

Introduction

Copyright in today's global and digital world is experienced through change and complexity. Its conceptual frameworks, its ability to accommodate changing modes of creativity and evolving forms of creative production, its beginnings, path dependencies and venues for development have all been opened for reconsideration. This multifaceted copyright discourse has been going on for over a decade, and debates remain heated. This issue of *Theoretical Inquiries in Law* explores the field by bringing together a set of theoretical, historical and contemporary perspectives on copyright law.

The issue opens with four theoretical destabilizations of central themes embedded in copyright discourse: the understanding of the field of copyright law as the negotiation of the conflicting interests of authors and users; the framing of copyright protection itself as an incentive for creativity; an assumption that the link between copyright and other intellectual property rights is loose at best; and the question of copyright's location at the fault lines between the tangible and the intangible.

Following these theoretical advances, the next four articles negotiate the past and present of copyright, exposing new historical patterns and offering new understandings of embedded wisdom. One such standard convention is that copyright's history is the narrative of a gradually expanding proprietary model; another is that colonialism can be viewed as an imposition of law, here copyright law, on local communities, and thus as a driver of global legal uniformity; a third is that secular and religious legal trajectories of copyright have been sealed off from one another. Historical inquiry opens up these issues, and proves essential for any discussion of theory and policy.

The contributions which follow offer new research on the most pressing contemporary challenges to copyright law. In an age of digital production, global flow of information, and multiple players in a crowded field involving power disparities, copyright requires an ever-expanding vision from multiple angles, which these articles provide, tapping key issues of our current reality.

Copyright law today, argues Maurizio Borghi in this issue's opening article, is often viewed as a legal means of balancing inherently conflicting interests between the author and the public as consumers. In consequence, the debate over copyright in recent years has often focused on the scope of copyright, instead of exploring what copyright is. Borghi defines the core subject matter of copyright law using the Kantian concept of truth. Copyright, he suggests, is a mode of human existence; it addresses the

act of speaking publicly in one's own name, and is primarily about an author-public coalescence, in which they share a common responsibility towards truth itself, prior to owning it. A specific relation to truth also allows Borghi to explain what copyright shares with patents and trademarks, and how each yet differs from the others.

As debates focus on the required balance between incentives for today's authors, and those of tomorrow, and the public interest, an underlying view remains unchallenged: that copyright protection is necessary as an economic incentive for creators. Diane Zimmerman builds on empirical research to suggest that intrinsic factors are much more important determinants of participation in creative work than extrinsic monetary reward. Creators, Zimmerman points out, are motivated by factors such as innate needs of expression or connectedness, and thus would create even without the monetary promise provided by copyright laws. While economic reward is not unimportant, Zimmerman suggests that it should not be a paramount factor in shaping copyright regimes. Those involved in the process can afford to develop more nuanced understandings of the forces of creativity.

Avihay Dorfman and Assaf Jacob probe the legal structure of intellectual property, and copyright law in particular, using a tort law perspective. Intervening in the debate over differences in the legal protection that should be afforded to tangible and intangible property, the authors argue that the analogy to trespassory torts and the expansion of the protection from the tangible to the intangible domain is inappropriate. However, it is not so much differences in terms of rivalry and privacy that set these two apart, say Dorfman and Jacob, but rather a set of normal, if contingent, circumstances surrounding both: the question of spatial boundaries; the level of saturated-ness of privately owned objects; the ability to identify clear signals as to whether or not non-owners are welcome to use an object; and the existence of ascertainable owners.

In *What Is a Copyright Work?* Brad Sherman interrogates copyright law through a concept central to its operation and indicative of its problems: the work. The work, says Sherman, serves as the basis on which the doctrinal edifice of modern copyright is built, yet its boundaries are ill defined. Sherman thus examines the techniques used in copyright law to configure the intangible work — to determine what a work is and when a new work comes into being. Rather than think of the copyright work as either tangible or intangible, argues Sherman, it is better seen as a quasi-object or a hybrid which enables the law to migrate between these different domains.

Historical inquiries in this issue open with Steven Wilf's article examining the nineteenth-century American movement to extend copyright protection to foreign authors. By placing legal change in social context, this story unveils

copyright's relation to political contestation, and provides a corrective to the perception of copyright's history as an ever-expanding proprietary model. The story also points to the unexpected turns of social movement agitations: from a public-oriented movement, shows Wilf, interest-group politics emerged. These politics became the foundation of the 1909 U.S. Copyright Act and its progeny down to the present time.

Lionel Bently's contribution turns to colonial history. Bently examines intellectual property laws in nineteenth-century British colonies to suggest that the development of intellectual property laws in the colonies was uncoordinated and unplanned. There was no imperial law of patents, designs or trademarks; the one exception was copyright in books, but here, too, Bently highlights the considerable room left for colonial variation. A shift in favor of uniformity became discernible only toward the end of the century. Bently offers explanations for these trends, and a caution to current policy debates: likening international intellectual property lawmaking to "colonialism" might just be off the mark.

If copyright in books was the one exception to the British devolution of intellectual property lawmaking, Michael Birnhack offers historical insight into its workings in one colony, actually a Mandate, that of Palestine. Birnhack, however, begins with Ottoman times, reminding us of the full stretch of Imperial history in Israeli copyright law. In the next stage, various factors converged to prompt the British to impose a copyright regime soon after they established their civil administration in Palestine. That regime, however, failed to meet the needs of the local Hebrew community. In consequence, shows Birnhack, an ordering based on contracts and social norms emerged alongside the Imperial legal transplant.

Rabbinic jurists have for a long time debated copyright's status as property right. Noting the parallel debate in common and civil law history, Neil Netanel and David Nimmer trace the terms of the Jewish debate, still lively in the present day with ultra-Orthodox as well as Modern Orthodox rabbinic jurists engaging in questions of the digital age. As in secular law, but for different reasons, identifying copyright as property in Jewish law has significant doctrinal consequences. Moreover, the arguments within the Jewish law debate bear some intriguing parallels to those of secular copyright law, show the authors, parallels suggesting the possible influence of secular law.

While Netanel and Nimmer conclude with the loose boundaries of seemingly distinct worlds, it is there that Madhavi Sunder begins. It is by now a commonplace observation in copyright scholarship that all creativity is derivative, she says, yet cultural biases continue to feed perceptions of Western originality and Asian piracy, buttressing copyright claims of the

former and undermining those of the latter, thus impeding the free and fair exchange of culture. Copying, derivativeness and influence go in all directions, Sunder reminds us, recalling stories like the striking resemblance that Steven Spielberg's *E.T. the Extraterrestrial* bore to *The Alien*, a script written by the Indian filmmaker Satyajit Ray. If copyright law is to avoid complicity in global inequities, argues Sunder, its role should be not just to incentivize the production of more cultural goods, but also to promote a global capacity to actively participate in making our cultural world.

The crisis of copyright in the digital era is often discussed in terms of enforcement challenges. In *Tailoring Copyright to Social Production* Niva Elkin-Koren argues that the crisis goes much deeper. As technology develops, web platforms such as Wikipedia and Facebook allow new modes of collaborative creation which challenge existing conceptual frameworks in copyright law. Elkin-Koren examines the social nature of new creation processes involving large groups of collaborators. The current legal framework, suited to the traditional author-publisher relations, offers poor accommodation for these new processes, she argues. The implications for policymakers are profound; Elkin-Koren begins to draw them out.

Margaret Chon reviews the shifts that intellectual property governance paradigms are undergoing. Classical top-down and bottom-up regulation models are no longer clear-cut; contemporary mechanisms of regulation are much more pluralistic, revealing the interaction between soft and hard law, in terms of diversity of actors, directions and domains. Chon's analysis focuses on the international arena. She discusses WIPO's Development Agenda as an example of a new governance modality, which promotes IP governance in developing countries via collaboration among various agents based on soft-law recommendations. While these changes are in effect taking place, problems such as fragmentation, policy incoherence and lack of due process of softer law make it difficult to assess, just yet, the risks and benefits of these new mechanisms. Thus, global IP governance is "under construction," at least for the time being.

Also included in this issue is the 2010 Annual Cegla Lecture on Legal Theory, *An Old-Fashioned View of the Nature of Law*, by James Boyd White. The Cegla Lectures on Legal Theory feature prominent legal scholars who are asked to address fundamental questions about law and legal institutions. In his lecture, delivered at Tel Aviv University in March 2010, White elaborates on the vision of law at the heart of his influential scholarship. That view, says White, is an old-fashioned one — building on a set of tensions basic and inherent in legal culture, and going back to the ancient study and practice of the art of rhetoric. For White, law is not at heart an abstract scheme of rules,

nor is it a set of institutional arrangements that can be adequately described in the language of social science; rather, it is an inherently unstable structure of thought and expression, an activity of mind and language built upon a set of dynamic and dialogic tensions. Focusing on the law as a system, and not on what happens when that system meets the world, White reminds us, is to strip it of its difficulty, its life, its meaning, and its value.

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The Associate and Assistant Editors

