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Introduction

Intellectual Property in the Age of the Internet

SUSANNA FREDERICK FISCHER*

This collection of essays explores the central problem of copyright law from a rule of law perspective. The major challenge for copyright law is to strike the appropriate balance between providing sufficient economic incentives to encourage authors to create, while also ensuring adequate access to creative works. The relevance of the rule of law seems evident in an era in which digital technology makes copying easy, quick, and increasingly widespread. How is the law to be formulated so that it retains the social respect necessary to ensure that, in the words of Aristotle, “the law should govern”?1 While the authors in this collection ascribe to a variety of philosophical views and represent diverse schools of thought, they come together in seeing that the resolution of this problem within the limits of the rule of law finds its anchor in an attitude of respect for the common good.

Although the essays included here were all written several years ago in response to the Supreme Court’s landmark ruling in Eldred v. Ashcroft,2 their insights remain just as timely now. The questions raised above still pose challenges for Congress as it assesses possible changes to intellectual property law, such as the Innovation Design Protection and Piracy Prevention Act3, which would protect fashion designs currently outside of the scope of copyright law. Courts also continue to confront these questions in cases requiring judicial interpretation of the federal copyright statute and the Intellectual Property Clause of the United States Constitution.4

The difficulty of these questions is shown by the divided outcome in the most recent copyright case argued before the United States Supreme Court, Costco Wholesale Corp. v. Omega, S.A.5 The key issue in the case, the breadth of the first

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1 ARISTOTLE, A TREATISE ON GOVERNMENT, Book III: Chapter XVI, 1287(a) (William Ellis, trans., 1912).
5 Costco Wholesale Corp. v. Omega, S.A., 541 F.3d 982 (9th Cir. 2008), aff’d per curiam, 131 S. Ct. 565 (2010).
sale doctrine permitting the owner of a lawful copy to sell or otherwise dispose of that copy without the copyright owner's permission, directly implicates the proper balance between the rights of owners and users of copyrighted works.6 Asked to determine whether the proper interpretation of the copyright statute was that the first sale doctrine does not apply to imported goods manufactured abroad, the Court could not reach agreement. The result was an unsigned *per curiam* opinion affirming, by an equally divided Court, the decision of the Ninth Circuit below. The Court's inability to agree generates uncertainty as to the scope of copyright rights and thereby raises rule of law concerns.

All of the authors in this collection agree that resolving the conflict between copyright owners who seek greater protection from the law and users who desire unrestricted access to copyrighted material requires attention to the common good. Their essays take a wide variety of approaches to the nature and effect of that concept.

Lawrence Lessig offers a concept of the social good that is at stake in the conflict over the scope and power of copyright rights. This is the continued existence of what he calls the innovation commons, which Lessig describes as "a place where everyone is equally allowed to innovate." An innovation commons generates explosive creativity, such as that which has resulted from the internet's original architectural design.7 Lessig argues that an alternative concept presents itself that should be rejected: that of the "anti-commons." In an anti-commons, too many people can control others' use of a resource, resulting in a failure of development of that resource.8

Several other authors explore the application to copyright law of concepts of the common good found in particular philosophical traditions. Susanna Fischer offers the notion of the common good found in Catholic social thought, with its acknowledgment of the universal destination of all goods.9 Amitai Etzioni proposes the correlation of rights and responsibilities inherent in communitarian concepts of human flourishing.10 Jude Dougherty suggests concepts of virtue and moral obligation found in ancient philosophy and revolving around respect for the nature of moral agency.11

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6 Id. at 983.
8 Id. at 36.
9 Susanna Frederick Fischer, *Catholic Social Teaching, the Rule of Law, and Copyright Protection*, post, pp. 63-72 [hereinafter Fischer].
11 Jude Dougherty, *Ancients and Moderns on the Subject of Property*, post, pp. 73-81 [hereinafter Dougherty].
Rather than focusing on a particular philosophical tradition, Margaret Jane Radin explores the values that should be taken into consideration in conceptualizing the common good. Radin argues that these values should not be limited to economic ones, but also must include noncommodified values, such as free expression. She argues that the law has lately been moving in the opposite direction by increasingly commodifying information.\footnote{12} Radin provides two examples of the resulting social harm: invasions of personal privacy when personal data is legally propertized, and damage to the social value of free expression when the copyright law of fair use is interpreted as having the sole goal of economic efficiency.\footnote{13} She also decries the use of absolutist property rhetoric to expand the commodification of information.\footnote{14}

Other contributors explore the extent to which the utilitarian incentive rationale found in the Intellectual Property Clause of the United States Constitution adequately or fully protects fundamental social values.

Seana Shiffrin focuses on the social value of the First Amendment in questioning whether the incentive theory is a sound justification for current copyright law. Shiffrin raises several problems with the incentive theory, including a dearth of research as to whether copyright incentives are really necessary for creative production and if so, what level and type.\footnote{15} She also highlights a related philosophical problem: how can it be known that the amount and social value of incented works is greater than those that would be created in the absence of copyright protection?\footnote{16}

In contrast, Edward Damich takes the position that the incentive rationale is “non-negotiable,” since it is embodied in the constitutional text. He contends that both sides in *Eldred* accepted this.\footnote{17} But Damich argues that focusing solely on the utilitarian rationale is incomplete. Judges and policymakers, within the proper limits of their respective roles, should not lose sight of the fact that the incentive rationale is undergirded by the natural law tradition, which is especially solicitous of fundamental privacy values as well as the right of personality.\footnote{18} Additionally, Damich urges judges to more consciously draw on the philosophical basis of copyright law. They should do so by adequately respecting the natural law rights of personality and privacy, and also by giving appropriate deference to the policymaking role of Congress in determining

\footnote{13} Id. at 84-86.
\footnote{14} Id. at 89.
\footnote{16} Id. at 52.
\footnote{17} Edward J. Damich, *The Philosophical Postulates of Current Copyright Law: A View of the Legislative History*, post, pp. 107-123, [hereinafter Damich]. See also Eldred, supra note 2 at 803.
\footnote{18} Id. at 107-108, 110-112.
whether a particular copyright law satisfies the utilitarian calculus mandated by the United States Constitution.\(^{19}\)

Many of the essays focus on the challenges posed to the rule of law as a result of the widespread deployment of digital technologies.

Susanna Fischer points out that even as Congress has strengthened and expanded copyright rights as a response to the widespread and near perfect copying made easy and cheap by these technologies, copyright law is widely flouted or ignored.\(^{20}\) She encourages judges and legislators to bear in mind concepts offered by Catholic social thought, including human dignity and the universal destination of goods, which can help them to respond to the pattern of defiance to the law in a way that will generate greater respect for law.\(^{21}\) She cites *Eldred* as an example of a case where the majority ignored these values, but the dissent endorsed them.\(^{22}\)

Amitai Etzioni is also concerned about disrespect for the rule of law, which he characterizes as the result of a lack of social responsibility by users of copyrighted works. His communitarian vision requires rights to be balanced with responsibilities, so that the common good will flourish.\(^{23}\) Etzioni points out that unless the laws can be effectively enforced, "they will become obsolete," and ultimately creativity and innovation will be stymied.\(^{24}\) Etzioni advocates changes to copyright law to protect the rule of law. In particular, he recommends shortening the copyright term while also strengthening its protections for creators.\(^{25}\)

Jude Dougherty is concerned about threats to the rule of law, which he sees as the natural rights foundation of property and intellectual property rights.\(^{26}\) Dougherty critiques post-Enlightenment thinkers, such as Marx, Mill, and Rawls, for giving too much importance the value of equality in the context of private property and ignoring the enduring insights of ancient philosophers like Aristotle and Cicero.\(^{27}\) Their writings reveal an appreciation for the institution of private property which is not only the result of customary usage and legislation, but also premised on a natural moral order which duly rewards talent and virtue but requires property owners to serve as stewards for the common good.\(^{28}\) Dougherty contends that where copyright law becomes

\(^{19}\) *Id.* at 108, 112, 120-121, 123.

\(^{20}\) Fischer, *supra* note 9, at 63.

\(^{21}\) *Id.* at 71-72.

\(^{22}\) *Id.* at 68-71. *See also* Eldred, *supra* note 2.

\(^{23}\) Etzioni, *supra* note 10, at 60.

\(^{24}\) *Id.* at 62.

\(^{25}\) *Id.*

\(^{26}\) Dougherty, *supra* note 11, at 73.

\(^{27}\) *Id.* at 73-75.

\(^{28}\) *Id.*
untethered from its natural law foundations, the result for society will be predictably litigious and negative.\textsuperscript{29}

Margaret Jane Radin is troubled by the consequences of information commodification for the rule of law. She believes that as copyright law increasingly propertizes and commodifies culture and communication, it increasingly violates the rule of law as traditionally formulated.\textsuperscript{30} In particular, the expanded copyright term at issue in \textit{Eldred} violates the rule of law requirement that the law should not be retroactive, but should exist in advance of the conduct it regulates.\textsuperscript{31} Additionally, the rule of law requires that laws be interpreted in accordance with their plain meaning. Radin illustrates how, in the \textit{Eldred} case, the government and Supreme Court failed to adequately recognize the threat to the rule of law posed by retroactive laws like the Copyright Term Extension Act.\textsuperscript{32} Radin also thinks that the government and Court ignored the plain meaning of the term “limited” in the Constitution by giving undue deference to congressional power to legislate under the Intellectual Property Clause.\textsuperscript{33}

In contrast to Radin, Edward Damich argues that appropriate deference to legislative decisions is key to ensuring that the copyright system retains the stability and predictability required by the rule of law. As long as legislative policy adheres to the rule of law, judges should respect the rule of law by exercising judicial restraint. They should respect the climate of practical compromise in which legislation is drafted and refrain from substituting their own philosophical ideas for the legislative judgments.\textsuperscript{34}

Oren Bracha’s essay contributes a historical perspective to the debate over intellectual property rights. He points out that commentary on intellectual property law employs two incompatible models. The first approach views such law as the product of practical reason, while the second considers it to be the result of realpolitik.\textsuperscript{35} Bracha contends that the two models are largely separate, and this separation has led to negative results and faulty discourse.\textsuperscript{36} His essay explores the historical role of three variables in developing the separate models: property, authorship, and technology.\textsuperscript{37} Bracha also views \textit{Eldred} through a

\textsuperscript{29} Id. at 80-81.
\textsuperscript{30} Radin, supra note 12, at 83-86, 96.
\textsuperscript{31} Id. at 101-102 See also Eldred, supra note 2, at 792.
\textsuperscript{32} Radin, supra note 12, at 101-102.
\textsuperscript{33} Id. at 102-103.
\textsuperscript{34} Damich, supra note 17, at 108, 121.
\textsuperscript{36} Id. at 126-128.
\textsuperscript{37} Id. at 136-146.
historical lens. He depicts Eldred38 as a catalyst for social change as significant as Brown v. Board of Education was for the civil rights movement.39

While the essays focus particular attention on the constitutionality of the copyright term extensions at issue in Eldred,40 they all raise far broader concerns about the appropriate copyright balance and the maintenance of the rule of law that are just as relevant today as when Eldred was decided. Congress and the courts will likely continue to grapple with these challenges for years to come. This collection of essays contains a wealth of thought-provoking ideas as to how legislators and jurists should address the ongoing struggle to achieve the most socially beneficial balance between the owners and users of copyrights, while at the same time respecting and protecting the rule of law. It is hoped that it will not only be of use to those who are actively involved in making, interpreting, and commenting on copyright law and policy, but also of great interest to general readers. May the essays collected here be inspiring and stimulating to all who read them.

38 Eldred, supra note 2.
40 Eldred, supra note 2, at 771.