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Series Preface

The International Library of Essays in Law and Society is designed to provide a broad overview of this important field of interdisciplinary inquiry. Titles in the series will provide access to the best existing scholarship on a wide variety of subjects integral to the understanding of how legal institutions work in and through social arrangements. They collect and synthesize research published in the leading journals of the law and society field. Taken together, these volumes show the richness and complexity of inquiry into law's social life.

Each volume is edited by a recognized expert who has selected a range of scholarship designed to illustrate the most important questions, theoretical approaches, and methods in her/his area of expertise. Each has written an introductory essay which both outlines those questions, approaches, and methods and provides a distinctive analysis of the scholarship presented in the book. Each was asked to identify approximately 20 pieces of work for inclusion in their volume. This has necessitated hard choices since law and society inquiry is vibrant and flourishing.

The International Library of Essays in Law and Society brings together scholars representing different disciplinary traditions and working in different cultural contexts. Since law and society is itself an international field of inquiry it is appropriate that the editors of the volumes in this series come from many different nations and academic contexts. The work of the editors both charts a tradition and opens up new questions. It is my hope that this work will provide a valuable resource for longtime practitioners of law and society scholarship and newcomers to the field.

AUSTIN SARAT
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Introduction

Intellectual property law is not intellectual – rather it often protects expression rather than ideas; it cannot always be best described as relating to property – although some of the rights, such as the right to exclude, often resemble a property right; and, as a form of modern law, it only joined other areas of legal regulation a little more than three centuries ago. In the United States, it is composed of a variety of major regimes – trade secrets, trademark, rights of publicity, copyright and patent, and a host of smaller, regime-specific regulatory frameworks pertaining to such subject matter as pharmaceuticals, computer chips and fine art. Given this multiplicity of different types of subject matter, Robert Merges (2011) has described intellectual property law as a sprawling, chaotic megacity which, since it is still very much a work in progress, remains filled with construction cranes.

Nevertheless, conceptual similarities bind these disparate forms of intellectual property together. Each of these regimes restrain copying or appropriation. Such protection for intangibles is often grounded upon analogies made to the law governing real property or chattel. Intellectual property regimes generally engage in balancing the competing benefits of private proprietary rights and the public interest in knowledge. Almost every form of intellectual property includes fair use provisions, which under certain circumstances provide for the adverse use of proprietary material without the authorization of its owner. Moreover, unlike real property, intellectual property specifies protection for a limited duration and after the completion of this term intangibles return to the public domain.

The history of intellectual property in the United States therefore is an intricate coupling of similarities and differences among the plethora of its diverse forms. Such variety only makes sense when examined in an historical context. No matter how similar, the language of regulating intangibles still must navigate the thicket of different doctrinal traditions that exist for different sorts of intellectual property. In part, this is because the doctrinal source varies widely for each area of law. Trademarks, for example, are rooted in the common law tort of palming off. Trade secrets have their origin in a different, though related, common law tort of misappropriation. In the United States, copyright and patent law are constitutional doctrines based upon Article I, Section 8, Clause 8, which provides Congress with the power to establish legislation in these areas 'to promote the progress of science and the useful arts'.

This variety of sources of law continues to expand over time as intellectual property law becomes increasingly dense. Common law, state legislation and federal statutory regimes – which in the case of patent include an important administrative law component – have all contributed to the regulation of knowledge in the United States. While intellectual property is said to be territorial, varying greatly in its foundations from one jurisdiction to another, the dissolving of the borders between states in an increasingly digital world has prompted the United States to alter its law in order to harmonize with the intellectual property norms of the global legal community. Even natural rights, which forms the basis of moral rights and is the backbone of Continental European copyright doctrine, has shaped the making of American intellectual property law – though America has long claimed to prefer utilitarian to natural

right justifications for copyright. As a consequence of the United States accession to the Berne Convention for the Protection of Literary and Artistic Works, however, America recognized with the Visual Artists Rights Act of 1990 the moral rights of an artist in the attribution and integrity of the work (Kwall, 2010). Increasingly, in the mid-1980s and later, the United States responded to heightened levels of piracy and difficulties with its trade balance of payments, by becoming part of a global system of intellectual property.

The reshaping of United States intellectual property law as a result of international commitments is a reminder of how the multiple cultures of intellectual property culture are continuously creating a kaleidoscope of new forms of law. The United States became a Berne Convention for Copyright signatory and joined the Madrid Protocol for trademark protection. By the early 1990s, the United States and other intellectual property producers had formulated new mechanisms for mandating minimum intellectual property standards through continuing multilateral negotiations as part of the Uruguay Round of the General Agreements on Tariffs and Trade (GATT). Further negotiations resulted in the Trade-Related Aspects of Intellectual Property Rights (TRIPs) agreement, enforceable in 1995, which made international policing of intellectual property rights ever more robust. As the electronic global marketplace has grown, the United States has become even more concerned with enforcing sanctions against intellectual property piracy. But the deepening of international influence is only the latest mechanism for defining whether (and, if so, how) knowledge should be regulated. As Justin Hughes (2006) has remarked, the term 'intellectual property' only emerged around 1845. During the last century and a half various fields of intellectual property have been rallying around the banner of this term – with its analogies to property – and negotiating the complex relationship of one part of the field to another. However, the history of intellectual property law – as a coherent, though constantly redefined field – must surely still be considered history in the making.

The History of US Intellectual Property – A Collection of Different Histories?

The United States is only slightly older than the first modern copyright statute, England's Statute of Anne of 1710, and therefore American history under the Constitution, which was ratified in 1789, is roughly synonymous with the rise of intellectual property as a field of legal regulation. Indeed, the United States has witnessed how intellectual property has shifted from a subject connected at the end of the eighteenth century – the time when the Constitutional Copyright and Patent clause was adopted – with innovative knowledge in artisan workshops and a print culture associated with the republic of letters to the mid-nineteenth-century railroad technology and the print capitalism of mass-produced publishing to the New Deal's focus on industrial design and, ultimately, in our own time to a notable expansion of American intellectual property law's participation in global legal, digital and economic networks.

There is a tendency to disaggregate the different major regimes and to construct three distinct narratives about their development. The story of copyright's trajectory has often centred upon its expansion. This has taken place at almost every level – the subject matter, the length of the term of protection and even the remedies evoked when a copyright is infringed. For critics of the contemporary copyright regime, the capaciousness of protection has led to an ever-shrinking public domain. The account of the evolution of trademark doctrine has focused upon the layered sources of law as trademark shifted from a common law tort in its

beginnings to a collection of state statutory protections in the nineteenth and early twentieth century to the introduction of a federal regime immediately after the Second World War and, finally, to trademark law without borders as it is employed to claim signs and symbols in a digital environment. The patent narrative, finally, emphasizes the gate-keeping function of patent registration. An ad hoc early system was replaced in the 1830s by a patent examination system within an administrative agency. Yet the struggles over issues such as the scope of patent, the filing of baseless patent suits and questions of the efficiency of the process have been a commonplace of American patent law in every period. The elusive quest for patent administration best practices might be the most helpful way of summing up the history of US patent law. According to these narratives, each regime was originally rooted in a particular doctrine and was altered with new circumstances.

Copyright provides protection for original works of authorship. The earliest modern copyright act, Britain's Statute of Anne (1710), afforded fourteen years of exclusive rights to printed work. The first United States Copyright Act of 1790 echoed the Statute of Anne in its protections and term, but offered protection to maps, charts and books. Almost immediately, the scope of copyright's subject matter broadened. An 1802 statute expanded copyright to include prints and engravings. Congress extended protection throughout the nineteenth century – to musical scores in 1831, to photographs in 1865 and to dramatic works, paintings, drawings and sculptures in 1870. Similarly, the 1909 Copyright Act marked the emergence of copyright as the cornerstone of a myriad of creative industries. The Act, for example, provided protection against the unauthorized recording of composers' compositions. During the period from the end of the century until today, the subject matter of copyright has become increasingly diverse. The amended 1976 Copyright Act protects photographs, architecture, musical recording and other extensions of the concept of 'writing'. But it also came to include both software – language which could only be deciphered by a machine – and the expressive shapes of ornaments. In addition, Congress has extended protection to related rights such as databases and has sought protection through the Digital Millennium Copyright Act of 1998, which prohibits the circumvention of anti-piracy mechanisms incorporated into software applications.

Copyright expanded the scope of its protection to new forms of expression. Yet it also grew ever larger by 1870 through Congress granting protection to derivative rights, the extension of an existing right to abridgements and translations. The copyright term increased by leaps and bounds from an initial fourteen-year term, with the possibility of a similar renewal by the author, under the 1790 Copyright Act to a term of life of the author plus seventy years for an individual's copyright under the 1998 Copyright Term Extension Act, which was intended to harmonize the duration of US copyright with the terms found in the European Union. As critics have pointed out, the expansion of copyright subject matter, protection of derivative rights and copyright term has greatly increased the reach of copyright law. But many of the most nettlesome cases where freedom of expression comes into conflict with copyright proprietary claims have emerged simply because commercial forms of expression have themselves become so pervasive.

Trademark law, similarly, has often strayed from its historical roots in the common law tort of palming off. Originally, trademark was part of the law of fraud. It was not included in the Constitutional clause granting Congress power to protect copyright and trademark. The first reported US trademark case was only recorded in 1837. Prior to 1877, the substantive

trademark law operated at the state level. Reflecting the general post-Civil War rise of federal power, the US Congress passed the first full-fledged substantive federal trademark act in 1870. In the Trade-Mark Cases of 1879, the Supreme Court struck down this protection as lacking a basis in the Constitution's Copyright and Patent Clause. Trademarks, unlike literary property or invention, were said to lack a critical creative element necessary to make them worthy of becoming a national intellectual property regime.

Federal trademark protection did exist in a very limited way, largely under an 1881 procedural statute that provided for registration if the marks were used in foreign commerce or in commerce with the Indian Nations. However, trademark law was almost completely a matter of state regulation. In 1946, with the New Deal expansion of federal powers under the Commerce Clause, a new national law of trademarks, the Lanham Act, was finally established. The most recent important shift of trademark from a state law rooted in tortuous fraud to a robust federal intellectual property regime took place in 1995 when trademark dilution, a doctrine preserving the uniqueness of marks even when they do not serve to prevent consumer confusion, was incorporated in federal trademark law. Trademark dilution reflected the adoption of foreign intellectual property norms – since it was of German origin – and the propertizing of what was originally a tort regime.

Patent law's trajectory has often centred on how, and how well, its issuance should be regulated. Like copyright, patent has an English antecedent, the Statute of Monopolies of 1624, and, also like copyright, the first US statute – the Patent Act of 1790 – was established under the Constitution's Copyright and Patent Clause. For patents, the period of the New Republic, however, was one of uncertainty. The 1790 Act created what might be called an aristocracy of innovation, an examination board of amateurs, whose most committed member was the Secretary of State, Thomas Jefferson. The 1793 Patent Act abandoned examination altogether in favour of a purely registration system. The validity of the patent would be contested in court. Given the many problems with fraudulent and unmerited patents, Congress restored examination with the Patent Act of 1836. This statute was influenced by Jacksonian ideas of meritocracy and depended upon technical expertise.

From the 1836 Patent Statute onwards, the history of patent law has often been a history of the development of administrative agency. Since patent has been the focus of significant litigation, courts, too, have been critical in shaping essential doctrines, including non-obviousness, enablement and the true inventor doctrine. With the shift of America from a first-to-invent to a first-to-file system under the America Invents Act of 2011, a legislative change that places the United States in harmony with the European Union, there is a move from the natural right of the inventor in his or her invention to a greater philosophical recognition of the granting power of the administrative agency.

In many ways, then, the history of intellectual property in the United States seems like many different histories – with each regime having its own narrative arc. However, there has always been borrowing back and forth between regimes, the challenges of protecting intangibles has been a common thread and, in recent times especially, there has been convergence of these areas of law as part of a shared conceptual framework. What truly unites the history of intellectual property is a story of a chimerical field – shifting to incorporate new frontiers of legal regulation as lawyers construct a sophisticated interwoven set of doctrines with real economic importance. As the essays in this collection suggest, the straightforward narratives of copyright, trademark and patent – with their focus on expansion of scope, jurisdiction and

administrative capacities – are simply inadequate to capture the complexity of the American experience with the regulation of knowledge.

Towards a Legal History of Intellectual Property

This volume is intended both to bring together for the first time exemplary scholarship in the history of intellectual property and to focus attention on historical approaches for those working in the area of intellectual property. As a field of legal historical inquiry, intellectual property is a late arrival. Other fields, including constitutional law and criminal law, were developed rather early by legal historians searching for the roots of the American legal tradition or those influenced by the rise of social history, and seemed more relevant to an earlier generation of legal historians. It was not until a few decades ago that a number of copyright and patent attorneys published articles delving into the history of these fields. Writing generally as a peripheral activity alongside their copyright or patent practices, they were primarily interested in notable cases and the emergence of doctrinal principles.

Strikingly, up until quite recently, most significant research in the history of intellectual property law has come from quarters other than traditional legal historians – or even mainstream history departments. Influenced by new historicism, literary scholars turned towards the history of copyright in order to understand authorial control over the means of production. Much of this scholarship has been written by British literature scholars on issues of eighteenth- and nineteenth-century copyright. These include books by Mark Rose (1993), Paul Saint-Amour (2003) and Kathryn Temple (2003). A second wave of scholarship by academics specializing in American literature such as Martin Buinicki (2006), Melissa Homestead (2005), Meredith McGill (1997, 2003) and Ronald Zboray (1993, 2005) turned towards the historical examination of how copyright, the rise of the industrial book and gendered property laws shaped the invention of the literary marketplace in the nineteenth-century United States.

While literary scholars examined the role of copyright law in the construction of authorship and readership, historians of technology developed an increasingly sophisticated literature about invention. Following the approach of the social historian of technology David Noble (1977), who looked at the institutional basis for invention, other scholars of the history of technology examined the importance of the patent system. A scholarly literature that was once rather unimaginative in its retelling of technological progress began looking at race, gender and the social aims and motives of invention. The question of the role of patent in reinforcing social hierarchies became an increasingly prominent thread in the new social history of technology. In similar fashion, social historians of consumption and material life addressed the rise of advertising and the role played by trademarks.

Such scholarship in the fields of literary historicism, the social history of technological innovation and the history of consumption underscored the significance of the legal regulation of knowledge for a wide array of disciplines. However, within law itself much of the writing about intellectual property had an antiquarian cast. While practitioner researchers such as Frank Prager in the area of patent law made important contributions a generation or two ago, their work remained too isolated from the historical mainstream and too undertheorized to prompt a vibrant intellectual enquiry into intellectual property's past within the area of law itself. Quite recently, a talented cadre of American legal historians has turned to tackling

intellectual property. This development reflects the increasing importance of intellectual property as a touchstone for the formation of knowledge-based civil society, the rise of the information economy and the spirited public debate over the scope of intellectual property protection. Among these legal historians are Christopher Beauchamp, Doron Ben-Atar (2004), Oren Bracha (2004, 2008, 2009, 2010), Catherine Fisk (Chapter 4 in this volume and 2001, 2003, 2009), Adam Mossoff (2007a, 2007b, 2009, 2011) Christopher Sprigman (Chapter 8 in this volume), Kara Swanson (2009, 2011) and Steven Wilf (Chapter 9 in this volume and 2009, 2011).

In the broader field of intellectual property law, there has been what might be called a turn towards history. Perhaps what is most remarkable is how long it has taken historical research in the legal regulation of knowledge to garner a central place in the many public policy and doctrinal debates swirling around intangibles. How do we account for the previously missing voice of history? Justification for these extensive property rights in intangibles has been founded largely upon philosophical arguments, and especially upon justifications for its protection. Intangible, inchoate and faced with the claim that information is a public good, intellectual property seems harder to justify than real property. Indeed, while real property rests upon the logic of actual possession, which establishes the right to exclude, intellectual property is grounded upon abstract claims of rights in ideas or expression for intangibles whose physical copies might remain within the possession of another. The absence of any immediate loss through the use of another, the ease of copying through new technologies, and fuzzy borders between what may be rightfully taken – such as the idea–expression dichotomy in copyright – and misappropriation places a significant burden upon those who seek to restrict the unfettered use of the products of the mind.

Almost every legal casebook for intellectual property law begins with the classic three justifications for its protection: labour theory, personality theory and a utilitarian assessment. Labour theory grounds these rights upon the labour invested in the work of intellectual property. According to John Locke, a person should reap where he or she has sown. The contribution of labour might be actual effort to produce a written work or invent a new device, it might be the capital contributed to such projects or it could even be a flash of genius – a contribution of real intellectual worth, but requiring very little investment over time. The second major theory, often identified with Hegel, suggests that the proper development of personhood requires control over certain property. An artist, for example, has a special relationship to their works of art, and this deep, often complex emotional connection should be recognized by law. Utilitarian, or law and economics justifications, thirdly, have also been frequently cited to suggest the importance in providing a system of incentives for the production and dissemination of intellectual property. Creators will hoard their creations if they are not given rewards for disclosing them. The utilitarian justification, of course, has given rise to a sizeable law and economics scholarly literature intended to analyse the optimal levels of incentive necessary to promote the production of intellectual property.

As justifications, these arguments focus upon the worthiness of the grantee. However, they have less explanatory purchase when discussing the collateral effects upon users, the political context of the decision-making and the ways that intellectual property doctrinal rules do not always follow such fundamental principles in a straight line. Despite the wobbly nature of philosophical claims, intellectual property rights are often portrayed as absolute. But even the most cursory glance at the variation in rights, and the expectations of rights, shows a great

deal of historical contingency. So many forms of expression are recognized as independent expression only upon a shift in cultural and economic presumptions.

The turn to legal history recognizes the need to understand the creation of intellectual property law as deeply situated in issues of the circulation of knowledge within civil society, the meaning of technological innovation and the development of markets. This has normative significance since if we can better understand how legal rules emerge within the context of society – this, of course, is the classic law and society approach – then we can craft a legal framework for protecting the products of the mind in a rapidly changing environment. This kind of social history of intellectual property takes into account the range of possibilities posed by new technologies and new developments in the construction of global markets of knowledge exchange. But it also highlights the contingent aspect of intellectual property. To the extent that we understand how past intellectual property rules came to be constructed, we might be more prepared to change them as we encounter challenges to those rules. This means that the new history of intellectual property must focus on the contingent: the jostling between competing interest groups for statutory and judicial interventions, responses to new technologies, the importance of infringement and what Eduardo Moisés Peñalver and Sonya Katyal (2010) have called 'property outlaws', the influence of foreign legal systems and shifts in political economy.

The essays in this volume are organized with a gentle chronological arc from the eighteenth to the twentieth century in order to underscore change over time. Every age has its own political economy, civil society and legal culture. The Early Republic was characterized by a focus on the literary works that formed the sinews of the republican political order. In this context, Doron Ben-Atar (Chapter 1) shows how the patent system in the Early Republic promoted technological appropriation by providing rights to introducers of technology appropriated from other countries as well as new inventions. American leaders viewed the development of technology as critical for enhancing the international power of the New Republic. Under the leadership of Alexander Hamilton and Tench Coxe, America promoted what Ben-Atar calls 'industrial piracy' (p. 1), the emigration of skilled artisans with invaluable information about manufacturing processes. America, at this time, might be thought of as a pirate nation. Or, perhaps, it was simply developing a model whereby technological invention is really linked to the *effect* a new technology might have in a particular local setting.

Yet America's early consideration of the regulation of knowledge was not simply pragmatic or rooted in the idea of improving the nation's economic position. In Chapter 2 Jane C. Ginsburg focuses on copyright's cultural foundations. She compares how copyright emerged differently in the course of the American and French Revolutions. While the French saw the conferring of an exclusive right upon authors as a natural right granted creators, Anglo-American copyright has largely been cast as a utilitarian incentive. However, at the time of the framing of the Constitution, US copyright advocates underscored a labour rationale for rights as well as claims of a potential public benefit. Discussions of French copyright in the 1790s drew upon a number of strands, including both the language of authorial rights and concerns with the public domain.

Peter Jaszi, in Chapter 3, challenges the conceptual basis of Anglo-American copyright. He asks not just who is an author, but more importantly for copyright, he interrogates the very idea of authorship. Authorship is a persistent and privileged concept for copyright doctrine – the determining factor for who is vested with rights in a work and, indeed, critical for the

very legitimacy of providing protection. As a concept, the author was a figure identified in the British Statute of Anne (1710), upon which US copyright law was originally grounded. The author was seen as an independent creator of expression even when nearly all literary writing is a product of influences. The idea of romantic authorship developed throughout the nineteenth century and was often substituted in copyright law for the rival claims of the centrality of the work itself. Authorship became the basis for such doctrines as work-for-hire. Since the idea of authorship has fluctuated, it might appear in different forms in various aspects of copyright and, as Jaszi shows, is often the source of many of copyright's legal conundrums.

Ben-Atar, Ginsburg and Jaszi placed broader political and cultural transformations at the core of their studies. Catherine Fisk (Chapter 4), on the other hand, contextualizes intellectual property within the relationship between employers and employees. She describes how legal control over employee inventions shifted during the nineteenth century. Originally, during the period from about 1840 to the mid-1880s, employees owned the entire right to their invention. By the 1880s, employers were claiming a *shop right*, a particular arrangement whereby employees still retained ownership over their inventions, but employers commonly had licences to use them. Finally, at the very beginning of the twentieth century, as corporate research laboratories became increasingly common, courts generally referred to the employment contract to determine who owned an invention.

But in Chapter 5 Claudia Stokes reminds us that whatever legislators and judges might draw upon to construct intellectual property doctrine and even as it is contested among competing claimants, the broader public also has a stake in debates over the regulation of knowledge. Stokes, a literary scholar, underscores the importance of an organized campaign to provide international intellectual property protection for understanding literary history. This campaign prompted a new interest in literary history. Partly, the turn to history was a means of sidestepping the contentious debates about competing interests in copyright among readers, authors, publishers and typesetters. It made the extension of copyright appear as more than simply a matter of financial self-interest. Discussing past authors, and the difficulties they faced from literary pirates, summoned up distinguished forebears for the copyright advocates. Assuming a populist posture, American copyright advocates insisted that authors were closer to craftsmen than to cultural aristocrats, and identified America as an expressive culture of meritocracy and self-creation, where the written word was core to the democratic project. Britain – ironically since the United States frequently reprinted British books without the payment of royalties – was portrayed as the heartland of copyright piracy.

In Chapter 6 Steven Lubar tells an ironic story. He examines the conditions and consequences of Congress enacting the Patent Act of 1836. The earlier Patent Act of 1790 had provided for a review of patents by three cabinet members to determine which were 'sufficiently useful and important'. By 1793, Congress had changed the law to rely largely upon litigation to determine the worthiness of a patent. The idea of patents as useful often revolved around moral judgements about how an invention might impact upon society. Yet in the early decades of the nineteenth century, a less demanding new notion of utility as being dynamic and instrumental – a marketable innovation – emerged. Moreover, litigation proved a difficult, often expensive means for evaluating patents. The 1836 Patent Act established a professional examination process which ultimately would burgeon into an administrative agency. As a Jacksonian reform, patent issuance was intended to be meritocratic and foster the common man's participation in the market revolution. Lubar shows how the results turned

out very different from the expectations of the Jacksonians: examiners with an increasingly scientific bent shunned the egalitarian approach and the Patent Office granted extensions of rights to inventors who claimed they had not sufficiently benefited from their inventions – which allowed corporations to leverage monopoly power and permitted the creation of patent pools in the 1850s.

Zorina Khan asks in Chapter 7 whether America's patent system in the early nineteenth century truly promoted technological development and led to economic growth. Although many patents were issued in agriculture and construction, the largest amount of litigation involved patents from the manufacturing sector. As Khan shows, patent litigation was a risky business. In the 1820s, courts often decided against patent holders, though they often strongly supported patents as a property right. The patents litigated prior to the Patent Act of 1836 were often a mix of weak and strong claims to rights. Yet courts used the first few decades of the nineteenth century to refine the idea of patents as protectable property. Contrary to the usual argument that courts minimized patent rights, Khan suggests that punitive damages were often exacted in wilful infringement cases. Courts tended to let the market determine the novelty of inventions by focusing on commercial success rather than technological innovation. In sum, court decisions focusing on the securing of patent rights were not the weak or ineffectual system so often described. Antebellum patent law, instead, was being shaped into an important promoter of innovation.

In Chapter 8 Christopher Sprigman provides a fresh look at formalities in the 1909 Copyright Act. Formalities, such as registration, providing notice of ownership by fixing on the work the copyright symbol or renewing the copyright after a comparatively short term, have frequently been criticized for creating artificial impediments to ownership based upon compliance with mandatory bookkeeping requirements. Moreover, the Berne Convention has disfavoured formalities. The 1976 Copyright Act shifted the US law from the formalities-based framework of the 1909 Act to a system that protected rights whether or not they were claimed. However, as Sprigman shows, copyright formalities have often served important purposes. They create a filter to distinguish between commercially viable works – where authors would take the trouble to meet formalities requirements – and those which should enter into the public domain because no profits can be easily extracted from them. The renewal rate was comparatively low under the 1909 Copyright Act, and therefore a large number of works became available to the public at no cost. The loss of formalities with the 1976 Copyright Act has led to a significant contraction of the public domain.

Steven Wilf, in Chapter 9, identifies the New Deal period as the foundational period for contemporary copyright, trademark and patent law. For the first time, products of the mind were identified as a dynamic engine for economic growth. Copyright changed from a regime concerned with literary property to an area of law organizing industrial designs, including fashion, and where debates took place over the policing of copyright rights largely of music broadcast over the radio through royalty collection societies. Relying upon an expansive reading of the Commerce Clause, a national legislative scheme, the Lanham Act, was enacted immediately after the Second World War to provide comprehensive protection of trademarks in an exuberant consumer society. Patent law grappled with issues of monopoly power, especially in the area of patent pooling, as the New Deal's legal architects struggled with industrial economies of scale. Wilf shows how the New Deal constructed what was really the first modern industrial knowledge economy and, despite this economic focus, debated the role

of how to balance this new intellectual property with recognition of the robust role played by intellectual property in the making of an informed and innovative citizenry.

In Chapter 10 Robert Merges describes the ways that intellectual property law encounters new technologies – fearful of its inadequacies and scrambling to meet the challenge of novel inventions. In Merges's scheme, adaptation takes place in three steps. In the beginning is an early period of uncertainty – 'disequilibrium' in his words – when the legal rules surrounding the new technology diverge. This is followed by 'an extended period of adaptation, when general doctrines developed in earlier eras are applied and modified on a case-by-case basis' (p. 433). Finally, these doctrinal innovations are incorporated, sifted and used to create a new normative structure. Merges is concerned with capture of the legislative process by rent-seeking parties, and indeed admits that this sometimes occurs. Nevertheless, he argues that mostly the slow recalibrating of courts and legislatures to new technologies is a process that works.

What do these histories tell us? First, that we must consider the different cultures of intellectual property law – such as Anglo-American and Continental European cultures of rights or literary cultures with their focus on authorship. Second, we must understand how intellectual property emerges as a right among different groups of people, including inventors and employers, the general public, examiners with technical backgrounds and litigants. Normative intuitions have different constituencies.

Finally, we must recognize that there are often sharp divides in periodization. For example, the end of formalities radically changed copyright. Each era – the New Republic with its focus on a republic of letters and the importation of new technologies; the meritocratic, anti-monopoly sentiment of Jacksonian America; the mid-nineteenth-century rise of the industrial production of intellectual property; the Progressive era and New Deal debates about the linkage between knowledge, political economy and citizenship; and contemporary concerns with intellectual property's global role – suggests that intellectual property was constantly being reinvented as different conceptions of knowledge surfaced among legal elites and ordinary citizens. The very complexity of this history is why it matters. How can we regulate intangibles in our own time, if we fail to understand the contingencies, varieties and, indeed, even the possibilities posed by the multitude of past intellectual properties?

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