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COPYRIGHT LAW AND THE PUBLIC INTEREST IN THE NINETEENTH CENTURY, by Isabella Alexander. Hart Publishing, 2010. 320 pp. Hardback $110.

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Few areas of the law have been more affected by the advent of the Internet and digital media than copyright law. Judges, litigants, and scholars often struggle to delineate the proper relationship between proprietors and users in this digital age. This has become especially true after *eBay*,[1] in which the Supreme Court reinvigorated several neglected factors for obtaining injunctive relief in intellectual property cases, including whether granting an injunction would serve the public interest. Practitioners and scholars now regularly find themselves consulting past instances where technology and other factors tested the bounds of copyright law, sometimes with a desire to adhere to past principles and practices and other times with a view to ensuring that we do not unwittingly repeat them. To help move forward, we are looking backward.

The history of English copyright law—which forms the foundation of Anglo-American copyright law—has remained especially relevant. In resolving doctrinal and normative queries, judges and scholars, including those in the United States, continue to refer to cases and statutes from England in the eighteenth and nineteenth centuries. Indeed, there has been an explosion of interest in recent years on the origins of copyright. Often pitted against each other in modern copyright debates is whether the initial justification for copyright policy was to recognize and reward an author's right in her work (be it a natural right or otherwise), on the one hand, or to promote the public interest, on the other.

In her recent book, COPYRIGHT LAW AND THE PUBLIC INTEREST IN THE NINETEENTH CENTURY, Isabella Alexander, explores these debates by investigating the "historical pedigree of claims that copyright

operates in the public interest, whether as an overarching goal, or through the balancing of competing claims," especially as against the rhetoric of romantic authorship (p.3). Alexander focuses primarily on the nineteenth century, which she notes was the period during which copyright law took a quantum leap forward. She concludes that though the public interest had a significant rhetorical impact on copyright law, the concept cannot bear the weight often given to it by modern scholars (p.4), largely because the "public interest" was so variable during the time periods she examines. Oftentimes the public interest was plausibly invoked by parties on both sides of a given debate, diluting any decisive value of the concept.

As the only book to date that focuses directly on the public interest in its historical context, Alexander's monograph is a welcome addition to the body of scholarship on the history of copyright law. This is especially so given that the book is very well researched and executed.

COPYRIGHT LAW begins by introducing the reader to the various works on copyright history that have preceded it, thus placing its own contribution to the literature in context (pp.4–11). Alexander concisely marshals the dozen or so principal works on the history of copyright into a digestible primer. Apart from serving its principal purpose, this primer will be especially useful for those lacking either the time or the inclination to peruse the key works in the field.

Recognizing that a work on a particular period often requires a discussion of the period that preceded it to provide the proper context, Alexander's first substantive chapter (ch. 2) discusses early instances in the seventeenth and eighteenth centuries where stakeholders in the debate over copyright began to visibly invoke the public interest as a means of achieving their objectives. She notes that it was right holders who argued as early as 1641 that exclusive printing rights were in the public interest because they provided authors and their booksellers the encouragement necessary to write and publish literary works. Alexander also explains how references to the public interest became much more pronounced in the mid-to-late eighteenth century in the battle in the King's Bench[2] and House of Lords[3] over whether a perpetual copyright at common law existed independent of the Statute of Anne of 1710 (which had limited statutory terms). Here, she notes, the rhetoric of the "public interest" was invoked by litigants and judges on both sides of the equation. Advocates for the common-law right towed the same line from 1641, that the public would suffer from a lack of learning if copyrights were not protected at common law. Advocates against the right argued that a perpetual monopoly would hurt the public as

it would lead to higher prices on books and could even be abused as a form of censorship (pp.30–37).

Although the House of Lords ultimately rejected the idea of a perpetual copyright at common law, Alexander challenges prior interpretations of this event which conclude that the Lords had rejected as specious that the public interest could be served by a perpetual right. She notes that the same House of Lords enacted legislation soon afterward granting a perpetual copyright to the universities for books bequeathed to them in perpetuity (p.37). As Alexander puts it, the "notion that the laws regulating literary property should serve a public interest was affirmed, but its precise nature remained unclear" (Id.).

The remainder of Alexander's book tracks and explores the various ways in which the "public interest" concept rears its head in the nineteenth century. Rather than continue her analysis in a purely chronological order, Alexander uses several themes as points of departure. They include: the making of books available to libraries under the requirements of legal deposit (pp.47–63); regulating books of dubious merit through copyright law and other ways to protect the public (pp.63–79); the role the public interest played in shaping debates over the expansion of copyright to new subject matter, such as plays, lectures, and music (pp.81–112, 128–140), to new people, such as to authors from outside of Britain, and to new places, such as for British authors publishing abroad (pp.113–154); and how the public interest was discussed in lawsuits and legislative proposals involving the prima-facie rights of copyright law, including the duration of copyright and whether to broaden a proprietor's bundle of rights to include preventing others from extracting or abridging the proprietor's works or from making transformative works of the same (pp.155–233). Alexander ends her book by bringing all of these themes together under the rubric of the Imperial Copyright Act of 1911—the omnibus legislation that codified copyright in Britain and its dependents (pp.234–290).

Alexander draws several conclusions from her research. There are two which are, in my view, paramount. The first is that modern scholars have overstated the historical importance of the "public interest" as the determinative factor in copyright's development. In fact, the concept was very amorphous. As Alexander concludes in one part of her book: "The 'public' itself was far from being a constant or coherent construct" in the debates (p.154). Moreover, the "interest" was also fluid and could serve many masters: "[T]he rhetoric of public interest, in its multitude of forms was used both to resist and to support the expansion of copyright law" (Id.).

In reading her book, I too was struck by how often the rhetoric of public interest was unhelpful to decision makers (be it the courts or the legislature) in deciding the issues before them.

The second major conclusion Alexander draws from her research is that the undoubted expansion of copyright law during the nineteenth century was not, by process of elimination, a singular triumph of the ideal of romantic authorship. Instead, Alexander concludes that a third, as yet unsung, factor played a much more important role in the development of copyright policy. She posits that concerns over market competition and the promotion of commerce regularly emerged unscathed (or what I might call the tie-breaker) from battles between the ideals of romantic authorship and public interest. In her own words: "Despite the claims of many commentators that the law of infringement represents a balance between the interests of the public and those of the copyright owner, this book highlights the central role of competition and the demands of the market in the law's development" (p.233).

The reader will, of course, have to draw his or her own conclusions from the evidence presented by Alexander. But her interpretations and reasoning are well supported. As a consequence, serious students and scholars of the history of copyright law—whether specialists or not—must now add Alexander's book to their reading list. I learned much from it.

ENDNOTES

[1] eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006).

[2] Millar v. Taylor, 4 Burr. 2303 (K.B. 1769).

[3] Donaldson v. Becket, 4 Burr. 2408, 2 Bro. PC 129, 17 Cobb. Parl. Hist. 953 (H.L. 1774).

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