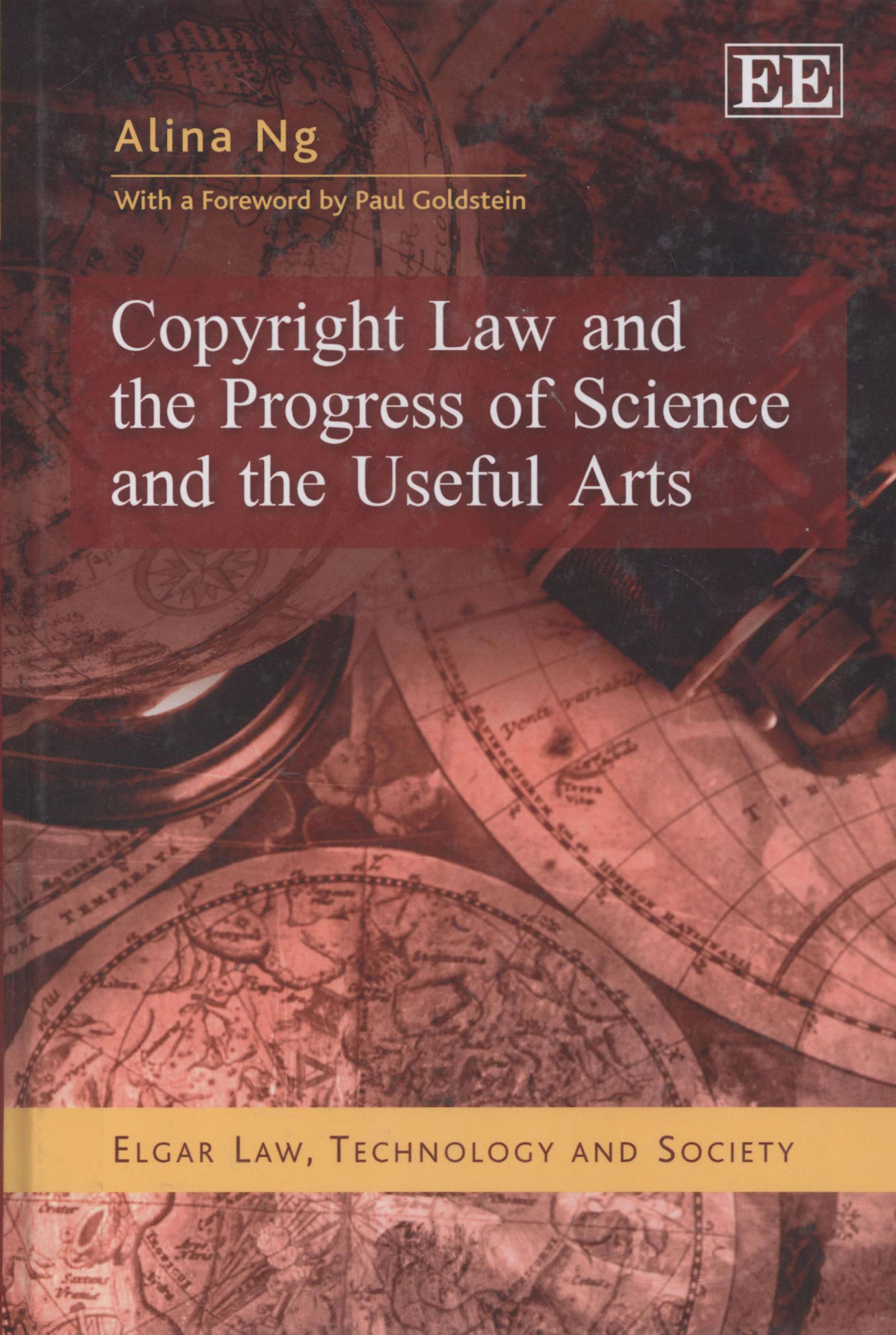
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Alina Ng
With a Foreword by Paul Goldstein
Copyright Law and the Progress of Science and the Useful Arts
Elgar Law, Technology and Society

Copyright Law and the Progress of Science and the Useful Arts

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Copyright Law and the Progress of Science and the Useful Arts

ELGAR LAW, TECHNOLOGY AND SOCIETY

Series Editor: Peter K. Yu, *Drake University Law School, USA*

The information revolution and the advent of digital technologies have ushered in new social practices, business models, legal solutions, regulatory policies, governance structures, consumer preferences and global concerns. This unique book series provides an interdisciplinary forum for studying the complex interactions that arise from this environment. It examines the broader and deeper theoretical questions concerning information law and policy, explores its latest developments and social implications, and provides new ways of thinking about changing technology.

Copyright Law and the Progress of Science and the Useful Arts
Alina Ng

For my mom and my dad

Foreword

In his seminal 1945 lecture, published as *Reflections on the Law of Copyright*,[1] Professor Zechariah Chafee, Jr. called copyright the 'Cinderella of the law', long crowded by her 'rich older sisters, Franchises and Patents . . . into the chimney corner.'[2] In the several decades since, copyright's suitors, if they have not exceeded patent and trademark's in their ardour and number, have at least equalled them. Even in 1945, Chafee could remark on the 'vast increase in the pecuniary value of literary and artistic property,'[3] and the copyright industries today – film, music, books, software, video games – account for 11.05 per cent of US Gross Domestic Product and 8.4 per cent of US exports.[4] Where in Chafee's day copyright cases were few and scholarship sparse, copyright law today has entered the mainstream of jurisprudence around the world. Copyright has become front page news.

Copyright scholarship over these years has splintered in the same several directions as legal scholarship generally. Historical inquiry and narrative have been persisting themes, as has economic analysis of copyright law's statutory rights, limitations on rights, and remedies. Literary theory and the question of authorship in copyright have had their day, as has empirical inquiry; indeed, there is evidence that the empirical enterprise tentatively initiated by then-Professor Stephen Breyer more than 40 years ago[5] is on the brink of a robust renascence. Other scholarly traditions have also shone their light on copyright law.

Professor Alina Ng's principal contribution in *Copyright and the Progress of Science and the Useful Arts* is to step back from these scholarly traditions and to fashion a methodology that seeks at once to encompass and reconcile the existing modes of inquiry; a methodology that seeks, in her words, 'to identify a set of moral and ethical principles that could

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[1] Zechariah Chafee, Jr. 'Reflections on the Law of Copyright' (1945) I, 45 *Colum. L. Rev.* 503.

[2] *Ibid.*

[3] *Ibid.*

[4] Stephen E. Siwek, 'Copyright Industries in the U.S. Economy: The 2003–2007 Report' (2009) 3, 7.

[5] Stephen Breyer, 'The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies and Computer Programs' (1970) 84 *Harv. L. Rev.* 281.

guide the use and production of literary and artistic works by authors, publishers and users toward cultural and social advancement.' As elaborated in this volume, Ng's vision for copyright effectively rejects the dominant tradition of utilitarian accommodation in favour of the establishment of a more idealised community in which the 'progress of science' heralded in the book's title 'correlates with the advancement of society and culture in a way that is just, fair, and equal for all groups rather than a utilitarian precept of wealth maximisation where a net balance of overall satisfaction is sought at the expense of a few in society.'

Although her mastery of copyright law's several diverging scholarly traditions is evident throughout this elegantly-written book, Ng draws for her analysis principally on the philosophical canon, and on no thinker more than John Rawls. From Rawls's *A Theory of Justice and Political Liberalism* Ng derives a social matrix within which authors, users and publishers have not only rights, but corresponding duties and liberties. Within this scheme, publishers – the participant most commonly neglected in copyright discussions – enjoy the right '[t]o receive monetary payment for social uses of creative works'; bear the duty '[t]o produce authentic works of authorship'; and have the liberty '[t]o be able to pursue the most cost-effective way of publishing and distributing works.'

Copyright and the Progress of Science and the Useful Arts is a provocative book, and it is not necessary to agree with every one of its claims in order to admire its brave questioning of certain long-accepted dogmas about copyright law. Taking a wide compass, and studying the forest rather than the trees, the book inevitably leaves unresolved hard questions that will arise from concrete and specific facts. Should the unauthorised transformation of a copyrighted work be excused as fair use, or should it be barred as an infringement of the work's derivative right? Should private uses of copyrighted works be exempted from copyright control or should they be subjected to liability in order to secure copyright owners' last potential market in the digital age? It will be fascinating to watch as future scholars apply this book's general methodology to the resolution of copyright law's hard cases.

Paul Goldstein
Stanford, California
May 2011

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I am indebted to numerous individuals who have, in one way or another, contributed to bringing this book to fruition. The arguments and ideas presented here have their intellectual roots in my dissertation, which was completed at Stanford Law School in June 2004. Therefore, I will begin my thanks by recognising those who were my teachers and mentors and with great patience planted the seeds of my own understanding of the copyright system and its unique role in society. The teaching and writings of Paul Goldstein, Lawrence Lessig, and Margaret Radin have been very influential in how I perceive the legal institution charged with encouraging creativity to benefit individuals and society as a whole. My editor, Jeanne Barker-Nunn, has devoted a large amount of time and tireless effort to reviewing and providing insightful comments that improved the manuscript.

This book also benefitted greatly from the adept observations and suggestions of Peter Yu, who despite his busy schedule took the time to thoroughly read my work. My deep appreciation goes to Annabel Patterson, whose in-depth and careful reading of the earliest draft of my manuscript raised fundamental questions about the assumptions I make in this book, and I hope I have succeeded in my attempt to address and clarify these in the final version. I am also grateful to Lisa Tener, for helping me get this project off the ground; Kayla Schwartz, for helping me make these ideas more accessible to a general audience; Tara Gorvine, for having unwavering faith in this project; and Doreen Collins, for support, both administrative and emotional, throughout this project. I am also thankful to Laurielle Altman for research assistance. Mississippi College School of Law provided generous support that allowed for the completion of the project. I offer Deans Jim Rosenblatt and Phillip McIntosh profound gratitude for supporting and believing in my work, within the classroom as a teacher and on written pages as a scholar. Last, but not least, I thank my family – my parents, my sister, and my brother – for their unconditional love and steadfast support every single day of my life.

Contents

PART III OUR FUTURE

Introduction: How did we get here?

The Rockettes is a well-known precision dance company performing out of Radio City Music Hall in New York City. Every Christmas season since 1932, the company performed Radio Music City Hall's famed 'Christmas Spectacular' four-to-six shows a day, seven days a week, with its best-known routine being an eye-high leg kick in perfect unison with a chorus line included at the end of every performance. The magic of America's favourite holiday show was complete with the Rockettes' performance to a 36-piece live orchestra. However, in 2005, in the course of a failed standard contractual negotiation between the musicians' union and the producers of the Christmas Spectacular, the show producers turned their musicians away when they showed up to perform for the show and opted instead for recorded music to back the show's performance.[1] By doing so, the producers of the Christmas Spectacular determined, and to a large extent diluted, the cultural experience that their patrons experienced, by replacing a full orchestra with canned, pre-recorded music. While nothing in the law prohibits the producers from doing so, surely there has to be some moral obligation that is owed by the producers to the musicians and the patrons of the Christmas Spectacular. Shouldn't the producer of a public performance have an ethical obligation to provide the best cultural experience possible for society because social and cultural progress depend on a good faith provision of creative works?

The law appears to not think that producers of creative works are required to abide by any ethical obligations in their provision of creative works for society. In a landmark 2005 case, for example, *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd*, the Supreme Court of the United States unanimously decided that a software distributor whose free, downloadable software products allowed its users to share digital files through the Internet, including copyrighted audio and video files, without the authorisation of the copyright owner, could be contributorily liable for copyright-infringing activities.[2] The court declared that if it could be shown

[1] Jaclyn Schiff, 'Radio City Opts for Canned Music: Spurns Musicians' Offer to Play Christmas Spectacular After Walkout', available at: www.cbsnews.com/stories/2005/11/03/entertainment/main1006028.shtml.

[2] 545 U.S. 913.

that a distributor intended to promote unauthorised uses of copyrighted works by 'a clear expression or other affirmative steps taken to foster infringement', that distributor would be liable for inducing the infringement of copyrighted works by its users. In this case, the provider of creative works to society – a group of copyright owners comprising motion picture studios, recording companies, songwriters, and music publishers – successfully argued that Grokster Ltd and StreamCast Networks, had induced their users' infringement in several ways: by deliberately attempting to capture the market for illegal file-sharing software left by the demise of Napster; failing to develop tools to diminish infringing activities using their software; and building their revenue model on advertising sales that would increase significantly with high-volume infringing usages. 'The unlawful objective' for the distribution of the software, said Justice Souter, 'is unmistakable'.[3]

This case represents a significant victory for the entertainment industry in its persistent fight to maintain control over social uses of literary and artistic works. But the same question about ethics resurfaces again here. Should copyright owners be allowed to prevent the sharing of creative works when technology exists to allow users to do so? Is the distribution of software that allow creative works to be shared digitally inherently wrong? Should technology manufacturers distributing technology, even with the intention to actively induce use of copyrighted content, be considered to have engaged in illegal behaviour? Is the sharing of creative works illegal because it is inherently harmful to social and cultural progress? Or is sharing of creative works illegal simply because the legal system protects economic rights of a copyright owner instead of holding the producer of creative works morally obligated to provide the best cultural experience for society through the production and use of such works? These are difficult questions and the inherent friction within the copyright system as its laws try to steer a difficult path between protecting private economic rights over literary and artistic works, on the one hand, and facilitating the progress of science and the arts for society's benefit, on the other is evident in this case. The interests in literary and artistic works are varied and often sharply at odds with each other. Copyright owners, for their part, seek possessory control over creative works as a form of property because exclusive control creates the scarcity necessary for the successful commercialisation of literary and artistic works. Users of creative works, on the other hand, seek access to these works for many reasons, including entertainment, research and development, and education. And the authors or creators of literary and artistic works seek recognition,

[3] 545 U.S. 913, 940 (2005).

monetary payment, and respect for their creative talents as and when they publish and disseminate their work to the public. Currently, these different and competing interests in literary and artistic works are balanced against each other without any principled or normative standard for resolution. The original purpose of the United States copyright system, as set out in the Constitution, is clearly singular: to promote the progress of science by granting authors exclusive rights over literary and artistic works to encourage creative production for society's benefit. While this is clearly a desirable goal, the grant of private exclusive rights over these works may unnecessarily limit society's ability to access works in the public domain as copyright owners persist in their fight to assert possessory control over literary and artistic works. To James Boyle, this fight is reminiscent of the enclosure movement in England, where over the course of 400 years, land held in common was converted to private property and enclosed by the state.[4]

Yet, this book argues, exclusive rights and public goals need not be as antithetical as current thought about the copyright system suggests that they are. One such school of thought, steeped in the tradition of law and economics, sees the grant of exclusive rights over literary and artistic works as an encouragement for creators and their publishers to engage in creative production. The belief that creators will be able to recover the cost of producing their work only if the law ensures that the market price for the work will not be driven down by piracy resonates well with copyright owners and serves to justify copyright protection and exclusive rights. Without copyright protection, a copier who bears little or no investment risk in production may unfairly profit from the success of well-received works and prevent creators and their publishers from recovering the costs of production from the market. A second and contradictory train of thought, premised instead on libertarian ideals of individual freedom, argues that the public goal of progress in science and the arts can be attained only by putting limitations on a copyright owner's proprietary control over uses of literary and artistic works, thereby preserving the public domain and conserving raw materials needed by other creators in the creative process. As Jessica Litman reminds us, authorship often involves the translation and recombination of existing works rather than an act of 'creating Aphodrite from the foam of the sea', a metaphor symbolising the romantic notion of a heroic, solitary author creating wholly original work through a sudden stroke of genius.[5] Because in fact the author or creator of a work is never free from influence by surrounding

[4] James Boyle, *The Public Domain* (New Haven, CT: Yale University Press, 2008), p. 42.
[5] Jessica Litman, 'The Public Domain' (1990) 39 *Emory L.J.* 965, 967.

literature and works of art, extensive property rights may restrict the very act of creativity necessary for progress. And as Lord Mansfield eloquently pointed out more than two hundred years ago, extreme care must be taken to make sure that 'the world may not be deprived of improvements, nor the progress of arts be retarded' by the 'reward [for] ingenuity and labour'.[6]

Most of the relevant literature and commentary on copyright law has focused on the apparent conflict between the grant of property rights to encourage creative production and the necessity of ensuring public access to creative works to oil the wheels of progress.[7] As a result, most have viewed these conflicts as the result of flaws of the legal system that are in need of reform, or at the very least in need of being treated with grave caution, particularly now that the Internet and digital technologies have produced profound changes in society's ability to use and modify literary and artistic works as a legitimate form of free expression.[8] It may be that copyright scholars and practitioners have been too uncritical in our acceptance of the inadequacies of the legal system in dealing with technological progress that offers previously undreamed-of advancements not only in science and the useful arts, but also in society, culture, and political discourse. This complacent acceptance of the failings of the copyright system and the tendency to call for legal reform is a position often embraced in successive waves of advancements in technological development. In 1966, for instance, Benjamin Kaplan began his James S. Carpentier Lecture at Columbia Law School by saying that:

> as a veteran listener at many lectures by copyright specialists over the past decade, I know it is almost obligatory for a speaker to begin by invoking the

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[6] *Sayre v. Moore* 1 East 361, 102 Eng. Rep. 139 (K.B. 1785).

[7] See e.g. Mark A. Lemley, 'Property, Intellectual Property, and Free Riding' (2005) 83 *Tex. L. Rev.* 1031 (arguing that property rights do not entitle the property owner to fully internalise positive externalities created by an activity); Stewart E. Sterk, 'Intellectualizing Property: The Tenuous Connection Between Land and Copyright' (2005) 83 *Wash. U.L.Q.* 417 (cautioning against the use of real property concepts to intellectual works where rights are provided as an incentive to create); Shubha Ghosh, 'Deprivatizing Copyright' (2003) 54 *Case W.L. Rev.* 387 (arguing that copyright should be deprivatised in order to achieve the public good purpose of the institution); Glynn S. Lunney, Jr., 'Reexamining Copyright's Incentives-Access Paradigm' (1996) 49 *Vand. L. Rev.* 483 (arguing that the incentives-access paradigm used to balance economic rights against public interest is an improper tool for defining copyright's limits and should be replaced by allocative-efficiency); Howard B. Abrams, 'Originality and Creativity in Copyright Law' (1992) 55 *SPG Law & Contemp. Probs.* 3 (seeing copyrightability as a balance that is drawn between the competing claims of the copyright owner and copyright user).

[8] For an example of the first of these perspectives, see Pamela Samuelson, 'Preliminary Thought on Copyright Reform' (2007) *Utah L. Rev.* 551; for the second, see Neil Weinstock Netanel, 'Copyright and a Democratic Civil Society' (1996) 106 *Yale L.J.* 283.

> "communications revolution" of our time, then to pronounce upon the inadequacies of the present copyright act, and finally to encourage all hands to cooperate in getting a Revision Bill passed.[9]

Whether a revision of the copyright system in response to the advent of the information age is warranted is a discussion to be undertaken outside the pages of this book, whose purpose is not to argue with either line of thinking or to criticise the copyright system for its alleged failings in achieving a neat balance between private rights in and public access to literary and artistic works. Rather, its purpose is to contribute a third thread of thought to this conversation by introducing a normative analysis on the nature of property rights and economic incentives that might bridge the gap between the wants of authors and creators, their publishers and distributors, and the larger society with the larger institutional goal of ensuring progress in science and the arts. Despite the lack of confidence of many scholars in the system, this book argues that a strong copyright system has substantial merit, and makes the case for a robust, rather than weakened, copyright system that brings together and protects different values surrounding the creation, dissemination, and use of literary and artistic works. Sustained creativity, it contends, is best achieved by upholding rather than undermining individual legal rights in literary and artistic works. By grasping the different nuances of property rights and economic privileges and deepening our understanding of the different kinds of entitlements and where they might fit on a rights and privileges scale, it becomes obvious that individual rights are unlikely to derail the natural progress of science and the useful arts.

A robust copyright system that will further the progress of the sciences and useful arts will, the following chapters assert, adapt to its society at any given point in history; will direct the creative and productive activities of authors, industry, and users toward the broader goals of educational, cultural, and educational growth; and will be able to adjust its institutional framework to embrace technological changes to allow the sciences and the useful arts to progress in the direction of basic human flourishing. This book maintains that if copyright laws are sufficiently robust, the legal system will promote, rather than impede, such progress. Legal reform to the copyright system, if any is to be undertaken, must, it argues, emanate from a deeper and more nuanced appreciation of the nature of property rights and economic privileges that are consistent with the goals of progress rather than a hasty inclination toward change.

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[9] Benjamin Kaplan, *An Unhurried View of Copyright* (New York: Columbia University Press, 1967), p. 1.

Fundamentally, as will be established in the following chapters, property rights are about establishing boundaries through exclusive control of resources that are limited. How easily this conception fits into the copyright system is arguable. Creative production and progress in science and the arts both depend on the same thing: the ability to access and use materials from the common storehouse of human knowledge. As suggested above, new generations of authors and creators must be able to use collective knowledge, research findings, and documented experiences to guide their own explorations and experiments in creating new insights and materials for society. If this fails to happen, the development in culture, better education, or economic growth that we all seek will always be elusive. Boyle and Litman are right to be concerned that granting stronger property rights to copyright owners runs the risk of preventing society from accessing the information and knowledge needed to further progress in the sciences and the arts. Even if reformers should feel compelled to draw boundaries between private rights and the public domain, they will not be easy boundaries to draw, especially if the purpose for drawing these boundaries is to allocate entitlements between copyright owners and society through a system of proprietary rights and exclusive control. Furthermore, any carefully drawn boundary is likely to crumble with the introduction of every new technology that enables greater user interaction with creative works, which in turn threatens a copyright owner's ability to commercialise works and recover the investment costs of production. Digital downloads of content through peer-to-peer technology in the *Grokster* case is just one such example. Since copyright is, as Paul Goldstein says, 'technology's child from the start', we can expect boundaries between private rights and public interests to be continually redefined.[10]

Perhaps, then, the ultimate goal of the copyright system is not to draw boundaries or make creative works exclusive through a system of proprietary rights and exclusive control but just the reverse: to build connections and be inclusive of different interests in creative works. As this book suggests, the copyright system may instead be about one human activity – authorship – and about one idea – connecting authors with their readers. In such an equation, property rights and economic privileges in literary and artistic works support the act of authorship in order to connect creators with their consumers and are not ends in themselves. Rather than securing private interests, these entitlements, would serve an institutional goal: encouraging authorship of literary and artistic works to further the

[10] Paul Goldstein, *Copyright's Highway* (Stanford, CA: Stanford University Press, 2003), p. 21.