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Edited by **CHRISTOPHER S. YOO**

Critical Concepts in Intellectual Property Law 4

Copyright
Volume I

Edited by

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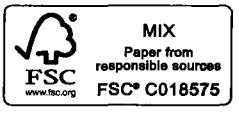

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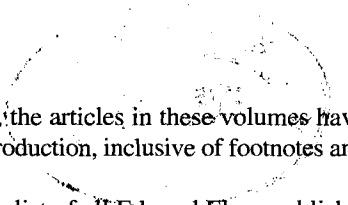

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Introduction

Christopher S. Yoo

The past few decades have borne witness to a remarkable outpouring of scholarship on copyright law. The increase in interest is due in part to copyright's growing economic importance. Copyright-related industries have now become a critical component of the world economy, representing an ever-growing proportion of global gross domestic product. The digitization of content and the advent of the Internet have further increased the value of copyrighted works by making it easier and cheaper to access content than ever before. At the same time, the emphasis on interdisciplinary research that has taken universities in general and law schools in particular by storm has enriched the panoply of perspectives through which scholars can study and understand copyright.

This collection brings together some of the best of the recent scholarship on copyright. Deciding which of the many excellent articles appearing in this rich and voluminous literature to include in these two volumes presented quite a challenge. Although the best work often requires a level of technical sophistication to appreciate them, wherever possible I selected articles that would be accessible to generalist audiences without any specialized training. I also favored works focusing exclusively on copyright, although some works discussing both copyright and patent are included. In addition, whenever possible I attempted to look beyond the classics in the field and to make sure to include articles that provide a new perspective on copyright, but have yet to receive as much attention as they deserve.

Part I of Volume I collects articles devoted to the history of copyright. Part II explores philosophical approaches to copyright. Part III offers an introduction to recent attempts to ground copyright law in democratic theory.

Volume II addresses the economic analysis of copyright law, which even its critics concede now dominates copyright scholarship. Part I brings together articles analysing the price theoretic aspects of copyright, including the role of monopoly analysis, public goods theory and price discrimination. Part II examines the insights of transaction cost economics. Part III explores the political economy of copyright.

Volume I The History of Copyright

Copyright scholars have produced an exceptional array of historically-oriented copyright scholarship over the past decade. The five articles in this part attempt to frame the classic arguments.[1] Chapter 1, which began as a legal brief that Tyler Ochoa and Mark Rose filed in *Eldred v. Ashcroft* (2003), presents what many regard as the conventional wisdom on the relevant historical antecedents for US copyright law. They argue that the Statute of Monopolies and predecessor decisions such as *Darcy v. Allen* (1603) reflect a background hostility toward monopolies that should guide the interpretation of the exceptions for patent and copyright

contained in the Statute of Monopolies as well as the provisions of the Statute of Anne. In addition, they see this same commitment embodied in the ratification history of the Constitution, relying primarily on the principles reflected in the state copyright statutes enacted under the Articles of Confederation and the views of Thomas Jefferson and George Mason.

An insightful analysis by Thomas Nachbar, reprinted in Chapter 2, takes issue with this interpretation. He suggests that the early English history of copyright was shaped by two more fundamental forces that dominated seventeenth-century English thought. First, the principal economic theory of the time was mercantilism, which, far from reflecting hostility toward monopoly, relied heavily on strong, centralized control through guilds and government-chartered corporations exercising exclusive rights as the primary means for ensuring stability and a 'fair' allocation of wealth. Second, far and away the foremost political issue of the day was the English Civil War, which represented England's defining moment in terms of constitutional structure, religion and its relationship with the rest of Europe (exemplified by James I's failed attempt to marry his son to a member of the Spanish royal family). In order to avoid calling Parliament into session, the Stuart kings attempted to raise revenue through means at least arguably outside Parliament's control, including the grant of monopolies. The objections raised by Parliament and the courts reflected hostility toward the Crown's attempt to execute a constitutional end run. They did not dislike monopolies as a general matter. In fact, Parliament continued to grant monopolies (and courts continued to approve them) before, during and after the rise and fall of the Stuart kings. It was *royal* monopolies that were the problem.

Chapter 3, by Paul Schwartz and William Treanor, re-examines the early American history, concluding that it supports conclusions drawn by the Supreme Court in *Eldred v. Ashcroft* (2003). As an initial matter, they note that the paucity of evidentiary support for claims that the English history with copyright significantly influenced the Framers' decisions. Any attempt to discern the views of the Framers from statements made by Thomas Jefferson is undercut by the fact that he did not participate in either the Constitutional Convention or the Virginia ratifying convention. Moreover, the statements of George Mason, sometimes thought to be hostile toward intellectual property, simply used the copyright statute as an example of the breadth of federal power under the Necessary and Proper Clause, which was the Virginia delegation's central concern after the Great Compromise diluted the political power of large states, and should not be taken as a direct criticism of broad copyright protection. In any event, relying exclusively on the views of Jefferson and Mason ignores the fact that they reflect the views of only one side of the debate, those of what would soon become known as the Republican Party. The Federalists, on the other hand, were much more congenial toward monopoly, as reflected by their support for the Bank of the United States and monopolies at the state level. Schwartz and Treanor point out that the *Eldred* petitioners' call for aggressive judicial oversight of copyright legislation is at odds with the original understanding of judicial review. It would also contradict the Supreme Court's rejection of the *Lochner* era's vision of courts serving as roving commissions evaluating purely economic legislation in accordance with their own conception of the public interest. Such decisions are now generally recognized as properly falling within the province of majoritarian political processes.[2]

Finally, a body of scholarship has emerged arguing that Anglo-American copyright law is based on a vision of authors as heroic figures who create works entirely from their own imaginations. Critics of this perspective point out that creative works typically do not emerge

from the author's mind fully formed without any historical antecedents.[3] A group of commentators trace the intellectual roots of this development to the German Romantic movement and argue that by the end of the eighteenth century this vision of authorship had become firmly embedded in a wide array of copyright doctrines.[4] In Chapter 4, Peter Jaszi offers a somewhat more nuanced account that begins from the premise that authorship has become one of copyright law's central organizing principles. He finds, however, that this vision occasionally gives way, such as in the low level of originality required to support copyright protection and the work-for-hire doctrine, which by default vests ownership of the work in the person commissioning the work rather than the author.

Other scholars have criticized this view, arguing that the authorship fails to explain the substance of copyright doctrines.[5] In Chapter 5, Oren Bracha offers a more moderate critique of the scholarly attack on the Romantic conception of authorship. He disputes the claim that the German Romantic vision of authorship was fully incorporated into US law by the end of the eighteenth century. Moreover, the reception of the authorship vision during the nineteenth century was only partial and incomplete, as reflected by the low level of threshold of originality needed to support copyrightability, the broadening of copyright's scope to include derivative uses, and the work-for-hire doctrine. This alternative view of the history suggests that authorship never occupied the central place that some suggest. Instead, it remained only one of several forces at work.

Philosophical Foundations

Theoretical justifications for copyright have long drawn on philosophical roots. Chapter 6, by Justin Hughes, reviews the two theories most often invoked as providing a philosophical foundation for copyright. The first, the labor or desert theory of property, is traditionally associated with John Locke.[6] Under this theory, all goods are initially held in common by all mankind. Goods such as fruit and venison, however, must be appropriated by a single person before they can be enjoyed. Locke's mechanism for permitting people to do so is labor. Because all people have a property interest in their own person, the work of their hands is properly theirs. Thus, people are allowed to take goods out of the commons by combining their labor with those goods. The fact that multiple people can benefit from ideas and creativity without reducing the supply available to others (a characteristic that economists call *non-rivalry*) leads many commentators to suggest that intellectual property is particularly well suited to Lockean property theories, because intellectual property will always satisfy the Lockean proviso requiring that recognizing a property interest in one person must leave 'enough and as good' in the commons for others.

Hughes helpfully disaggregates labor theory into two separate ideas: the avoidance view of labor (which rewards people for undertaking activities generally perceived to be unpleasant) and the value-added theory of labor (which rewards people because their efforts create social value), noting that both approaches may justify property either for instrumental or normative reasons. He also points out certain mismatches between Lockean theory and intellectual property, including the facts that the scope of protection is not metered by the amount of effort put in, that some ideas are inherently not protectable regardless of how much labor they reflect, that most rights are limited in time, and that most forms of intellectual property can be hoarded

and thus run afoul of Locke's non-waste condition prohibiting people from acquiring more than they can use.

The second, the personality-based theory of copyright, typically posits that creative works are so inextricably bound up in an author's or artist's personality as to justify giving the creator property interests in the work, usually in the form of moral rights.[7] These theories traditionally claim to be based on the work of Georg Wilhelm Friedrich Hegel as their analytical foundation. Hegel believed that property represents the central mechanism by which the human will actualizes itself in the world. The human will begins as a mere abstraction that must translate itself into the external world in order to be reified. The will does so by exerting itself over external objects and by having its dominion recognized by others. Property thus plays an inextricable role in defining a person, since it is only by establishing property interests in external objects that the will achieves concrete existence. Hughes identifies several problems in basing an intellectual property system on personality theory. Most notably, intellectual property fails to reflect that the amount of personality embodied in any particular object varies widely and fails to justify how something so personal can be alienated or abandoned.[8]

In Chapter 7, Seana Valentine Shiffrin challenges the idea that intellectual property represents a particularly good fit with the Lockean justification for property. She points out that Locke's theory begins from the premise that all property begins in a state of common ownership and that labor is used to identify who owns those goods that must be appropriated in order to be enjoyed. Because intellectual property goods are non-rival and can be enjoyed by everyone without reducing the supply for anyone, they do not satisfy the conditions for overcoming the default presumption in favor of common ownership in the first place. Far from justifying propertization of most intellectual products, Shiffrin sees Locke's theory as militating against strong intellectual property rights. She finds the few statements that Locke made about copyright to be largely consistent with her analysis.

Jeanne Schroeder's perceptive analysis, reprinted in Chapter 8, takes issue with the conventional wisdom on the connection between Hegel and personality-based justifications of intellectual property. As Schroeder points out, property is important to Hegel not because of the personal attachment that people develop with respect to particular things. Instead, property develops personality by defining each individual's relationship with others. In other words, Hegelian property is not defined by an individual's relationship with an object; it is instead an interpersonal relationship mediated by objects. Understanding the true role that property plays in Hegel's theory makes alienation of even deeply personal property unproblematic, because it is the relationship with others that matters, not the relationship with the object itself. Indeed, because alienation necessarily involves the recognition of the person's property interest by other people, it reinforces rather than weakens Hegelian personality. Furthermore, while Hegelian theory requires that the state recognize a baseline level of property protection, it does not require the recognition of any particular form of property. Instead, Hegel regarded the content of intellectual property protection as entirely a matter of positive law. As such, Hegel provides no support for regarding any particular type of protection (including moral rights) as an essential part of copyright protection.

Democratic Theories

Legal commentators have recently begun to explore the relationship between copyright and democracy, exemplified in this collection by the article by Neil Weinstock Netanel included as Chapter 9. According to this view, copyright promotes democracy in two ways. First, through what Netanel calls the *production function*, copyright creates the incentive for authors to create a wide variety of speech important to democratic society. Second, through what Netanel calls the *structural function*, copyright supports an independent creative sector that is free from the influence of both the government and elite patronage. At the same time, copyright's scope must be carefully limited to preserve what Netanel's later work calls copyright's *expressive function*, by preventing hierarchical control of the communicative space by media conglomerates and by encouraging citizens to participate in and contribute to public deliberations by creating their own transformative works.

Shyamkrishna Balganesh critiques Netanel's theories in Chapter 10, which reprints a review of Netanel's subsequent book. As an initial matter, Balganesh argues that the proper target for Netanel's concerns is not the economic approach that now dominates copyright scholarship, but rather the property essentialism associated with Blackstone. More fundamentally, Netanel fails to explain the relationship between creative works and democracy that can provide a basis for assessing when the incentives for creation are too strong and leave too little room for individual expression.[9] Rather than reconstituting copyright through the lens of democratic theory, Balganesh proposes an innovative, new approach that would consider copyright as a common law entitlement that can only be understood contextually and purposively and whose development is properly left to the courts.

Volume II Public Good Economics, Monopoly and Price Discrimination

The economic analysis of copyright is typically based on two premises, both of which are presented in William Fisher's classic article, reprinted in Chapter 1 of Volume II. The first premise is that copyrighted works represent pure public goods.[10] The second premise is that copyright protection gives authors monopoly power.

Pure public goods have two defining characteristics. They are non-excludable, in that they cannot be provided to one customer without simultaneously providing it to others, and they are non-rival, in that consumption by one person does not reduce the supply available for consumption by others.[11] Pure public goods are prone to two characteristic forms of market failure: markets produce too few pure public goods and underutilize those public goods that are produced; and non-excludability creates positive externalities that give other would-be purchasers the incentive to free-ride on the efforts of others. The non-rivalry of copyright is traditionally modeled by assuming that the marginal cost curve is flat or even zero. This in turn gives rise to a classic pricing problem. Maximizing economic welfare requires that goods be priced at marginal cost. Pricing at marginal cost means that the work will cover only the costs of producing that particular copy, in which case the transaction will generate no contribution toward defraying the fixed cost of producing the first copy. (In the extreme case where marginal cost is zero, efficient pricing means that the work will generate no revenue whatsoever.) Efficient pricing of works thus provides no incentive to produce the work in the first place.

Giving authors the exclusive right to make copies solves the problems stemming from both non-excludability and non-rivalry. The right to stop others from reproducing copyrighted works helps mitigate free-riding by rendering those works (at least partially) excludable. Preventing purchasers of the work from making their own copies and selling them at marginal cost also gives authors the incentive to create by enabling them to charge prices that exceed marginal cost. Unfortunately, pricing above marginal cost inevitably excludes some would-be consumers, even though the benefits they would derive from consuming the work would exceed the cost of permitting them to do so. According to this perspective, every attempt to increase the incentives for creating works inevitably reduces access below efficient levels, and vice versa. Copyright is often said to be an exercise in calibrating this trade-off between access and incentives.

Regarding monopoly, the classic problems are depicted in Figure 1, with the welfare maximizing price and quantity depicted by P_{eff} and Q_{eff} and the monopoly price and output depicted by P_{mon} and Q_{mon}. Monopolies charge prices that are too high and produce quantities that are too low, represented by the deadweight loss triangle in the lower right corner. In addition, monopolies allow producers to earn supracompetitive returns.

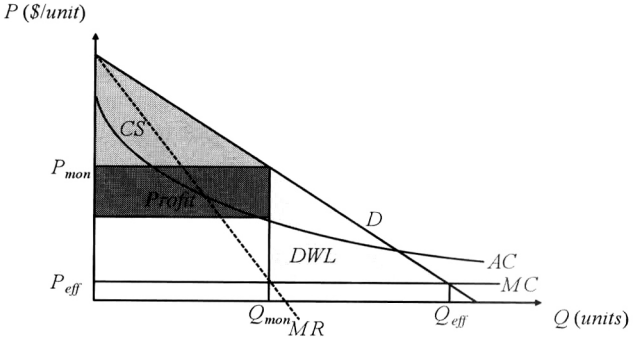

Figure 1 Monopoly pricing

One way to increase consumption toward efficient levels is price discrimination, which can permit authors to charge lower prices to new customers without necessarily giving the same discount to existing customers. As depicted in Figure 2, price discrimination increases total consumption from Q_{mon} to Q_3. Price discrimination always increases authors' incentive to create works, and, if done perfectly, it increases access to efficient levels. It is for this reason that many scholars argue that copyright should condone technological changes that make price discrimination easier.[12] Other scholars, represented by Michael Meurer's analysis in Chapter 2, are more skeptical.[13] If price discrimination is imperfect (as is always the case), the welfare impact is ambiguous. On the one hand, it potentially allows more people to consume the work and provides greater incentive to produce more works. On the other hand, increases in consumption are not inevitable, in which case price discrimination would simply allow authors to appropriate a greater proportion of the available surplus and encourage them to engage in rent-seeking. Whether (imperfect) price discrimination would increase economic welfare in any particular cases is thus an empirical question.

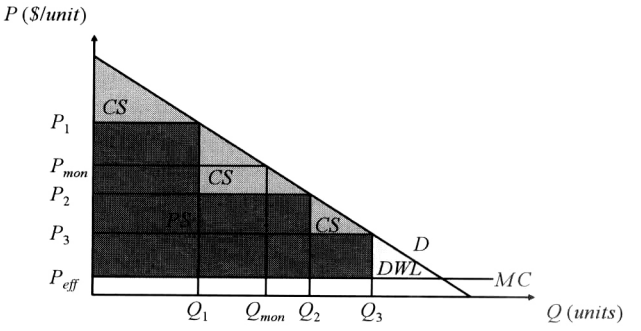

Figure 2 Price discrimination

The subsequent two chapters contain articles that I authored challenging these paradigms. Chapter 3 notes that the exclusive right to sell a work confers monopoly power only when the work faces no competition from close substitutes.[14] Because the idea–expression dichotomy essentially guarantees that entry by close substitutes is always possible, markets for copyrighted works are better modeled as monopolistic or spatial competition between differentiated products. The policy implications associated with differentiated products theory are quite different from those following from monopoly theory. As an initial matter, exclusivity does not yield any monopoly profit, as entry should continue until all supracompetitive returns are dissipated. In addition, it suggests that the access–incentives trade-off may not be as irreconcilable as generally believed. Instead, policymakers can promote both by increasing incentives and relying on the reduction in price from the ensuing increase in competition to increase access. Lastly, differentiated products theory provides a basis for distinguishing among different ways in which copyright protection can be strong or weak and provides insights into the optimal way to configure each dimension.

Chapter 4 takes issue with the way in which copyright's public good aspects are modeled in the current literature.[15] Specifically, modeling non-rivalry by assuming that marginal costs are flat ignores Paul Samuelson's observation that public goods continue to pose economic difficulties even if the problems associated with non-excludability and supramarginal cost pricing were somehow solved.[16] The true source of market failure for public goods lies in a more fundamental difference between private and public goods, which is that public goods are *indivisible*, in that every consumer necessarily consumes the entire industry output. This has a profound impact on the conditions for optimal production. For private goods, each consumer pays the *same price* and signals the intensity of their preferences by purchasing *different quantities*. For public goods, consumers cannot signal their preferences in this manner. Instead, consumers purchase the *same quantity* and must signal the intensity of their preferences by paying *different prices*, with each consumer paying an amount equal to the marginal benefit they derive from consuming the product. Reframing the public goods analysis in this manner provides several key insights. First, it suggests that, far from being a policy problem, price discrimination is a necessary condition for economic optimality. Second, it underscores that the real problem is incentive compatibility. In the case of private goods, end users have no incentive to misrepresent the intensity of their true preferences by purchasing quantities that

are too low. For public goods, however, consumers have strong incentives to misrepresent the intensity of their preferences through prices. It is this incentive compatibility that creates the persistent tendency toward underproduction that exists, even if the problems associated with non-excludability and marginal cost pricing are solved. Lastly, the presence of other factors affecting utility means that copyright may be more properly regarded as impure public goods. Unlike pure public goods, impure public goods can be provided efficiently by markets, since the presence of other factors affecting welfare can provide the means for consumers to signal their preferences by shifting their purchases from one good to another.[17]

Transaction Costs and the New Institutional Economics

In addition to analysing the implications of public good economics and monopoly pricing, economic scholarship has also examined the impact of transaction costs on copyright. Economically minded scholars have long suggested that friction might give authors sufficient lead time over would-be copiers to allow them to recover their first copy costs even in the absence of copyright.[18] These claims were disputed when they were previously advanced.[19] They are even less plausible today, when digital formats and the Internet have pushed the costs of reproduction and distribution ever closer to zero.

As a result, the focus of this line of research has shifted away from asking whether copyright should exist at all and instead now examines the impact of transaction costs on particular copyright doctrines. In Chapter 5, Wendy Gordon applies the classic analytical framework on liability rules established by Guido Calabresi and Douglas Melamed (1972) to justify fair use, arguing for what is in effect a zero-price liability rule whenever the bargaining costs for negotiating a license would be so large as to consume the entire value of the transaction.[20] Although Gordon has subsequently made clear that she regards transaction costs as only part of the story,[21] the Supreme Court has embraced the transaction cost-based interpretation of fair use traditionally associated with her work.[22]

In Chapter 6, Robert Merges offers a somewhat more skeptical assessment of the need for state-imposed liability rules. The literature on the New Institutional Economics, for which Elinor Ostrom and Oliver Williamson recently won the Nobel Prize, demonstrates how rights holders can create alternative institutional arrangements by contract, including pricing arrangements that mimic liability rules. He also points to numerous historical examples of this occurring, including collective rights organizations such as BMI, ASCAP and the Copyright Clearance Center. Other industries, such as the fashion guilds and the Hollywood script market, developed less formal, norm-based solutions. A burgeoning literature is emerging analysing the development of such norm-based enforcement regimes among fashion houses, comedians, chefs and magicians.[23] When compared with the government's struggles to place an appropriate value on access to creative works and to update those prices over time, privately managed solutions seem preferable.

The article by Abraham Bell and Gideon Parchomovsky, which appears as Chapter 7, offers an even more nuanced framework for analysing the ways in which property owners can reconfigure their property interests. They take as their starting point Harold Demsetz's (1967) classic evolutionary theory of property rights, which posits that the world will transition from open access property to private property over time as the benefits from internalizing negative

externalities exceed the transaction costs of defining and protecting property rights. Barry Field's (1989) less celebrated, but nonetheless important, work points out that, contrary to Demsetz's suggestion, the road from open access to private property is not a one-way street, as demonstrated by medieval England's shift from individual land holdings to a common field system. Such shifts occur when the exclusion costs of excluding non-members exceed the governance costs of enacting and monitoring rules and norms for exploiting the common resource. Demsetz and Field, however, both envision the reconfiguration of property only along a single dimension – the number of property owners. Bell and Parchomovsky note that property owners can adjust their property interests in two other ways. For example, they can reconfigure their assets by decreasing or increasing the size of the lots, granting easements across them, or dividing ownership across time such as occurs when granting life estates. In addition, the government can change the scope of the owner's dominion over the property, such as through nuisance and zoning laws. They then apply these insights to the copyright context, noting that the impetus toward open access caused by the sharp increase in exclusion costs caused by the digitization of music has been largely offset by content owners' ability to increase their dominion through digital rights management backed by the Digital Millennium Copyright Act and to reconfigure their assets by starting to sell individual music tracks. Bell and Parchomovsky apply a similar analysis to the open source movement.

Other scholars, represented in Chapter 8 by the work of Clarisa Long, use the desire to minimize information costs to explore why the law recognizes different types of intellectual property and why their structures are so different. Scholars have pointed out that the law has traditionally limited the number of real property forms in order to minimize and organize the information that third parties interacting with the property must process.[24] Long observes that the information costs associated with different types of intellectual property vary widely. In particular, copyrights tend to be much greater in number and tend to be much more idiosyncratic than patents. As a result, copyright law includes a number of features that attempt to minimize the higher information costs associated with creative works, including the incompleteness of the right to exclude, the acknowledgement of independent creation as a defense, and the fixation requirement. The differences in information costs also caution against blindly extending doctrines developed with respect to one form of intellectual property to another. In addition, the legal regime will have to adapt to the increasing importance of non-paradigmatic goods with high information costs, such as software and business methods.[25]

In addition to the optimal level of standardization, scholars have explored the effect of transaction costs on follow-on innovation.[26] Other scholars have analysed the optimal size of particular intellectual property rights.[27] Others analyse copyright as a 'semicommons'.[28] Still others have begun to examine copyright from the perspective of Coase's theory of the firm.[29] Research into the connection between transaction cost economics and copyright is likely to continue to grow in the future.

The Political Economy of Copyright

The final part to this collection explores the literature on the political economy of copyright. Chapter 9 presents Jessica Litman's classic analysis of the legislative history of the 1976 revision to the copyright laws, which she notes was not drafted by members of Congress and

their staffs, but rather by the industry participants whose rights would be affected by the new legislation (after Congress and the Copyright Office essentially strong-armed them into negotiating with one another). She ends with the recommendation that courts do their best to understand and effectuate the compromise underlying the statute even if they believe the resulting expansion of copyright's scope to be unwise. In the middle of her analysis, however, she argues that the drafting process systematically gave short shrift to future, unanticipated interests. Consequently, courts should give an expansive interpretation to fair use and the idea–expression dichotomy (which Litman regards as the only two limiting principles offsetting the widescale expansion of copyright protection) even if such an interpretation deviates from what those who negotiated the compromise intended.[30]

In Chapter 10, Thomas Nachbar's fascinating chronicle of Noah Webster's extensive lobbying campaign from 1782 to 1786 that ultimately convinced 12 of the 13 states to adopt general copyright laws prior to the enactment of the Constitution, as well as his successful efforts to convince Congress to extend the copyright term in 1831, underscores the long legacy of public interest lobbying for copyright legislation. The history also belies any suggestion that the Copyright Clause was designed to limit the power of a small number of publishers that dominated the industry. In a passage cited by the Supreme Court in *Eldred v. Ashcroft* (2003), Nachbar notes that, unlike the English publishing industry of the Stationers' Company or the modern publishing industry of today, the publishing industry of the early United States was fiercely competitive. Moreover, in an era when vanity-press style self-publishing was the norm, publishers rarely purchased copyrights from authors. As a result, they typically favored shorter copyright terms, which weakened authors' bargaining position and hastened the day when they could freely publish any works that turned out to be commercially successful. This account underscores the hazards of making broad generalizations about the politics surrounding copyright reform legislation without a clear understanding of how the context has changed over time.

Finally, Chapter 11 consists of Robert Merges's call for copyright scholars to expand their scholarly horizons to include the political economy of intellectual property rights. He begins by providing a helpful recapitulation of the monopoly and transaction cost theories of intellectual property, before turning his attention to political economy theories. As he points out, the political economy literature is rich and varied. The early literature focused on the tendency of small, discrete groups to triumph over diffuse majorities and attempts by special interests groups to use campaign contributions to purchase regulatory outcomes (with the cycle sometimes instigated by the government itself). These relatively simplistic studies have given way to more nuanced models analysing the role of lobbyists as sources of information, which suggests that special interests may have only an indirect and incomplete impact on public policy. In addition, the fact that special interests are often arrayed on both sides of political battles undercuts attempts to base copyright reform on simplistic notions of legislative capture.

* * *

Any anthology of an area of study as broad as copyright can necessarily provide only a brief introduction to the field. Inevitably, many excellent works had to be omitted. Still, the works reprinted here (as well as those cited in this introduction) should provide readers with a sense

of the rich and variegated nature of current copyright scholarship. I hope that the collection of works that follows paves the way for a lifetime of engagement with copyright scholarship.

Notes

1. Significant historical works not reprinted in this collection include Fisher (1999), Heald and Sherry (2000), Walterscheid (2002), Nachbar (2004) and Oliar (2009).
2. See also Nachbar (2003).
3. For a classic statement of this view, see Litman (1990).
4. The seminal work is Woodmansee (1984). Other important writings in this vein include Rose (1988), Lange (1992), Rose (1993), Woodmansee (1994), Woodmansee and Jaszi (1994) and Boyle (1996).
5. See, e.g., Lemley (1997a).
6. For other leading analyses of Lockean theory, see Nozick (1974), Hettinger (1989), Yen (1990), Gordon (1993), Becker (1993) and Waldron (1993).
7. Radin (1982). For a discussion basing moral rights on personality theory, see Netanel (1993).
8. For an additional critique of Hegelian theories of copyright, see Yoo (2011).
9. In my own critique, I note that Netanel's proposal fails to engage non-consequentialist theories that value free speech. It contradicts some tenets of liberal theory by placing listeners' interests over speakers' and by making democracy logically prior to speech instead of the other way around. It is also under-theorized, failing to provide a basis for striking a balance when the different functions conflict (Yoo 2000).
10. For the seminal work on public goods theory, see Samuelson (1954). For the seminal work applying public goods theory to intellectual property, see Arrow (1962).
11. Musgrave (1969).
12. See Bell (1998), Fisher (1998) and Epstein (2006).
13. See Gordon (1998), Cohen (2000), Boyle (2000), Benkler (2000) and Lunney (2008).
14. For a work analysing copyrighted works as differentiated products that was published at roughly the same time, see Abramowicz (2004). Prior works that recognized the possibility of competition from differentiated products employed dominant firm models that are essentially refinements on monopoly models. See Landes and Posner (1989).
15. For a more formal presentation, see Conley and Yoo (2009).
16. Samuelson (1958, 335–6).
17. For the seminal work on impure public goods, see Tiebout (1956) and Buchanan (1965).
18. See Plant (1934), Hurt and Schuchman (1966) and Breyer (1970).
19. See Tyerman (1971).
20. For other leading analyses of the proper role of liability rules in intellectual property, see Merges (1994) and Lemley and Weiser (2007).
21. See Gordon (2002).
22. *Harper & Row Publishers, Inc. v. Nation Enterprises* (1985).
23. See Buccafusco (2007), Fauchart and von Hippel (2008); Oliar and Sprigman (2008) and Loshin (2010).
24. See Merrill and Smith (2000).
25. For other analyses applying information cost theory to intellectual property, see Smith (2007, 2009).
26. See Landes and Posner (1989), Merges (1993) and Lemley (1997b).
27. See Hughes (2005) and Van Houweling (2010).
28. For the seminal work on the semicommons theory of property, see Smith (2000). For applications to copyright, see Heverly (2003), Frischmann and Lemley (2007) and Loren (2007).
29. See Burk (2004), Burk and McDonnell (2007) and Bar-Gill and Parchomovsky (2009).
30. This interpretive approach is stated even more strongly in Litman (2001).