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RECENT TRENDS IN THE ECONOMICS OF COPYRIGHT

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Recent Trends in the Economics of Copyright

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Recent Trends in the Economics of Copyright

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Part V discusses the development of interest by economists in open source questions that have interested lawyers for some time now, led in particular by Stanford Law School professor, Lawrence Lessig. Open source is a system under which software is distributed along with full disclosure of its source code (the written programming instructions comprising the software), so that any downstream users may freely appropriate this programming code for their own use. This, of course, seems at first sight to be diagonally opposed to copyright – rather than going to lengths to protect and hide software code, it is fully exposed and others are openly invited to use it at will. Open source, however, relies heavily on copyright law (Leveque and Meniere, 2007), because while downstream use is encouraged, it is restricted (for example, most open source licences do not allow code to be taken from the open source commons and then sold on for economic gain in any way). However, the basic idea behind open source is that the huge community of programmers that is available on the Internet will ensure that bugs in programmes are quickly found and fixed, and that more and better software is made generally more available than would be the case under a fully commercial system.

The law and economics literature on open source software is certainly huge, and growing very quickly, which means that there is an enormous pool of papers from which we had to choose only a few for this volume. Our final choice reflects the two most important issues that have interested economists – the reasons why programmers would participate in open source projects, when their efforts are not directly rewarded by any royalty mechanism (Lerner and Tirole (**V, 13**), which also provides a good summary of the literature up to 2005), and the interconnections between the open source community and markets for commercial software, including an analysis of the relative efficiencies of each model of software development and distribution (Johnson (**V, 14**)).

Overall, the last ten years have been fruitful in producing important research in the economics of copyright with economists still questioning, though possibly less than previously, the merits of copyright law. With demands for longer and stronger copyright protection for commercially valuable copyrights becoming increasingly pressing, the political economy of copyright is correspondingly increasingly important, and it is clear that economists will continue to play an important role in analysing the costs and benefits of copyright. This work will undoubtedly proceed in terms of theoretical development but economists also have a fundamental role to play in doing empirical research. We hope this volume has made the case for both aspects of the economics of copyright.

References

Besen, Stanley M. (1998), 'Intellectual property', in Peter Newman (ed.), *New Palgrave Dictionary of Law and Economics*, **2**, London: Macmillan, pp. 348–51.

Besen, Stanley M. and Sheila Nataraj Kirby (1989), 'Private copying, appropriability and optimal copying royalties', *Journal of Law and Economics*, **32**, 255–80.

Gordon, Wendy J. (1982), 'Fair use as market failure: a structural and economic analysis of the Betamax case and its predecessors', *Columbia Law Review*, **82**, 1600–57.

Gordon, Wendy J. and Robert Bone (1998), 'Copyright', Entry 1610 in B. Bouckaert and G. De Geest (eds.), *Encyclopedia of Law and Economics*, Cheltenham, UK and Northampton, MA, USA: Edward Elgar, pp. 189–215.

Hadfield, Gillian K. (1992), 'The economics of copyright: A historical perspective', *Copyright Law Symposium* (ASCAP), **38**, 1–46.

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Contents

Part I
Economic Aspects of the Copyright Term

Introduction to Part I

Part I focuses on the term of copyright only; other copyright doctrines have also been subject to detailed economic analysis (see, for example, Novos and Waldman, 1984; Raskind, 1998; Gordon and Bone, 2000). We have chosen to concentrate on this apparently simple feature of copyright because of the recent (and possibly ongoing) controversy surrounding the term or duration of copyright and because these three papers show both the power of economics in understanding the issues and also demonstrate that the economics of copyright is a specialised field such that general economic principles only take one so far.

Long before the modern study of law and economics got underway, Thomas Babington Macaulay famously stated (in a speech to the House of Commons, 5th February 1841):

> Copyright is a monopoly and produces all the effects which the general voice of mankind attributes to monopoly ... the effect of a monopoly is to make articles scarce, to make them dear, and to make them bad ... It is good that authors be remunerated; and the least exceptional way of remunerating them is by a monopoly. Yet monopoly is an evil; for the sake of good, we must submit to evil; but the evil ought not to last a day longer than is necessary for the purpose of securing the good.

Quite so – but how long is this necessary period of time? In England and the USA, the term was originally fixed in relation to the creation of the work: in England, the 1709 Statute of Anne set it at 14 years renewable for a further 14 years and in the USA the 1790 Federal law made the same provision. However, the term has been increased several times in the ensuing years; being gradually altered to 50 years after the death of the author (the convention in European author's rights legislation, adopted with the Berne Convention) and then to 70 years in all the countries of the European Union and in the USA (and elsewhere too). Connecting copyright to the author's lifetime considerably extended its duration in some cases: for example, a work produced by an author at the age of 25 who died at age 75 would be protected for 50 years during the life of the author and for 70 subsequent years, making the effective term 120 years – a significant extension over the original 28 years maximum duration envisaged by the US Founding Fathers and the English Parliament.

All economists who support the principle of copyright law have taken more or less the same stance as Macaulay - that copyright is a trade-off between the beneficial incentive and the 'evil' of higher prices with consequent loss of access by users; copyright must therefore be limited in duration while lasting long enough to be an effective incentive. The answer to how long that actually should be is studiously avoided. The 1989 article by Landes and Posner is generally regarded as the fundamental article on the law and economics of copyright law; in it, they changed the emphasis of the analysis away from the trade-off between *price* and incentive to the cost of access by later creators because they regard the more damaging effect of the monopoly to be its inhibition of future creativity. In their model, the cost of expression is the variable to be balanced against the incentive to create, where the cost of expression includes tracing costs of later creators who need to check they do not infringe or who need to seek authorisation to create a derivative work. In Landes and Posner (1989), therefore, the

cost of tracing is the variable that is emphasised as determining the duration of the copyright term. They considered the point that different types of work and authors need different strengths of protection and so, in principle, the copyright term should vary, but recognise that it would be administratively unworkable and so support the existence of a uniform term for all copyrightable works. However, subsequent developments have caused Landes and Posner to revise their view that the copyright term should be limited and they now propose, in the paper that we reproduce (**I, 3**) of this book, that copyright should be indefinitely renewable.

The first article reprinted in this book has a curiosity value over and above its contribution to the debate on the economically efficient term of copyright. It was a joint submission of a brief to the US Supreme Court by 17 leading US economists, including several Nobel Prize winners (the list is included in the document), as *amici curiae* in support of the petitioner(s); with George Akerlof as the first author alphabetically, the brief is sometimes referred to as Akerlof et al. (2002) reproduced here as (**I, 1**). The occasion was the case *Eldred v. Ashcroft* (the US Attorney General) that reached the US Supreme Court in 2002; it challenged the Copyright Term Extension Act of 1998 (the CTEA or, as it is popularly known, the 'Sonny Bono extension') that increased the term of copyright in the USA from 50 to 70 years after the author's death and in addition, made it retrospective – a cardinal sin especially to economists – and it was that feature of it that was the basis of the Eldred case. Eldred, a non-commercial Internet publisher, along with several other such publishers, wished to publish works that had recently come into the public domain upon the expiry of the 50 year plus life rule without paying a royalty; but with the extension of the term to 70 years plus life, the works reverted to being in copyright. In their amici brief, the '17 economists' in fact mostly adopted a very similar argument to that of Macaulay, dwelling on social cost of monopoly in contrast to the insignificant extra incentive offered by the extension of 20 years (due to discounting far into the future), emphasising its negligible increase in value due to discounting of an extra 20 years' revenues. However, as the next article in Part I demonstrates, the economic analysis of copyright has moved on some considerable way from the statements by Macaulay and first principles alone are no longer adequate to the task.

The article by Liebowitz and Margolis (**I, 2**) essentially points out that the '17 economists' had not taken on board the specific features of the economics of copyright, rather relying as they did on basic economic principles without considering the nature of the cultural industries in which copyright law plays such a major role. They emphasise the effect of the extension on the elasticity of supply, something, however, about which little is known empirically (though Liebowitz has a notable record of doing empirical research on the impact of copyright). They point out that while copyright protects vast numbers of works, very few of these ever have commercial value and fewer still remain on the market long enough to outlive the duration of the copyright term and enter the public domain: this winner-takes-all feature of what are sometimes called the 'copyright-based' industries must be taken into account in assessing the optimal term of copyright.

Landes and Posner in (**I, 3**) also make use of detailed empirical research on the effect of the term of copyright on the commercial status of various types of works. Their main concern, however, is something that has received little attention in the previous literature of the economics of copyright: the role of rent-seeking in lobbying legislators for extensions of copyright (and, of course, for other aspects of copyright law, such as its scope). The CTEA, which included an extension to 95 years for works for hire (essentially those works created by

corporations) was strongly lobbied for by, among others, the Disney Corporation, owners of the Mickey Mouse copyright, which without the extension would soon have entered the public domain. Rent-seeking is viewed by economists as akin to the 'deadweight' loss of monopoly in being wasteful: use of the concept of rent intentionally signals wasteful use of resources, economic rent being the amount in excess of the outlay needed to induce an effort on the part of producers. Rent-seeking essentially means looking for a handout that has no incentive effect – in this case, an extra 20 years' revenue that was not anticipated at the time of the creation of the protected work. Landes and Posner take the view here that with any fixed term for copyright (even when the term is 'fixed' in relation to the life of the author), there will be an incentive on the part of copyright holders to seek an extension and so resources will inevitably be wasted in lobbying. To avoid that, they favour no limit to the copyright term, proposing indefinitely renewable copyright (similar to the indefinite term of trade marks), something against which almost every economist and lawyer previously had made a strong case.

References

Gordon, Wendy and Robert Bone (2000), 'Copyright', Entry 1610 in B. Bouckaert and G. De Geest (eds), *Encyclopedia of Law and Economics*, Cheltenham, UK and Northampton, MA, USA: Edward Elgar, pp. 189–215.

Landes, William M. and Richard A. Posner (1989), 'An Economic Analysis of Copyright Law', *Journal of Legal Studies*, **XVIII** (2), June, 325–66.

Novos, Ian E. and Michael Waldman (1984), 'The Effects of Increased Copyright Protection: An Analytical Approach', *Journal of Political Economy*, **92** (2), April, 236–46.

Raskind, Leo (1998), 'Copyright', in *New Palgrave Dictionary of Law and Economics*, London: Macmillan.

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ERIC ELDRED *et al.*,

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v.

JOHN D. ASHCROFT, ATTORNEY GENERAL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF GEORGE A. AKERLOF, KENNETH J. ARROW, TIMOTHY F. BRESNAHAN, JAMES M. BUCHANAN, RONALD H. COASE, LINDA R. COHEN, MILTON FRIEDMAN, JERRY R. GREEN, ROBERT W. HAHN, THOMAS W. HAZLETT, C. SCOTT HEMPHILL, ROBERT E. LITAN, ROGER G. NOLL, RICHARD SCHMALENSEE, STEVEN SHAVELL, HAL R. VARIAN, AND RICHARD J. ZECKHAUSER AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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