767, the catalogue for the sale of the Tonsons' copyrights, however, indicates that the Wellingtons owned only *Hamlet* and *Othello* and that the Tonsons owned all of *King Lear*. *See* Belanger, *supra* at 196.

How or when *Hamlet*, the rights to which were presumably assigned by Herringman to Tonson, was acquired by Wellington is unclear. *See* Dawson, *supra* note 18 at 28.

⁸⁶ *See Id.* at 26. In 1731, Theobald indicated that "other Booksellers" had made "overtures" to him about publication of an edition of the collected works. In a letter relating to Theobald's possible publication of a separate edition, Tonson referred to the existence of "other persons... concerned with the Text of Shakespear." *Id.* at 27. The implication is that persons who held some portion of the rights to Shakespeare with Tonson were separately discussing the possibility of Theobald publishing a separate work. *See infra* note 186.

Shakespeare apparently also first appear in book sale catalogues in 1737.⁸⁷ When the Tonsons' copyrights were sold in 1767, the catalogue for the sale states that the Tonsons owned a 2/3 interest in the "collected works" of Shakespeare and either a 2/3 or full interest in most of the other plays. The 1767 catalogue lists only *Hamlet* and *Othello* as Shakespeare plays in which the Tonsons had no interest.⁸⁸

The Tonson Shakespeare copyrights were sold in 1767 for £1200.⁸⁹ The assignment ended an age of Shakespeare publishing.

C. Tonson's Shakespeare Publications

1. Collected Works of Shakespeare

Prior to 1709, there had been few publications of Shakespeare's works.⁹⁰ The First Folio, containing the thirty-six plays, had been published in 1623. A Second Folio followed in 1632; a Third Folio in 1663; and a Fourth Folio in 1685. Each of the later folios strayed farther and farther from the text of the First Folio, and the Third and Fourth Folios contained an additional seven "apocryphal" plays that were attributed to Shakespeare.⁹¹ Each was in the large single volume "folio" format. Each was expensive.

Jacob Tonson I's publication of Shakespeare's works began with the seminal 1709 six-volume edition of *The Works of Mr. William Shakespear* edited by Nicholas Rowe.⁹² Rowe was a popular contemporary playwright, and the Rowe edition

⁸⁷ See Belanger, *supra* note 85 at 196.

⁸⁸ See *Id.* The catalogue states that the Tonsons had no interest in *Hamlet* or *Othello*, and *Pericles* is not mentioned.

The reference to a copyright in the "collected works" Shakespeare is interesting, and the issue of Tonsons' claim to some copyright interest in the collected works, rather than individual plays, is discussed below, *see infra* note and accompanying text.

⁸⁹ See Belanger, *supra* note 48 at 18; Geduld, *supra* note 11.

⁹⁰ In addition to the Folios, there had been some publication of small quarto editions of individual Shakespeare plays and "adaptations" in the Seventeenth Century. See Dugas, *supra* note 8 at 82-91.

⁹¹ See *infra* notes 165-167 and accompanying text.

⁹² *The Works of Mr. William Shakespear in Six Volumes, adorned with cuts, Revised and Corrected with an Account of the Life and Writings of the Author* (N. Rowe Ed. 1709). For a description of the edition, see Alfred Jackson, *Rowe's*

involved significant additions that made the plays more accessible and “reader-friendly.”⁹³ There is little doubt about the significance of this work. McKerrow noted that “[w]e ought not, I think, to refuse to recognize that in all probability it was to Rowe and his publisher Tonson that the beginning of the world-wide recognition of Shakespeare was due.”⁹⁴

Among other things, Rowe’s edition included scene descriptions that had been lacking in the Folios, modernized spelling, illustrations for each of the plays, more consistent Act and Scene breaks, lists of *dramatis personae*, and significant corrections and emendations to the text.⁹⁵ Although Rowe consulted various earlier versions of the plays, his 1709 Collected Works was based on, and largely used, the text of the Fourth Folio.⁹⁶ As will be discussed below, however, Rowe

Edition of Shakespeare, 10 The Library 455 (1930); Andrew Murphy, *The Birth of the Editor*, in *A Concise Companion to Shakespeare and the Text* (Andrew Murphy ed. 2007).

The 1709 editions did not contain the Sonnets, and a rival publisher, Edward Curll, independently printed a “copy cat” seventh volume to the Rowe Shakespeare containing the sonnets. An agreement was apparently reached between Tonson and Curll, and the 1714 edition contained the seventh volume printed by Tonson. *See* Dawson, *supra* note 18 at 9.

⁹³ Rowe’s edition became the model for later editions. *See* Murphy, *supra* note 33 at 61. Tonson may have selected Rowe, the popular playwright, for marketing purposes. This was the model Tonson was to follow later when Alexander Pope and Samuel Johnson were selected as editors of later editions. *See* Dugas, *supra* note 8 at 141.

⁹⁴ *See* Ronald B. McKerrow, *The Treatment of Shakespeare’s Text by his Early Editors, 1709-1768*, Annual Shakespeare Lecture of the British Academy, 1933, at 12 (1976).

⁹⁵ We may also be able to thank Rowe for the common use of the name Puck, rather than Robin Goodfellow, for the sprite in *A Midsummer’s Night Dream*. *Id.* at 11.

⁹⁶ *See* Jackson, *supra* note 92 at 464-465; McKerrow, *supra* note 94 at 19-21. Although Rowe’s edition was almost completely based on the Fourth Folio, in the preface to the work, Rowe wrote:

I must not pretend to have restor’d this Work to the Exactness of the Author’s Original Manuscripts: Those are lost, or, at least, are gone beyond any Inquiry I could make; so there was nothing left, but to compare the several Editions, and give the true Reading as well as I could from thence.”

certainly looked at earlier Folios and some quarto versions of the plays, and he added significant new text to *Hamlet* and *Romeo and Juliet* that had not appeared in the Fourth Folio.⁹⁷

In addition to these editorial additions, Nicholas Rowe also added an introductory essay on the life of William Shakespeare.⁹⁸ This was the first significant “biography” of Shakespeare,⁹⁹ and it is the source of many of the stories of Shakespeare that have become part of his legend: Shakespeare poaching deer, Shakespeare performing the role of the ghost in *Hamlet*, Queen Elizabeth commanding Shakespeare to write a play describing Falstaff in love.¹⁰⁰ Although Rowe’s essay was written almost 80 years after Shakespeare’s death, it is based upon accounts gathered from people in Stratford-on-Avon who may have had some recollection of the earlier times.¹⁰¹ With this essay, Shakespeare became an identifiable individual to Eighteenth Century readers.¹⁰²

Quoted in Murphy, *supra* note 92 at 94. Aside from its intrinsic interest to understanding the development of Shakespeare scholarship, Rowe’s reliance on earlier versions is relevant to understanding the scope of Tonson’s copyright on the development of this scholarship. *See infra* notes 145-149 and accompanying text.

⁹⁷ Among other things, Rowe restored the preface to *Romeo and Juliet*, although he placed it at the end of the play. He also included an entire scene from *Hamlet*, Act IV, Scene ii, that was not included in the Fourth Folio. *See McKerrow, supra* note 94 at 8-10.

⁹⁸ Rowe’s work has been reprinted as a separate book. Nicholas Rowe, *The Life of Shakespeare* (2010).

⁹⁹ Schoenbaum describes Rowe as “for all practical purposes, the first biographer” of Shakespeare. *See Schoenbaum, supra* note 8 at 86 (1991). A number of very brief descriptions of Shakespeare’s life had been published in the late seventeenth century, beginning with a short passage in Fuller’s *Worthies*. *See id.* at 83-85; Jackson, *supra* note 92 at 458-459.

¹⁰⁰ *See* Jackson, *supra* note 92 at 457-458.

¹⁰¹ As Rowe acknowledges in this prefatory life of Shakespeare, the information he used was largely obtained from Thomas Betterton, a noted actor of the time. Betterton apparently visited Stratford in 1708 to review records and interview the residents for stories about Shakespeare. *See Schoenbaum, supra* note 8 at 88-89; Dugas, *supra* note **Error! Bookmark not defined.** at 148-151.

¹⁰² Dugas states that Rowe’s biography “served to connect those plays to the man who wrote them in the minds of many – possibly most – readers for the very first time.” Dugas, *supra* at 131.

Although the Folios had been physically large and expensive single volumes, the Rowe edition was published in a six-volume Octavo format that was smaller, easier to read, and less expensive.¹⁰³ The work was presumably popular; a second imprint of the Rowe Shakespeare was issued in 1709 and a new edition was published in 1714.¹⁰⁴

In 1725, Tonson published a new edition of Shakespeare's collected works edited by Alexander Pope. Pope may have been one of the foremost essayists and poets of his time, but his editorial work was, shall we say, problematic. The text of his edition was based on Rowe's (which had been based on the Fourth Folio), but Pope decided to improve Shakespeare by editing out offending language and puns. He was apparently less interested in reproducing the "actual" Shakespeare, than in producing a text "in keeping with an eighteenth-century idea of what Shakespeare should be."¹⁰⁵ Although Pope made contributions to the editing of Shakespeare, the 1728 edition was subject to substantial criticism.¹⁰⁶

The next Tonson edition of Shakespeare, the 1733 Theobald edition, was edited by a then-obscure lawyer and writer named Lewis Theobald.¹⁰⁷ Theobald had previously savaged Pope's scholarship in a book called *Shakespeare Restored, or a Specimen of the many Errors as well Committed as Unamended by Mr Pope in his late edition of this poet; designed not only to correct the said Edition, but to*

¹⁰³ See *infra* notes 180-185 and accompanying text for a discussion of the significance of the edition on the popular dissemination of Shakespeare's works.

It has been estimated that the First Folio sold for one pound or about \$200 in today's currency. The 1709 Rowe edition sold for 30 shillings. See Murphy, *supra* note 33 at 62. They are somewhat more valuable today. A copy of the First Folio sold in 2001 for over \$6 million. See Collins, *supra* note 9 at ???. An internet search in July 2011 found a set of the 1709 Rowe Shakespeare being offered for sale for \$32,500. See <http://www.abebooks.com/servlet/SearchResults?an=shakespeare&prl=10.00&recentlyadded=all&sortby=1&sts=t&x=59&y=19>.

¹⁰⁴ It was not until 1934 that R. B. McKerrow recognized that Tonson had printed a "surreptitious" second imprint sometime later in 1709. See Ford, *supra* note 3 at 2.

¹⁰⁵ Murphy, *supra* note 92 at 96.

¹⁰⁶ As Giles Dawson stated "Pope's editorial work in preparation of his text has in recent years been sufficiently studied to make its small worth now generally understood." Dawson, *supra* note **Error! Bookmark not defined.** at 22.

¹⁰⁷ See Peter Seary, *Lewis Theobald and the Editing of Shakespeare* (1990)

*restore the true Reading of Shakespeare in all the Editions ever published.*¹⁰⁸ Theobald's *Shakespeare Restored* has been characterized as "the first book-length study dedicated wholly to textual issues in Shakespeare."¹⁰⁹ Although not published by Tonson, it was certainly prompted by Tonson's issue of the Pope edition, and thus Tonson can be seen as a progenitor not only of Shakespeare scholarship, but also of the tradition of nasty Shakespeare scholarly battles.¹¹⁰

Theobald was perhaps the first scholar systematically to review the early quarto and First Folio texts of Shakespeare.¹¹¹ He also recognized the importance of an editor being familiar not only on the works on which Shakespeare relied, such as *Holinshed's Chronicles*, but also on other contemporary works and the vocabulary of Elizabethan England.¹¹² Theobald's work is among the most important in establishing the methodology of Shakespeare studies.¹¹³ Theobald attempted to publish his own edition of the works of Shakespeare, but for copyright, and other reasons discussed below, he came to an agreement with Jacob Tonson II to publish the work with the Tonsons.¹¹⁴

A succession of other editors and editions added to the Tonson legacy of Shakespeare publication and scholarship. These included the editions by William Warburton in 1747,¹¹⁵ Samuel Johnson in 1765, and Edward Capell in 1767.

¹⁰⁸ See *id.* at 65-86. It probably pays to be cautious in attacking a poet; Pope responded by making Theobald the subject of his poem, *The Dunciad*. Pope's friends also attacked Theobald and Theobald's reputation suffered as a result. See *Id.* at 87-101.

¹⁰⁹ Murphy, *supra* note 92 at 95.

¹¹⁰ See Ron Rosenbaum, *The Shakespeare Wars: Clashing Scholars, Public Fiascos, Palace Coups* (2006).

¹¹¹ See Seary, *supra* note 107 at 131-170.

¹¹² See *Id.* at 32. One scholar attributes Theobald's attention to "precedent" to his training as a lawyer. Murphy, *supra* note 92 at 96.

¹¹³ McKerrow describes Theobald who "in many ways was the true founder of modern Shakespearian scholarship." McKerrow, *supra* note 94 at 23. McKerrow particularly notes that "the feature of Theobald's edition which gives it a place of first importance in the history of Shakespearian scholarship is his footnotes, which maybe said to have initiated the crucial study of Shakespeare's language. *Id.* at 26.

¹¹⁴ See Seary, *supra* note 107 at 133-135.

¹¹⁵ Warburton's edition was not well received, and Edmund Malone, perhaps the greatest of Shakespeare's eighteenth century editors, particularly criticized Warburton's emendations. See Murphy, *supra* note 92 at 98. Nonetheless, this

Samuel Johnson's edition of the Collected Works was particularly significant for his insightful Preface to the works and for continuing editorial contributions.¹¹⁶

2. Individual Plays

The history of the Tonsons' publication of individual plays is somewhat harder to track. Between 1709 and 1734, it does not appear that the Tonsons published a significant number, if any, of the plays as individual volumes.¹¹⁷ The Tonsons had, it has been suggested, little financial incentive to publish the individual plays since this would affect the market for the collected works.¹¹⁸

All this changed in 1734 when a bookseller names Robert Walker began to publish a series of cheap individual editions of the plays.¹¹⁹ Walker's publishing technique

author's favorite emendation to Shakespeare was apparently made by Warburton. The First Folio and Second Quarto texts of *Hamlet* have the Prince say to Polonius "For if the sun breed maggots in a dead dog, being a good kissing carrion— Have you a daughter?" *Hamlet*, Act 2, Scene 2. Warburton's emendation of this line replaces "a good kissing carrion" with "a god kissing carrion." Good stuff. This was the line as read by Derek Jacobi in the BBC production of *Hamlet*.

¹¹⁶ Among other things, Johnson was the first editor to expressly state the principle that earlier editions of Shakespeare had priority over later editions in determining the "authoritative" text. In other words, he was the first to acknowledge that later editions could only have been modified by editors who were more remote in time from Shakespeare, and thus the earlier editions must be closer to the original text. Johnson's use of this principle was more honored in the breach than the observance, and much of Johnson's 1765 edition in fact relies on post-First Folio text. See Murphy, *supra* note 92 at 98.

¹¹⁷ H. L. Ford notes only a limited number of individual plays being published by Tonson before 1736. See Ford, *supra* note 3 at ??? (1935). Dugas states that Tonson published only single editions of five Shakespeare plays between 1720 and 1733. Dugas, *supra* note 8 at 216. Dugas and Hume state that Tonson "did not publish a single unaltered Shakespeare play" between 1700 and 1714. See Don-John Dugas and Robert D. Hume, *The Dissemination of Shakespeare's Plays Circa 1714*, 56 *Studies in Bibliography* 268 (2003-2004)

Harry Geduld describes in some detail the extensive publication of individual editions of the plays. He expressly states that "[d]uring 1714, he issued twenty-five of the plays in separate octavo volumes." Geduld, *supra* note 11 at 138. Dugas and Hume, however, conclude that Geduld was in error. Dugas and Hume, *supra* at 261-266.

¹¹⁸ *Id.* at 269.

¹¹⁹ See generally Giles E. Dawson, *Robert Walker's Editions of*

was interesting. Each play was published in “weekly penny parts:” a single sheet, costing a penny, was published in a journal, and purchasers of the three or four of the sheets that constituted a play could bind them together for a copy of the play for a total cost of about 4 pennies.¹²⁰ Later, Walker also published a cover sheet that allowed all of the plays to be bound into a set of collected works. By 1735, Walker had published almost all of the plays.¹²¹

Rather than institute legal action for copyright violation, Tonson responded by a publishing effort that simply drove Walker from the market.¹²² For each of the plays that Walker published, Tonson published the same play in a cheap, small duodecimo edition.¹²³ Tonson also flooded the market with these cheaper plays; it has been estimated that Tonson published 10,000 copies each of most of the plays.¹²⁴ As a result of Walker’s competition copies of the Shakespeare plays became accessible to a far larger public.¹²⁵

Shakespeare, in *Studies in the English Renaissance Drama* (Josephine Bennett, Oscar Cargill, Vernon Hall Jr. eds. 1959).

¹²⁰ See Murphy, *supra* note 33 at 108.

¹²¹ See Dawson, *supra* note 84 at 13-14.

¹²² Tonson also played hardball. His lawyer wrote Walker stating: “Mr. Tonson would spend £1000 before he should go on, and likewise have him lock’d up in Gaol, and that it would be the ruin of him and his family.” See Murphy, *supra* note 33 at 108. For a discussion of the Tonsons’ legal response to Walker’s challenge to their monopoly, see *infra* notes 186-203 and accompanying text.

¹²³ While a complete play from Walker cost about 4 pennies, the Tonsons’ published their plays at a cost of 1 penny each. See Dawson, *supra* note 119 at 63. Cheaper, but not perhaps better. As Dawson notes: “Textually neither series is of any value; both are reprints, hastily got up, ill printed, and poorly proofread; neither is materially better than its rival nor materially below the usual level of the cheaper reprints of the day.” *Id.* at 69.

¹²⁴ See Dugas, *supra* note 8 at 220-221.

¹²⁵ Dawson states: “By starting a price war and causing his great rival to pour out floods of cheap Shakespeare, Walker was responsible for putting the plays into the hands of many lowly readers who otherwise could not afford them.” Dawson, *supra* note 119 at 80.

Dugas also notes: “The Tonson-Walker conflict produced an explosion of single texts of Shakespeare plays, more than two-thirds of which (twenty-three) had never been performed in their unaltered states during the late seventeenth and early eighteenth centuries, and almost a third of which had never been published individually.” Dugas, *supra* note 8 at 230.

III. The Impact of Copyright on the Tonsons' Shakespeare Publications

There can be little doubt of the significance of the Tonsons' publications on the growth of Shakespeare scholarship. The editors they selected inaugurated a scholarly examination of the text. Indeed, the Tonsons' publications began the identification of an editorial role; Rowe's edition was the first work of Shakespeare to identify the editor by name.¹²⁶ The essays, emendations, commentaries and biographies produced by these editors also contributed to the growth of Shakespeare criticism. The publication of cheap, easily read versions of the plays contributed to the enormous growth in public appreciation and demand for Shakespeare.¹²⁷

There is also no doubt that the Tonsons' publication decisions were influenced by their presumed control of the Shakespeare copyrights. Jacob Tonson and family were in it for the money, and exclusive ownership of the "copy" meant money. Tonson was a successful publisher who vigorously fought perceived "piracy" of his copyrights. One scholar says that Tonson sought to preserve his copyrights with "nearly every means short of actual murder."¹²⁸

An advertisement in a 1734 edition of *Hamlet* published by Tonson gives some indication of his view of his copyright in Shakespeare. Referring to Walker's publication of *The Merry Wives of Windsor*, "at the Rate of One Penny per sheet," the advertisement continues:

Which vile Practice is to the manifest Injury of the Fair-Trade, and to the apparent Loss, if not Ruin, of the Proprietors of the Copy-Right of the said Play, who have given great Sums of Money for the Copies of Plays, some which belong to Widows and Orphans, who have nothing to subsist upon but the Profit arising by Reprinting such Copies. And moreover, if

¹²⁶ See Murphy, *supra* note 92 at 94.

¹²⁷ See *supra* notes 180-185 and accompanying text. It has been suggested that the Tonsons' publications also led to an increase in theatrical performance of Shakespeare. As one scholar states:

At the risk of being charged with heresy by stage historians, I would like to suggest that the publication history of Shakespeare's plays in the second quarter of the century had a strong connection with the increased offering of the plays upon the stage.

Scouten, *supra* note 7 at 197.

¹²⁸ Ford, *supra* note 3 at 41.

this vile Practice should go on, it would be the Total Ruin of all good Printing, and in a short time no Book will be printed so as to be read.¹²⁹

The Tonsons' certainly wanted to protect their copyright, and they were major players in the efforts both to enact the Statute of Anne and obtain a court ruling on common-law copyright.

Assessing the significance of copyright on the Tonsons' publication decisions is, however, confounded by at least three factors. First, the Statute of Anne was adopted in 1710, and the scope of its protection became clearer only through litigation over the next decades. Second, English Booksellers, including Tonson, asserted a perpetual "common law" copyright that they claimed gave them protection even after their rights under the Statute of Anne had lapsed. This claim to common law copyright was not rejected until 1774, almost a decade after the Tonsons had finally ceased publication of Shakespeare. Finally, whatever the legal legitimacy of the claim, Tonson acted (and fought "pirates") as if he owned the exclusive right to publish all of Shakespeare.

Nonetheless, some conclusions about the impact of copyright on the Tonsons' decisions to publish Shakespeare can be made, and it seems clear that the Tonsons' publications cannot be fully attributed to the adoption of the copyright protections in the Statute of Anne or even to any more general claim of common law copyright. Much of what Tonson did that fostered the birth of Shakespeare studies is explainable through the Tonsons' response to market forces, their reliance on the London Booksellers monopoly control of the publishing trade, and perhaps Jacob Tonson's own innate appreciation and pride in the publications.

A. The Scope of the Tonson Copyrights

The Tonsons' clearly claimed that they had the copyright to Shakespeare. Through the 1707 Herringman and 1709 Wells assignments Jacob Tonson secured the

¹²⁹ Advertisement, dated September 12, 1734, published at the end of *Hamlet, Prince of Denmark* (1734). A similar "advertisement," without the reference to "widows and orphans," had previously appeared with Tonsons' publication of his own edition of *The Merry Wives of Windsor*. See Dawson, *supra* note 84 at 13-14. For a description of other similar advertisements attacking Walker, see Geduld, *supra* note 11 at 189-195.

It is amazing how many "widows and orphans" subsisted on copyrights. The Booksellers had made reference to widows and orphans when petitioning Parliament for a statutory copyright. See Rose, *supra* note at 43. Aside from the nice rhetorical appeal of destitute widows and orphans, these references may relate to the Stationers' Company practice of providing a share of the proceeds from their English Stock to widows and orphans of Company members. See Bladgen, *supra* note 9 at 179.

“copyright” to twenty-odd individual Shakespeare plays, and the Tonson family, at some point, presumably obtained the rights to all or parts of most of the other plays.¹³⁰ Before considering the impact of copyright on Tonsons’ publication decisions, there are, however, several questions regarding the scope of the Tonson copyright claims that are worth considering. First, did the Tonsons obtain some separate right to publish the “collected works” of Shakespeare apart from their rights to individual plays? Second, to what “text” of the plays did they hold copyright?

1. Collected Works

Although the Tonsons’ effectively held the copyright to most of the individual plays there is some dispute over whether they held some separate right to publish the “collected works” of Shakespeare. It appears from the catalogue of the 1767 sale of their Shakespeare copyrights that the Tonsons made just such a claim: they purported to sell a 2/3 interest in the “collected works” of Shakespeare.¹³¹ Theobald, when attempting to publish his own edition of the collected works, also may have felt he was stymied by a Tonson copyright in the collected works.¹³²

It is, however, hard to find any basis for a claim that Tonson had some separate right to the collected works of Shakespeare. The history and language of the assignments themselves indicate that the Tonsons only acquired interests in individual plays. As noted, the original publication rights originated in the

¹³⁰ The assignments from Herringman and Wells would presumably have given the Tonsons’ the exclusive right to the assigned plays. After 1731, however, it appears that the Tonsons’ shared copyright interests in some of the plays with other “proprietors.” See *supra* notes and accompanying text. Dawson suggests that control of any percentage interest in a work gave that “proprietor” the right to publish. See Dawson, *supra* note 18 at 27-28. With the exception of the dispute with Theobald, it does not appear that other persons who shared an interest in the copyrights with the Tonsons, interfered with their control over publication. see *supra* notes and accompanying text.

¹³¹ See Belanger, *supra* note 85 at 195. In 1737, the publisher William Feales claimed a one-ninth interest in “Shakespear’s Whole Works.” See *id.* at 196.

¹³² Theobald, who wanted to publish his own edition of the collected works, wrote:

tho’ *private Property* should so far stand in my Way, as to prevent me from putting out an *Edition of Shakespeare*, yet, some Way or other, if I live, the Publick shall receive from my Hand his *whole Works* corrected, with my best Care and Ability.

See Murphy, *supra* note 33 at 70.

registration of the individual plays in the Stationers' Register. Blount and Jaggard's registry entry for the First Folio lists by name the sixteen plays they newly registered, and the series of assignments from Blount and Jaggard conveyed only their interests in those individual plays. The rights to other plays also trace their origin to their original registration with the Stationers' Company.¹³³ Dawson concludes that "no copyright to Shakespeare's collected works existed in the seventeenth century."¹³⁴

Nor do any known assignments to the Tonsons purport to grant a right to the collected works. The 1707 assignment from Herringman refers only to the assignment of rights to individual plays or to the rights previously obtained in individual plays.¹³⁵ The Wells' assignment can also be traced to prior assignments in a discrete set of individual plays.

It has also been suggested, however, that by virtue of holding the right to publish some significant number of the Shakespeare plays, the copyholder somehow gained the right to publish the entire collected works of the author.¹³⁶ This also seems incorrect. It is true that holding the rights to a large percentage of the individual plays gave the publisher an advantage in publishing an edition of collected works: it meant that the publisher had to negotiate with fewer rights holders to obtain the rights to publish, and it also meant that there were fewer who might seek to enforce their copyright. But there is no reason to believe that it gave the publisher some legal right to publish plays to which the publisher did not hold copyright.

This misconception seems to have originated in a reading of Dawson's work on the Shakespeare copyright.¹³⁷ Dawson did write that "the ownership of a large number of these entitled a man to initiate the publication of a collected edition."¹³⁸ But he goes on to state that other owners of the rights to the play could negotiate for payment or even block that play's inclusion in the collected works.¹³⁹ Thus,

¹³³ See *supra* notes 67-75 and accompanying text.

¹³⁴ Dawson, *supra* note 18 at 24.

¹³⁵ This includes the assignment of three individual plays and "the moyety of Mr. William Shakespeiers Playes bought of Mr. Andrew Clarke." See *supra* notes and accompanying text.

¹³⁶ See, e.g., Dugas and Hume, *supra* note 117 at 267.

¹³⁷ See Dugas, *supra* note 8 at 83-84.

¹³⁸ Dawson, *supra* note 18 at 23.

¹³⁹ *Id.*

ownership of the copyright to a large number of Shakespeare plays may have given Tonson a practical advantage, but no particular legal right, to publish all of the plays.

2. Specific Text

There is another important question concerning the scope of the Tonson copyright to be considered. At the time of publication of the First Folio, eighteen plays had been published in one or more quarto versions that differed, in some cases significantly, from the text published in the First Folio.¹⁴⁰ The text of later editions of the Folios varied in significant respects from the First Folio, and there were other versions of the plays issued as individual quarto editions published after 1623.¹⁴¹ To what text did Tonson hold copyright?

It appears that Tonson simply assumed a copyright in the plays themselves, including all of the textual variations that may have existed among the Folios and individual editions published before 1709.¹⁴² This assumption is reflected in some aspects of his publishing history. In March 1709, in anticipation of publication of the Rowe Shakespeare, Tonson took out announcements in London papers requesting any “materials” that would aid in the publication of the work.¹⁴³ Tonson published a similar announcement prior to publishing the Pope edition.¹⁴⁴

¹⁴⁰ See *infra* notes 168 and accompanying text.

¹⁴¹ See Murphy, *supra* note 33 at 15-56.

¹⁴² Peter Seary suggests that Tonson only acquired the rights to the Fourth Folio text since “Tonsons’ claim to the copy stemmed from negotiations with those who had rights to this edition.” Seary, *supra* note 107 at 58. But, as discussed below, this claim is certainly unsound.

¹⁴³ In March 1709, Tonson published the following advertisement in the London Gazette and Daily Courant:

Whereas a very neat and correct edition of Mr. William Shakespeare’s works in six volumes in octavo, adorned with cuts, is now so far finished as to be published in a month, to which is designed to be prefixed an account of the life and writing of the said author as far as can be collected. If therefore, any gentlemen who may have any materials by them that may be serviceable to this design will be pleased to transmit them to Jacob Tonson at Gray’s Inn Gate: it will be a particular advantage to the work, and acknowledged as a favour by the gentleman who hath care of this edition.

See Jackson, *supra* note 92 at 455.

¹⁴⁴ See McKerrow, *supra* note 94 at 7.

Presumably Tonson was attempting to obtain earlier editions of the plays for use in preparation of the Rowe edition.

The Rowe, Pope and Theobald editions were largely based on the imperfect text of the Fourth Folio. Although many attribute this to the editorial conventions of the day,¹⁴⁵ some claim that these editors relied on the Fourth Folio because of copyright concerns.¹⁴⁶ The idea that Tonson somehow held copyright only to the text of the Fourth Folio is, however, certainly wrong. Although Tonson may have received most of their rights in Shakespeare by assignment through Herringman and Martin, publishers of the Fourth Folio, these assignments themselves originated by assignment of individual plays. No express assignment of the “Fourth Folio” was apparently ever made.

Furthermore, all of the Tonson editors, starting with Nicholas Rowe, relied on the text from a variety of different quarto and Folio versions in preparing their editions under the Tonson copyright. Rowe, in the introduction to his 1709 edition, refers to his efforts to review earlier editions of the plays. Pope lists twenty-seven earlier editions of Shakespeare to which he referred, and Theobald claimed that he relied on forty-three.¹⁴⁷ None seem constrained by the view that Tonson held copyright

¹⁴⁵ See Jackson, *supra* note 92 at 464-465. Jackson speculates that Rowe used the Fourth Folio because it was the most “accessible and convenient for his purpose.” *Id.* Holland, although alluding to a claimed Tonson interest in the rights to the Fourth Folio, suggests that early Shakespeare editors simply preferred to use the latest available text. See Peter Holland, *Modernizing Shakespeare: Nicholas Rowe and the Tempest*, 51 *Shakespeare Quarterly* 24, 27 (2000). See also McKerrow, *supra* note 94 at 19-21.

¹⁴⁶ See, e.g., Seary, *supra* note 107 at 58; Dugas, *supra* note 8 at 147. Seary specifically makes this claim to explain Theobald’s reliance on the Rowe/Pope editions that themselves had been based on the Fourth Folio.

Jarvis finds the suggestion that Rowe (or Theobald) relied on the Fourth Folio because of copyright considerations “implausible” because in Jarvis’ view it would have required a judge, in order to evaluate a copyright claim, to compare the textual language in detail to see if it corresponded to the Fourth Folio. He writes that “it is hard to imagine a magistrate sufficiently bored, insane, or malicious to have the texts collated with each other, or to hear such evidence when presented.” Simon Jarvis, *Scholars and Gentlemen: Shakespearian textual criticism and representations of scholarly labour, 1725-1765*, at 95 (1995). Jarvis finds literary practice of the time sufficient to account for Theobald’s reliance on the Rowe/Pope texts. *Id.*

¹⁴⁷ See Taylor, *supra* note 3 at 87.

only to a single, particular text.¹⁴⁸ Their judgments of the text of their editions must stand on their own; any judgments on the text to be included were not the result of the constraints of copyright.¹⁴⁹

B. Copyright and the Rowe Edition

In 1709, Tonson published the Rowe edition of Shakespeare, and thus launched an era of Shakespeare scholarship. Although Tonson viewed himself as the owner of the Shakespeare copyright, there are difficulties in concluding that it was possession of the copyright that was necessary to induce Tonson to publish the original Rowe edition. This conclusion seems obvious since, at the time of publication, Tonson did not own the copyright.

First, the Rowe edition was published by June 1709 and work on it presumably began in 1708.¹⁵⁰ At that time, Tonson apparently owned a one-half interest only in twenty-odd plays arising from the 1707 Herringman assignment.¹⁵¹ Tonson did not secure the other half to the rights to these plays until the assignment from the Wells in October of 1709. It is of course possible, indeed likely, that Tonson had by June 1709 reached some understanding with the Wells about assignment of the remaining rights to the plays. But the fact remains that at the time of publication of the 1709 edition, Tonson may have held no more than a one-half interest to any of the plays.

It also seems clear that, even if he understood that he had (or would soon obtain) the full rights to the twenty-odd plays, Tonson did not hold the rights to all of the other plays published in the collected works. Although he may have obtained the rights to these other plays at a later time, it is likely that he never had the rights to *Othello*. And it is unclear if Tonson had the rights to *Hamlet*. Thus, in 1709

¹⁴⁸ See *supra* notes 131-135 and accompanying text.

¹⁴⁹ As noted above, the understanding that earlier editions had some claim to priority and legitimacy over later editions was not expressly recognized until Samuel Johnson's statements in his edition. See *supra* note 116.

¹⁵⁰ Jackson states that the work was published between May 30 and June 2, 1709. See Jackson, *supra* note 92 at 455.

As noted, Tonson took out advertisements in March 1709 suggesting that the edition was "so far finished as to be published in a month." See *supra* note . It seems likely that work on the Rowe edition began earlier, "probably late in 1708." See Peter Holland, *Modernizing Shakespeare: Nicholas Rowe and the Tempest*, 51 *Shakespeare Quarterly* 24, 26 (2000).

¹⁵¹ It is possible that Tonson held a full interest in four or five plays obtained from the Herringman assignment. See *supra* note and accompanying text.

Tonson published an edition containing plays to which he almost certainly did not have the copyright.¹⁵²

Perhaps most significantly, Tonson published the Rowe edition almost a full year before the effective date of the Statute of Anne and before it was even considered by Parliament. Did Tonson purchase the rights to Shakespeare and publish the Rowe edition in anticipation of the passage of the Statute of Anne? The London booksellers, prominently including Tonson, had repeatedly petitioned Parliament for adoption of a statutory copyright, and a number of bills were considered and rejected by Parliament between 1695 and 1707.¹⁵³ Tonson would have been aware of the political climate and could estimate the possibility of passage of the bill in early 1709.¹⁵⁴ Some have suggested that this prospect prompted both his acquisition of the copyrights and publication of the Rowe Edition.¹⁵⁵

It is, first of all, a leap to say that Tonson decided to acquire the copyrights based on the prospect of passage of the Statute of Anne. The Herringman assignment

¹⁵² As discussed above, Tonson's ownership of the copyright to a substantial number of Shakespeare's plays would not have given him any rights to publish plays to which he did not hold the copyright. *See supra* notes 136-139 and accompanying text.

It has been suggested that Richard Wellington, the individual who likely held the rights to the other plays, "presumably cooperated fully" in the Rowe Edition. *See* Seary, *supra* note 107 at 133 n. 7. However, the 1709 Rowe edition states only that it was "Printed for Jacob Tonson, within Grays-Inn Gate, next Grays-Inn Lane." It is not until after 1728 that the Tonson publications identify the publisher as Jacob Tonson "and the rest of the Proprietors." *See* Dawson, *supra* note 18 at 26.

¹⁵³ *See supra* notes 27-35 and accompanying text.

¹⁵⁴ As noted, the booksellers petitioned for introduction of the bill that became the Statute of Anne in December 1709. *See supra* note 37.

¹⁵⁵ Paul Collins, referring to Tonson's acquisition of the copyrights in 1707 and 1709, suggests that Tonson traded on his insider knowledge to buy "neglected old works" in order to obtain a monopoly under the new law. Collins, *supra* note 11 at 62.

Dugas, referring to the possibly "coincidental" timing of acquisition of the copyrights, publication of the 1709 Edition, and the 1710 passage of the Statute of Anne, states that he would not be surprised if Tonson knew of a willingness of the booksellers to accept a statute involving the protection of older grandfathered works, and that "although he may not have known how long those works would be protected, Tonson probably recognized that publishing his edition of Shakespeare before the act went into effect was desirable." Dugas, *supra* note 8 at 132.

occurred in May, 1707, several years before passage of the statute. Still, perhaps Tonson gambled on, or at least considered, the possibility of passage of a statutory copyright act in the coming years when he acquired the copyrights.

But it is an even greater leap to suggest that he actually published the Rowe Shakespeare in anticipation that a later statute would protect his rights. The 1709 edition was published in June 1709 and work on it presumably began in 1708. The bill that was ultimately enacted as the Statute of Anne was not given its first reading in Parliament until January 1710.¹⁵⁶ Thus, Tonson could not have been certain about either the existence or the terms of a statutory copyright when he published the 1709 edition. As it turned out, the scope of the statutory protections provided by the Statute of Anne were far less than had been sought by the booksellers, and by publishing before adoption of the Statute of Anne, any later claim that Tonson might make to the individual contributions of Rowe would be limited to twenty-one years, rather than the potential for twenty-eight years that would be provided to authors for works published after adoption of the statute.

If not certain of statutory protection, Tonson could, and presumably did, claim whatever common law protections to his copy that existed in June 1709. But, as noted above, the existence and scope of any such copyright protection at that time was uncertain.¹⁵⁷ The protections to copy had largely been a function of the authority conferred on the Stationers' Company, and in 1695 this authority ended. Although the booksellers as early as 1709 were developing a claim to "common law" copyright arising, in part, from claims of the natural rights of authors, there was at that time no litigation in the law courts defining any independent rights of authors or booksellers. It was this very uncertainty that led the Booksellers repeatedly to seek statutory protection from Parliament.

When Tonson published the first Rowe edition he simply could not have had any credible assurance that any legal copyright, either statutory or common law, would protect his publication. Rather, shrewd businessman that he was, Tonson was far more likely to have been motivated by the prospect of immediate profit from publication of the 1709 edition, even without assurance of copyright protection.¹⁵⁸ His judgment was apparently sound; he published a second imprint of the Rowe Shakespeare later in 1709.

¹⁵⁶ See *supra* note 37 and accompanying text.

¹⁵⁷ See *supra* notes 27-35 and accompanying text.

¹⁵⁸ Although Dugas believes that the prospect of copyright motivated Tonson's publication of the Rowe edition, he also notes that the "other main reason the firm decided to publish Shakespeare's plays was to make money." Dugas, *supra* note 8 at 132.

C. Copyright and the Later Editions

Although Tonson may not have had any assurance of copyright protection when he published the 1709 edition, after the passage of the Statute of Anne his copyright in Shakespeare was subject to statutory protection. Under the Statute of Anne, however, whatever copyright Tonson had acquired to the text of Shakespeare would have ended in 1731.¹⁵⁹ The copyright to any separate work of Rowe that was entitled to protection would have ended no later than 1728.¹⁶⁰ What was the role of copyright in Tonson's decision to publish his series of post-Rowe editions starting with the Pope edition in 1725 and continuing through the Capell edition in 1767?

Some have asserted that the series of editions, occurring in roughly 14 year increments, were undertaken in order to preserve Tonson's copyright claims.¹⁶¹ At

¹⁵⁹ The copyright for works published before April 10, 1710 was 21 years. *See supra* note 39 and accompanying text.

¹⁶⁰ The Statute of Anne initially gave copyright protection for a period of 14 years for work published after its effective date. This copyright would be extended for an additional period of 14 years if the author were still alive. Rowe died in 1718, four years after publication of the 1714 edition of his work, and thus his copyright would have ended no later than 1728 if the publication of the 1714 edition established a new copyright.

¹⁶¹ This argument is expressly made by Seary. *See Seary, supra* note 107 at 134. H. L. Ford suggests something similar. Noting that any of Tonson's copyrights under the Statute of Anne would have lapsed by 1731, Ford goes on to state:

From this date or thereabouts, there is a remarkable increase in the editions, and one of the attempts of Tonson and his confreres to try to establish or continue a perpetual copyright comes within the purview."

Ford, *supra* note 3 at 41.

Dugas, referring to a claim that publication of a new edition would somehow protect Tonson's statutory copyright, states:

We do not know whether Tonson actually believed in the validity of this scheme or whether a court would have upheld it, but it affected the publication of Shakespeare's plays in two ways. The primary effect was commercial: Tonson's claim would make any would-be publishers... think twice about challenging the Tonsons' Shakespeare monopoly. The secondary effect was literary: Tonson's claim compelled Pope, Theobald, and Warburton each to base his edition on that of his immediate predecessor, in defiance of all editorial logic.

least with respect to any claims for copyright protection under the Statute of Anne, this position is not tenable. The Statute of Anne expressly limited the rights to works published before its enactment to twenty-one years, and nothing provided for an extension of this right by subsequent re-publication.¹⁶²

To what extent, however, did the Tonsons simply rely on a claim of “common law” copyright to protect their publishing monopoly in Shakespeare after the expiration of any protection under the Statute of Anne? The Tonsons claimed such a copyright, but, as discussed below, the litigious Tonsons never asserted a “common law” copyright to Shakespeare’s works in court. As discussed below, any claim to a common law copyright in Shakespeare would have been weak, and their decision to publish new editions of the collected works, most edited by a prominent public figure, seems likely to have been motivated by the prospect of profit protected by monopoly power, not by any assurance of legal protection of their claimed copyright to the works of Shakespeare.¹⁶³

D. Copyright and the Editors’ Contributions

Although any claims by the Tonsons to a copyright in the works of Shakespeare would have been weak after 1731, the Tonson would have had a different and far stronger claim to a copyright in the contributions of their editors, and they were careful to obtain an assignment of any copyright held by the editors.¹⁶⁴ And this raises a key question: did the existence of the copyright under the Statute of Anne

Dugas, *supra* note 8 at 191.

Publication of a later edition closely based on an earlier edition as a basis for establishing copyright, if fact, defies legal logic. By relying on the text of earlier editions, publisher reduced the chance to assert the unique authorial voice that formed the basis of a common law copyright based on the natural rights of authors. *See infra* notes 193-203 and accompanying text.

¹⁶² *Motte v. Faulkner*, c.11 2249/4 (1735) was a complicated case involving an effort by English publishers to prevent the importation and sale of books printed in Ireland that contained works of Jonathan Swift. Among other things, the English publishers apparently claimed that their republication of some of Swift’s works first published before 1710 constituted a new work entitled to copyright protection under the statute. They were granted an injunction that disposed of the case without any subsequent hearing. There does not, however, appear to be any case in which a party claimed that a work, published after 1710, received new and extended protection by republication.

¹⁶³ *See infra* notes 193-203 and accompanying text.

¹⁶⁴ *See Seary, supra* note 107 at 215-218(contract between Tonson and Theobald containing such an assignment.)

or a claim to a perpetual common law copyright provide a significant incentive for the publication, not of the Shakespeare text itself, but of the editorial contributions that were crucial to the birth of Shakespeare scholarship?

In considering copyright claims to the work of the Tonson editors, it is important to recognize that their contributions to Shakespeare scholarship would have varying claims to copyright protection, and in considering the extent to which the scholarship was encouraged by copyright, it is appropriate to address the elements of scholarship separately.

1. Selection of the Shakespeare Canon

One of the significant contributions of the early Eighteenth Century editions was the identification of the Shakespeare canon: those plays that should be attributed to Shakespeare as author or significant co-author.¹⁶⁵ The original First Folio included thirty-six plays that are now universally recognized as attributable to Shakespeare. This is not surprising since they were presumably selected by his friends and fellow actors, Heminges and Condell. These thirty-six plays were also included in the Second Folio. The Third and Fourth Folios, however, included an additional seven plays that were claimed to have been written by Shakespeare.¹⁶⁶ These are the Shakespeare “Apocrypha,” and today, among these apocryphal plays, only *Pericles* is included in the Shakespeare canon.¹⁶⁷

Nicholas Rowe included the seven apocryphal plays in his 1709 and 1714 editions. It was Pope who excluded these plays from his initial 1725 edition of the collected works. Although he later included the plays as an additional seventh volume of his 1728 edition, the 1725 Pope edition began the confirmation of the thirty-six First Folio plays as the legitimate canon.

The exclusion of the apocryphal plays from the collected works is a significant contribution to Shakespeare publications, but this is not itself an act of scholarship

¹⁶⁵ For many of the plays included in the modern canon, Shakespeare has been identified not as the sole author, but as a major contributor or co-author. These “collaborative” plays include, among others, *Pericles*, *Timon of Athens*, and *The Two Noble Kinsman*. See Brian Vickers, *Shakespeare, Co-author: A Historical Study of Five Collaborative Plays* (2004).

¹⁶⁶ Although the decision to include these plays was perhaps made to increase the marketability of the Third Folio, it was not wholly arbitrary. Each of the six non-canonical plays had previously been published in quarto editions with either the name “Shakespeare” or the initials “W.S.” on the title page. See Dawson, *supra* note 84 at 4.

¹⁶⁷ See Halliday, *supra* note 9 at 478-484. Additionally, *The Two Noble Kinsman* is also now generally accepted as having being co-written by Shakespeare. See

that was subject to copyright. Later editors could decide to include, or not include, plays in a collected works without having this decision challenged as a violation of copyright. Exclusion of the apocrypha may not have been protected by copyright, but it is a scholarly judgment that has largely survived.

2. Selection of the Published Text

For most of Shakespeare's plays, multiple versions exist: these include separate quartos published during Shakespeare's lifetime, the First Folio published seven years after his death, and the three Folios and additional quarto versions published later. Significant textual differences for many of the plays exist among these sources.¹⁶⁸ One of the key tasks of a Shakespeare editor is to select the text of the plays from these varying sources.

The Tonsons' editors, beginning with Rowe, all made their own selections of the text to be published.¹⁶⁹ Theobald and particularly Johnson discussed the "priority" to be assigned to earlier editions of the plays, at least those editions published in or around Shakespeare's lifetime, and both the selection of the text to be included and identification of the principles of priority were important contributions by these editors.¹⁷⁰

It is possible that Tonson, through his assignments, could claim copyright to the text of all versions of the plays published before the Statute of Anne, but Tonson had no basis to assume that selection of text from among these version was independently subject to copyright. In other words, publication of later editions with differing textual choices would not have established any unique claim of copyright beyond that which existed in the underlying claim to the text itself. It appears that the decisions regarding textual selection by the editors were driven by scholarship and the desire to present a more marketable product, not by efforts to establish or protect some claim of copyright.

¹⁶⁸ Perhaps the best known differences occur between the Second (Good) quarto of Hamlet and the First Folio. The First Folio, for example, does not include the "rogue and peasant slave" soliloquy contained in the Second Quarto; the Second Quarto does not include Hamlet's "one small defect" speech in Act I that Olivier used to introduce the play in his 1948 movie. The Second Quarto has Hamlet telling Horatio that there are more things in heaven and earth that are dreamed of in "your" philosophy; in the First Folio, it is "our" philosophy. A strikingly different reflection of Hamlet's character.

¹⁶⁹ As discussed above, neither Rowe nor Pope blindly copied the text of the Fourth Folio. They reviewed earlier texts and made significant judgments about the language to be included. *See supra* notes and accompanying text.

¹⁷⁰ *See supra* note 116.

3. Reader Aids: Scene descriptions, divisions, illustrations, dramatis personae

One of the significant contributions of the 1709 Rowe edition was its addition of materials that aided the readers' appreciation and understanding of the written plays. This included more detailed descriptions of locale at the beginnings of scenes, the use of illustrations of the plays, and complete and consistent lists of dramatis personae.¹⁷¹ Although the specific text included by the editors might be subject to copyright, the decision to include these "reader's aids" to further the marketability of the works almost certainly was not. The addition of material of this type became standard after the Rowe edition and certainly furthered the popularity of the Shakespeare texts.

4. Editorial Text: Emendations, Prefaces and Biography

There are, however, certain unique contributions from each of the editors that would have been subject to copyright protection under the Statute of Anne. These would include the "prefaces," specific textual notes, and the text of the Rowe "biography." Additionally, copyright protection would apply to the unique textual "emendations" provided by the editors. These emendations were the editors' changes to the text as published in the quartos and Folios made to provide clarity or correct supposed printing errors. Many of the emendations made by the Tonson editors, no longer subject to copyright protection, are still the text of choice for modern editors.¹⁷²

There seems to have been no dispute during the eighteenth century that editorial contributions of this type were subject to copyright protection. In Tonson's contractual arrangement with Theobald for publication of the 1733 edition, Tonson specifically provided for Theobald to assign the copyright of the "emendations" to Tonson.¹⁷³ In a letter to a rival publisher, Tonson specifically claimed copyright to emendations.¹⁷⁴

The courts also assumed that the Statute of Anne protected editorial notes. In the 1752 case of *Tonson v. Walker*, Tonson sought an injunction to prevent publication of an edition of Milton's poems, together with "Dr. Newton's notes" on the poems.¹⁷⁵ Although copyright in the poems, at that point, could only be claimed

¹⁷¹ See *supra* notes 95 and accompanying text.

¹⁷² See, e.g., McKerrow, *supra* note 94.

¹⁷³ See *supra* note 164.

¹⁷⁴ See *supra* note 187 and accompanying text.

¹⁷⁵ 36 Eng. Rep. 1017 (1759).

through some common law copyright, the court held that “Dr. Newton’s notes come within the statute of Anne.”¹⁷⁶ Concluding that the defendants had essentially copied Dr. Newton’s notes, the court granted the injunction to prevent a violation of the copyright in the notes, and it thus avoided the need to address the common law claim to the poems themselves.¹⁷⁷

Similarly, a line of early cases established that while a “fair abridgement” of a text would not violate copyright, a mere copying of the author’s text would.¹⁷⁸ In 1740, the court in *Gyles v. Wilcox*, although allowing a “fair abridgment” of copyrighted text, recognized that the Statute of Anne protected authors and their assigns as “recompence for their pains and labour in such works as may be of use to the learned world.”¹⁷⁹ Original production could thus form the basis for a new copyright.

¹⁷⁶ *Id.*

¹⁷⁷ The court concluded:

it is clear that the injunction ought to be granted, because the notes are colourably abridged or taken from Newton, and only twenty-eight added by Mr. Merchant. What right could he give to Walker to print Dr. Newton’s notes? To say that he had the same right to publish *Newton’s* notes, as *Newton* had to publish those of others, is not defence, but recrimination.

A fair abridgment would be entitled to protection; but this is a mere evasion.

Id.

¹⁷⁸ *See, e.g.,* *Tonson v. Walker, supra; Gyres v. Wilcox*, 26 Eng. Rep. 489 (1740).

¹⁷⁹ *Id.* The court went on to state:

Where books are colourably shortened only, they are undoubtedly within the meaning of the act of Parliament, and are a mere evasion of the statute, and cannot be called an abridgment.

But this must not be carried so far as to restrain persons from making a real and fair abridgment, for abridgments may with great propriety be called a new book, because not only the paper and print, but the invention, learning, and judgment of the author is shewn in them, and in many cases are extremely useful, though in some instances prejudicial, by mistaking and curtailing the sense of an author.

Id.

E. Copyright and the Availability of Shakespeare's Works

The Tonsons' contributions to Shakespeare scholarship also include the increase in the popularity and demand for Shakespeare among a larger population by their publication of cheaper, more readily available texts. What effect did the Tonsons' claims of copyright have on the broader dissemination of Shakespeare's works?

With respect to their original publication of the collected works, there is some dispute as to whether the Tonsons in fact acted to significantly increase the market for Shakespeare. It has been suggested by some that the 1709 Rowe edition constituted a breakthrough in the accessibility of the Shakespeare texts. While the Folios had been large, single volume editions that were expensive and difficult to read, the original 1709 Rowe Shakespeare was printed in a six-volume octavo edition that was smaller, easier to hold, and cheaper than the Folios. In 1714, the Rowe Shakespeare was published in an even "smaller and cheaper" duodecimo edition. Ford states that this later edition was purchased "for the amusement of the then large household staff attached to their residences: some copies do turn up marked specifically for 'The Housekeeper's Room'."¹⁸⁰ Conventional wisdom among "students of Shakespeare dissemination" is that the 1709 edition was "crucially important in making the whole canon widely available" and that the 1714 edition "brought the price with the reach of ordinary bookbuyers."¹⁸¹

Others dispute this view. Murphy, noting that the cost of Rowe's edition was 30 shillings, states that this would "have been an expensive purchase."¹⁸² Peter Hume describes the cost of the Rowe Shakespeare as a "relative bargain... but still a substantial sum."¹⁸³ Don-John Dugas and Robert Hume, considering the cost of the 1709 and 1714 editions of the Rowe Shakespeare, conclude that "[t]he idea that Tonson had brought Shakespeare to the masses is simply fallacious."¹⁸⁴

There can be little doubt that the 1709 Rowe Shakespeare and the later editions, if not inexpensive, were more "user friendly" than the Folios and that the efforts of the editors increased the marketability of Shakespeare. But it is difficult to

¹⁸⁰ Ford, *supra* note 3 at 3-4.

¹⁸¹ Dugas and Hume, *supra* note 117 at 261.

¹⁸² Murphy, *supra* note 33 at 62.

¹⁸³ Hume, *supra* note 7 at 51.

¹⁸⁴ *Id.* at 271. Dugas has also stated that the 1725 Pope Edition sold for a "staggering price." See Dugas, *supra* note 8 at 195. Contemporary publications had satirical pieces on the cost of the Pope Shakespeare, attacking the Tonson monopoly and calling for an edition of Shakespeare at a "reasonable price." See Murphy, *supra* note 33 at 105-106.

conclude that the Tonsons' exploitation of their claimed copyright led to them to publish cheaper, more accessible editions of the collected works that significantly expanded the market and furthered the dissemination of Shakespeare to a wider audience.

The Tonsons' indisputably published cheap and widely available editions of the individual plays, but this decision was taken in spite of, not because of, their claimed copyright. As discussed above, it was the Tonson/Walker competition in 1734-1735 that led the Tonsons' to flood the market with an enormous number of "1 penny" editions of the Shakespeare plays.¹⁸⁵ But their decision to publish these cheap editions was prompted by a strategy to use their wealth and monopoly power, rather than legal protections, to protect their exclusive control of publication of Shakespeare. In the absence of competition, the Tonsons' gave no indication they would have used their copyright monopoly to publish "cheap" Shakespeare.

IV. The Tonsons' Response to Shakespeare "Pirates"

Between 1710 and 1731, the period of statutory protection for the original Shakespeare copyright, the Tonsons never faced a serious challenge to their copyright.¹⁸⁶ After that time there were a series of proposed or actual rival publications of Shakespeare, but these were met with threats, bluster or a price war. At no time did the Tonsons' go to court to litigate their copyright in Shakespeare.

In 1745, for example, the publisher Edward Cave was considering publication of the works of Shakespeare to be edited by Samuel Johnson. Jacob Tonson III sent a threatening letter to Cave stating "that you think it [Shakespeare] is a copy any one has a right to; if so, you are very much mistaken." Tonson claimed that he could provide documentation of his Shakespeare copyrights "not only as to the original copy, but likewise to all emendations to this time" and warning him not to

¹⁸⁵ See *supra* notes 119-125 and accompanying text.

¹⁸⁶ In 1710 and 1711, Thomas Johnson published several of the Shakespeare plays in his "Collection of Best English Plays." Johnson was printing in the Netherlands and importing the books, and the Tonsons did not take legal action since "presumably it would have been difficult for them to do so, given that he was permanently based in the Netherlands." Murphy, *supra* note 33 at 105.

In 1731, Lewis Theobald was apparently negotiating with "proprietors," persons who may have shared an interest with Tonson in the Shakespeare copyright, to publish his own edition of Shakespeare. See Dawson, *supra* note 18 at 27. As was to become the pattern, Tonson threatened and then "bought out" Theobald, by contracting with Theobald to publish an edition of the Collected Works for Tonson. According to Theobald, Tonson "doubled" the offer. *Id.*

publish.¹⁸⁷ Cave did not, in fact, publish, and the Tonsons later secured Johnson as the editor of their own 1765 edition.

In 1744, Oxford University had published a significant six-volume edition of Shakespeare edited by Thomas Hanmer. In his letter to Cave, Tonson had written that he had “reasons why we rather chuse to proceed with the University by way of reprisal for their scandalous invasion of our right, than by law.”¹⁸⁸ Whatever their reasons, the Tonsons never did challenge the Oxford publication in court. Several years later, Joseph Osborn republished Hanmer’s Oxford Shakespeare, but again Tonson did not sue but rather “bought off” Osborn and later published the text as a Tonson publication.¹⁸⁹

As discussed above, the Tonsons were also faced with Walker’s challenge to their monopoly by his publication of cheap individual editions of Shakespeare. The Tonsons’ threatened litigation and “gaol” for Walker, but never sued.¹⁹⁰

It is noteworthy that the Tonsons, whose name figures prominently in many of the early eighteenth century copyright cases (including several against Walker),¹⁹¹ never attempted to litigate their copyright claim in Shakespeare. Walker, in advertisements for his plays, asked the crucial question: if “Tonson and his Accomplices call themselves Proprietors of Shakespear’s Plays; if they have any just claim to them, why do they not vindicate their claim.”¹⁹²

¹⁸⁷ See Murphy, *supra* note 33 at 114.

¹⁸⁸ *Id.*

¹⁸⁹ As Murphy describes it: “The cartel were obliged to make a deal with Osborn. They agreed to purchase a large portion of his edition from him, which they then reissued with cancel title pages, with their own names in the imprint. In addition, they reportedly arranged to pay Osborn an annual pension, ‘to buy him off from reprinting upon them.’” *Id.* at 115.

¹⁹⁰ See *supra* note 122 and accompanying text.

¹⁹¹ The limited number of mid-eighteenth century copyright cases include *Tonson v. Walker*, 3 Swans 642 (1739); *Tonson v. Walker*, 36 Eng. Rep. 1017 (1752); *Tonson v. Collins*, 96 Eng. Rep. 169 (1761); *Tonson v. Collins*, 96 Eng. Rep. 180 (1762), *Tonson v. Clifton*, cited in 2 Bro. P.C. 138, 1 Eng. Rep. 842 (1722) and *Tonson v. Baker*, (1710).

¹⁹² See Dawson, *supra* note 119 at 65. Walker disputed the Tonsons’ legal claim and stood his ground – until the ground fell out from under him through Tonson’s cut-throat effort to drive him out of business. See *supra* notes and accompanying text.

It is possible that the Tonsons' failure to assert a legal claim to a common law copyright reflected both litigation strategy and a weakness in their theory of common law copyright. After expiration of the initial period of protection under the Statute of Anne, the London Booksellers as a group were engaged in an effort to fend off Scottish publishers and domestic book pirates by establishing a perpetual common law copyright. Part of the Booksellers' strategy was to claim that this common law right arose, not as a function of the publishers' historic claims through the Stationers' Company, but rather as a function of the "natural rights" of authors.¹⁹³ Their position had roots in the arguments leading to the passage of the Statute of Anne; copyright was for the encouragement of learning by authors and a consequence of the "natural rights" that authors had in the product of their own ingenuity and effort.¹⁹⁴

This justification for copyright was clearly reflected in arguments made in earlier cases brought by the Booksellers.¹⁹⁵ In *Tonson v. Collins*, Blackstone, expressly relying on Locke, argued for the existence of common law copyright as a function of "the natural foundation and commencement of property; viz. by invention and labor."¹⁹⁶ In *Millar v. Taylor*, Lord Mansfield based the common law copyright on the rights of authors. It was not, in his view, to be found, because of custom or precedent, but "from this argument – because it is just, that an author should reap the pecuniary profits of his own ingenuity and labour."¹⁹⁷ Indeed, the House of Lords in *Donaldson v. Beckett*, may have recognized such a natural right in authors.¹⁹⁸

This legal strategy of relying on the "natural rights" of authors may have created a problem for the Tonsons in asserting common law claims of copyright in Shakespeare. All of the Tonsons' copyright litigation asserted violations of a common law copyright either to the works of living authors or at least from

¹⁹³ John Feather, *Publishing, Piracy and Politics: An Historical Study of Copyright in Britain 67-75* (1994); Deazley, *supra* note 26 at 31-50.

¹⁹⁴ *See supra* note 33-34 and accompanying text.

¹⁹⁵ *See* William J. Howard, *Literature in the Law Courts, 1770-1800* in *Editing Eighteenth-Century Texts* (ed. D.I.B. Smith)(1968)(discussing evolution of arguments to secure common law copyright). *See also* Rose, *supra* note 11 at 91.

¹⁹⁶ *See* *Tonson v. Collins*, 96 Eng. Rep. 180 (1761).

¹⁹⁷ *See* *Millar v. Taylor*, 96 Eng. Rep. 201, 253 (1769).

¹⁹⁸ *See supra* note 56. If they did so, they certainly found it limited by the Statute of Anne.

deceased authors with some direct connection to a living publisher.¹⁹⁹ In the effort for the law courts to recognize a common law copyright it was an advantage to assert the right of a living, identifiable author, and virtually every other copyright case of this period involved works first printed after 1700.²⁰⁰

It would obviously be problematic to assert some natural right of Shakespeare himself as the basis for the Tonsons' copyright. Shakespeare was in no sense a contemporary author; indeed, Johnson had noted that Shakespeare's worth as a writer was proved by the fact that he had "long outlived his century."²⁰¹ John Locke, an advocate for protection of authors' property right to their work, had previously written of the foolishness of claiming copyright in "classic authors."²⁰²

¹⁹⁹ See *Tonson v. Walker*, 3 Swans 642 (1739)(Milton's *Paradise Lost*); *Tonson v. Walker*, 3 Swan. 672, 36 Eng. Rep. 1017 (1752)(Milton's *Paradise Lost* and editorial notes of Dr. Newton); *Tonson v. Collins* 1 Black. W. 329 (1762)(reprint of "The Spectator" first published in 1711). Two earlier copyright cases, *Tonson v. Baker* (1710)(publication of proceedings from a 1710 trial); *Tonson v. Clifton* (1722)(publication of Steele's play *The Conscious Lovers*), apparently involved claims of copyright under the Statute of Anne, but also involved works written after 1700.

In two cases styled *Tonson v. Walker*, Tonson did seek an injunction to prevent the publication of Milton's *Paradise Lost*. *Paradise Lost* had been first published in 1667, and Tonson had acquired the first half of the copyright in 1683 and the remaining half in 1690. See Lynch, *supra* note 57 at 103. See also Rose, *supra* note 11 at 27-28 (discussion of the contractual rights between Milton and the original publisher, Samuel Simmons.) Although Milton died in 1674, almost sixty-five years before *Tonson v. Walker*, Tonson and Milton were contemporaries, and Tonson had actually tried, unsuccessfully, to meet Milton shortly before his death. See Lynch, *supra* note at 13. The legal basis for the claim for an injunction in these cases is unclear.

²⁰⁰ For a discussion of the copyright case law from 1731 to 1774, see Patterson, *supra* note 9 at 158-179; Deazley, *supra* note 26 at 74-85. One early case, *Eyre v. Walker*, 96 Eng. Rep. 184 (1737), did involve an injunction from printing a work first published in 1657. The injunction was uncontested, and it is unclear if this case involved a claim of common law copyright. See Deazley, *supra* note 26 at 74-75.

²⁰¹ See Samuel Johnson, *The Preface to Shakespeare*, <http://ebooks.adelaide.edu.au/j/johnson/samuel/preface/preface.html>

²⁰² See Deazley, *supra* note 26 at 3-4. Locke, however, was referring to author's who wrote before the invention of the printing press.

Asserting the rights of Shakespeare in his own work would have been particularly problematic since before his death in 1616 Shakespeare would not have held the rights to his own work. The plays themselves were “owned” by the player’s company, and the “copyright” was held by members of the Stationers’ Company who first registered the work.²⁰³ In short, litigating a claim to a common law copyright in Shakespeare would not be the strongest case for Booksellers attempting to secure a ruling confirming the existence of the copyright.

Good lawyers, and smart Booksellers, would have been hesitant about bringing a weak claim that might have established a precedent that threatened to undermine their claim to common law copyright in their other works. Litigation strategy or otherwise, the Tonsons’ never asserted any legal claim to the copyright in Shakespeare’s text. Instead, the Tonsons relied on threats and market strategies to intimidate publishers of any competing works.

V. Conclusion

Jacob Tonson and his family of publishers were central figures in the birth of Shakespeare scholarship in the beginning of the Eighteenth Century. Starting with the 1709 Rowe Shakespeare, the editors of the Tonson Shakespeare publications made contributions to the editing and study of Shakespeare that shaped the development of the field. The Tonsons’ publication efforts also resulted in the publication of cheap and readily available editions of the plays that were an important part of Shakespeare’s elevation to the iconic status of “National Poet” during that period.

The Tonsons’, who certainly claimed a significant copyright interest in the Shakespeare works, were also chief among the group of London Booksellers who pushed for copyright protection in these interests. Through their efforts to pass the Statute of Anne and their role in the Battle of the Booksellers over common law copyright, they were fierce in seeking legal protection of their copy.

This has led to something of a conventional view that it was legal copyright protections that led to the Tonsons’ major publication decisions and thus their contributions to Shakespeare scholarship. There are, however, reasons to question the extent and legitimacy of any copyright protections the Tonsons’ might have claimed, and it is undisputed that the Tonsons’ never actually went to court to protect their claimed copyright.

Rather it appears that the Tonsons’ and their editors were driven more by market, rather than legal, forces in making their publication decisions. This certainly does not detract from the Tonsons’ contributions, but it does raise questions about whether the Statute of Anne, in fact, “encouraged” learning, and whether claims of copyright had the effect more of limiting, rather than promoting, the dissemination of Shakespeare to the public.

²⁰³ See *supra* notes 10-23 and accompanying text.