Foreword

In his seminal 1945 lecture, published as *Reflections on the Law of Copyright*,¹ Professor Zechariah Chafee, Jr. called copyright the ‘Cinderella of the law’, long crowded by her ‘rich older sisters, Franchises and Patents . . . into the chimney corner.’² In the several decades since, copyright’s suitors, if they have not exceeded patent and trademark’s in their ardour and number, have at least equalled them. Even in 1945, Chafee could remark on the ‘vast increase in the pecuniary value of literary and artistic property,’³ and the copyright industries today – film, music, books, software, video games – account for 11.05 per cent of US Gross Domestic Product and 8.4 per cent of US exports.⁴ Where in Chafee’s day copyright cases were few and scholarship sparse, copyright law today has entered the mainstream of jurisprudence around the world. Copyright has become front page news.

Copyright scholarship over these years has splintered in the same several directions as legal scholarship generally. Historical inquiry and narrative have been persisting themes, as has economic analysis of copyright law’s statutory rights, limitations on rights, and remedies. Literary theory and the question of authorship in copyright have had their day, as has empirical inquiry; indeed, there is evidence that the empirical enterprise tentatively initiated by then-Professor Stephen Breyer more than 40 years ago⁵ is on the brink of a robust renascence. Other scholarly traditions have also shone their light on copyright law.

Professor Alina Ng’s principal contribution in *Copyright and the Progress of Science and the Useful Arts* is to step back from these scholarly traditions and to fashion a methodology that seeks at once to encompass and reconcile the existing modes of inquiry; a methodology that seeks, in her words, ‘to identify a set of moral and ethical principles that could

¹ Zechariah Chafee, Jr. ‘Reflections on the Law of Copyright’ (1945) I, 45 *Colum. L. Rev* 503.
² Ibid.
³ Ibid.
guide the use and production of literary and artistic works by authors, publishers and users toward cultural and social advancement.’ As elaborated in this volume, Ng’s vision for copyright effectively rejects the dominant tradition of utilitarian accommodation in favour of the establishment of a more idealised community in which the ‘progress of science’ heralded in the book’s title ‘correlates with the advancement of society and culture in a way that is just, fair, and equal for all groups rather than a utilitarian precept of wealth maximisation where a net balance of overall satisfaction is sought at the expense of a few in society.’

Although her mastery of copyright law’s several diverging scholarly traditions is evident throughout this elegantly-written book, Ng draws for her analysis principally on the philosophical canon, and on no thinker more than John Rawls. From Rawls’s *A Theory of Justice* and *Political Liberalism* Ng derives a social matrix within which authors, users and publishers have not only rights, but corresponding duties and liberties. Within this scheme, publishers – the participant most commonly neglected in copyright discussions – enjoy the right ‘[t]o receive monetary payment for social uses of creative works’; bear the duty ‘[t]o produce authentic works of authorship’; and have the liberty ‘[t]o be able to pursue the most cost-effective way of publishing and distributing works.’

*Copyright and the Progress of Science and the Useful Arts* is a provocative book, and it is not necessary to agree with every one of its claims in order to admire its brave questioning of certain long-accepted dogmas about copyright law. Taking a wide compass, and studying the forest rather than the trees, the book inevitably leaves unresolved hard questions that will arise from concrete and specific facts. Should the unauthorised transformation of a copyrighted work be excused as fair use, or should it be barred as an infringement of the work’s derivative right? Should private uses of copyrighted works be exempted from copyright control or should they be subjected to liability in order to secure copyright owners’ last potential market in the digital age? It will be fascinating to watch as future scholars apply this book’s general methodology to the resolution of copyright law’s hard cases.

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