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

No work springs fully formed from the head of the author like Athena sprang from the forehead of Zeus. As Ng points out often over the course of this book, a work is a product of its era and the sum of the works that influenced the author. Sometimes a work is the synthesis and reiteration of the works that came before: this book is a response and a challenge to prevailing trends. For example, Ng stresses that copyright law has validity only when it balances the public domain with the rights of private authors and publishers, whereas a US Supreme Court ruling published after this book appeared describes the public domain as not being ‘a category of constitutional significance’ (Golan v Holder (565 U.S. S. Ct. 2012)).

Unlike the power to borrow money or to declare war, Article I, Section 8 of the US Constitution does not grant to Congress the direct power to establish patents and copyrights. Instead, Congress is given the power ‘To Promote the Progress of Science and useful Arts’, and may do so by establishing patents and copyrights. This anchors intellectual property in what Ng describes as ‘an institutional goal with strong moral and ethical undertones’. She elaborates the goal to be ‘about improving the social and educational conditions of individuals and society through the provision of creative works’ (p. 20). She gives a quick summary of the history of copyright and how it has been used both for censorship and as a favor to those who lobbied the ruling powers in just the right way. In the present-day US, one can argue that copyrights and patents for such purposes are unconstitutional.

Ng sees the central problem of promoting progress as balancing the needs of authors, publishers, and readers. Because the recent dialogue has been dominated by publishers whose primary motive is plain profit and preferred method is greater restrictiveness, Ng’s call for balance among the three players may seem like a call for liberalization and weaker copyright. But at no point does she deny the need for authors and publishers to make a profit on their product, and when considering the balance between author and reader, she often advocates greater power to the author, such as expanded moral rights.

A focus on the moral and ethical issues of information sharing may seem unusual for a law book, but readers who are uncomfortable with such discussion will have to take it up with the framers of the Constitution; as Ng stresses, it is they who saddled us with the problem of determining how best to promote cultural and scientific progress, which is a very different question from that of promoting economic progress. Ng is restrained in her commentary, but is clearly dissatisfied with those who would simply equate economics with progress, and those who claim that ‘the copyright law celebrates the profit motive’ (Ng p. 128 citing the ruling in American Geophysical v Texaco, 60 F.3d 913 (2nd Cir. 1994)).

Claims that the free market equilibrium equals the social optimum have been endlessly deconstructed and shown to fail in well-enumerated cases, such as in situations where marginal production costs are zero (like intellectual property), or situations where there are significant externalities to private choices (like information sharing, and thus intellectual property), or situations where it is difficult to put a tradeable cash value on the motives behind production (like the artistic drive to produce new intellectual property). Ng hints at her dissatisfaction with the claims that a free market always produces a social optimum, but shies away from directly discussing these economic issues.

She does touch on the boundary problem: setting the boundaries for a plot of land is largely a solved problem, while the boundaries for an artistic work are diffuse (for instance, would a new film version of Frank L. Baum’s now public domain novel the Wizard of Oz violate MGM’s copyright on its film version?). There is much about this in the patent literature that is relevant in the copyright context (Bessen and Maurer 2009).

Ng states that her goal is to provide a framework for considering new cases as they come up, so let us consider some current cases and see how her framework might apply.

Since the book was written, a boycott against Elsevier, an academic publisher, has gained much traction. To summarize a complex argument, the boycotters profess that Elsevier’s focus on profitability has been to the detriment of public academic discourse, and that academics no longer have reason to cooperate by submitting, reviewing, and purchasing articles. I cannot guess whether Ng supports or opposes the boycott. However, the boycotters will find many sympathetic passages in this book, as Ng
stresses the importance of balancing private and public benefit, and balancing the need of the publisher to make a fair profit against the author–reader connection at the core of further progress in arts and sciences.

A lawsuit from another academic publisher provides another example to which we might apply Ng’s framework. The US Patent and Trademark Office (PTO) has written a memo asserting that submitting copies of copyrighted academic articles to the PTO as prior art in support of a patent application is a fair use and not an infringement of copyright. John Wiley and Sons disagrees and is currently suing a law firm which subscribes to its journals for copyright infringement based on copies of articles submitted to the PTO as prior art (John Wiley & Sons and American Institute of Physics v. McDonnell Boehnen Hulbert & Berghoff (N.D. Ill.)) Ng suggests framing the question around whether the promotion of progress in the form of improved patent quality outweighs the impairment of progress due to scientific publishers not gaining revenue from the copied journal articles. This analysis, based on the powers granted to Congress in the Constitution, is a very different analysis from the analysis one would obtain from other theories of intellectual property, such as a natural rights theory or the analysis of intellectual property as physical property.

Ng’s core argument should not be controversial—that copyright should promote the progress of science and useful arts is directly stated in the Constitution. Her framework has natural application in current open questions. Nonetheless, her framework is likely to have a hard time being adopted over the prevailing norms, which regard copyright as its own beast, unfettered from its stated intent.

References


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