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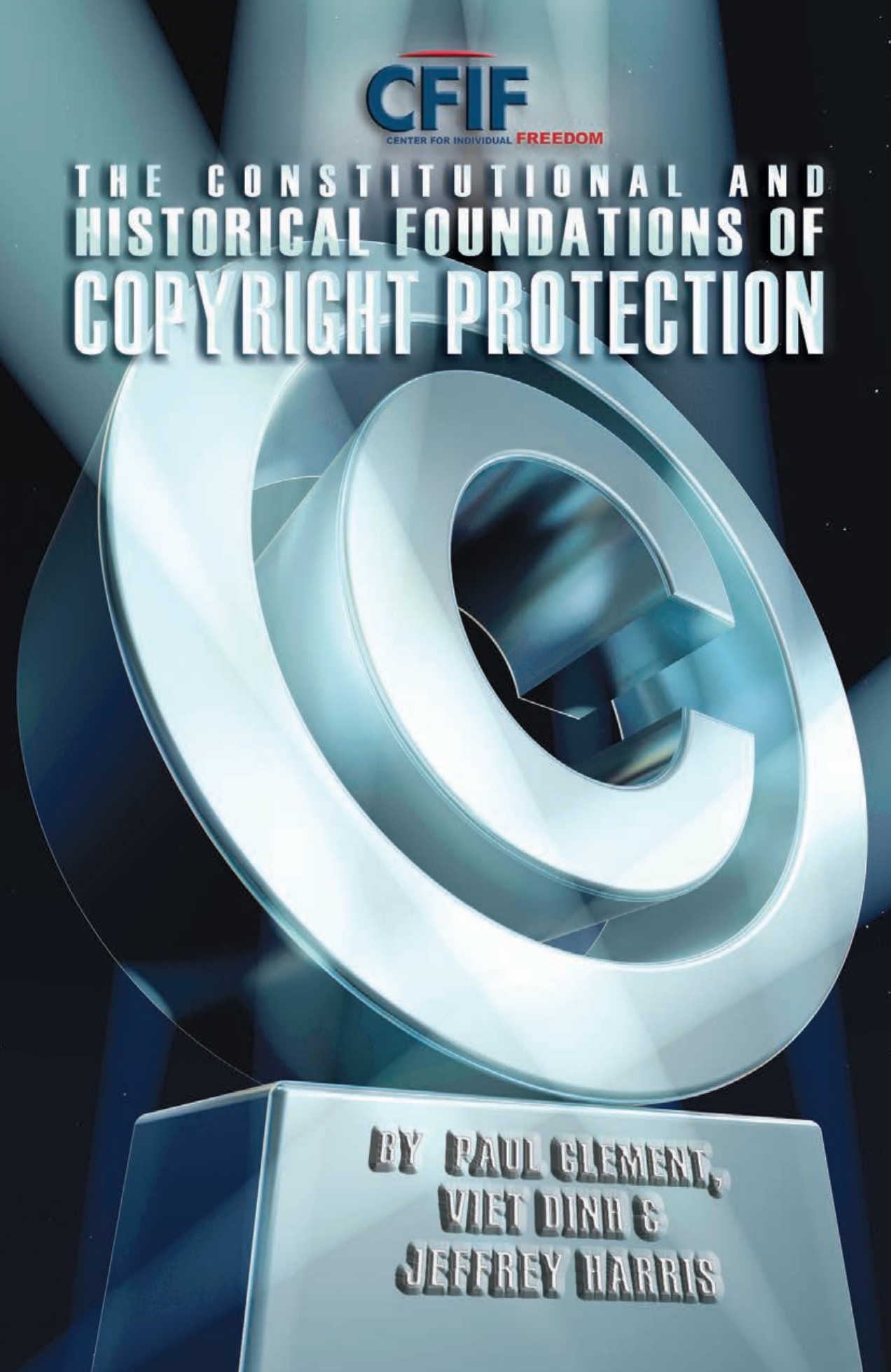
THE CONSTITUTIONAL AND HISTORICAL FOUNDATIONS OF COPYRIGHT PROTECTION



BY PAUL CLEMENT, VIET DINH & JEFFREY HARRIS

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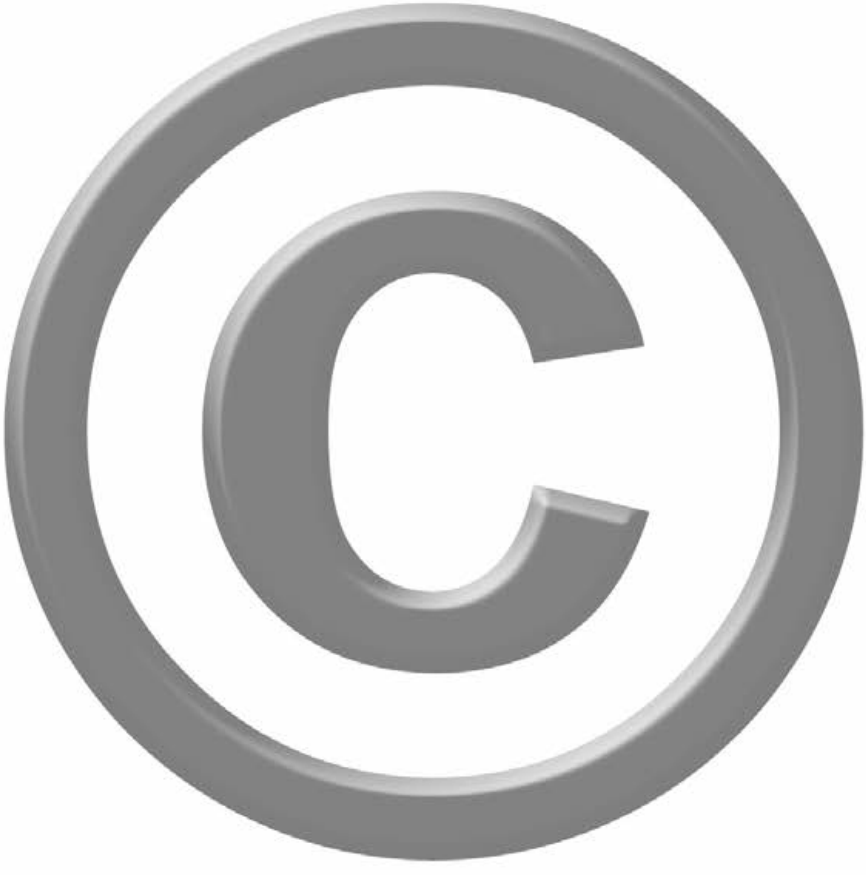

By Paul Clement, Viet Dinh & Jeffrey Harris[1]

Article I, section 8 of the Constitution grants Congress authority "[t]o promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." There was little debate over this provision during the Convention, but James Madison (as Publius) emphasized in Federalist 43 that "[t]he utility of this power will scarcely be questioned," and "[t]he copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law." With respect to both copyrights and patents, Madison asserted that "[t]he public good fully coincides in both cases with the claims of individuals."

As Madison recognized, the Copyright Clause does not merely create a new right out of whole cloth, but instead recognizes and "secure[s]" a *pre-existing* right. The Supreme Court has emphasized that when a constitutional provision "codified a pre-existing right"—rather than "fashion[ed] a new right"—it is appropriate to consider "the historical background" of that right in construing the meaning of the clause at issue. *District of Columbia v. Heller*, 554 U.S. 570, 592, 603 (2008).

"Copyright was seen not merely as a matter of legislative grace designed to incentivize productive activity, but as a broader recognition of individuals' inherent property right in the fruits of their own labor."

The Copyright Clause in the U.S. Constitution and the pre-existing rights it secures both arose from a long intellectual and historical tradition that reflected *both* the importance of economic incentives (the utilitarian argument) and the notion that individuals have an inherent and inviolable right to the fruits of their own labor. As the Supreme Court has explained, "[t]he economic philosophy behind the clause empowering Congress to grant patents and copyrights" is the conviction that: (1) "encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and the useful Arts'; and (2) "[s]acrificial days devoted to such creative activities deserve rewards commensurate with the services rendered." *Mazer v. Stein*, 347 U.S. 201, 219 (1954). Another early decision emphasized that only through copyright protection "can we protect intellectual property, the labors of the mind, productions and interests as much a man's own, and as much the fruit of his honest industry, as the wheat he cultivates or the flocks he rears." *Davoll v. Brown*, 7 F.Cas. 197, 199 (D. Mass. 1845).

In this Paper, we examine the intellectual and historical roots of copyright law, and explain that—from its inception—copyright was seen not merely as a matter of legislative grace designed to incentivize productive activity, but as a broader recognition of individuals' inherent property right in the fruits of their own labor.

A. THE THEORETICAL FOUNDATIONS OF COPYRIGHT PROTECTION

The theoretical underpinnings of copyright law are based heavily on the work of John Locke, "one of the Enlightenment thinkers who most influenced the Founders."[2] The Supreme Court has looked to Locke's writings in construing the background understanding of pre-existing rights at the time of the Founding. *See, e.g., Ruckelshaus v. Monsanto*, 467 U.S. 986, 1003 (1984) (considering Locke's views in assessing whether trade secrets should be treated as "property").

"The fact that intellectual property is subject to various government-imposed restrictions (such as durational limits), does not diminish its status as an inherent property right."

The foundational premise of Locke's theory is that all people have a natural right of property in their own bodies.[3] Because people own their bodies, Locke reasoned that they also owned the labor of their bodies and, by extension, the fruits of that labor.[4] When an individual catches a fish in a stream, he has a right to keep that fish because but-for his efforts, the fish would not have been caught. For the same reason, an author has a right to his works because his efforts made the work possible. Under Locke's view, "[o]ur handiwork becomes our property because our hands—and the energy, consciousness, and control that fuel their labor—are our property."[5] That is, "a person rightly claims ownership in her works to the extent that her labor resulted in their existence."[6]

If anything, under Locke's theory, intellectual property should be even *more* worthy of protection than physical property. Land and natural resources are pre-existing and finite, and one person's acquisition of a piece of tangible property may reduce the "common" that is available to others. Not so with tangible expressions: the field of creative works is infinite, and one person's expression of an idea does not meaningfully deplete the opportunities available to others; indeed, it *expands* the size of the "pie" by providing inspiration to others. Moreover, while tangible property such as land and chattel is often pre-existing and acquired through mere happenstance of birth, intellectual property flows directly from its creator and is essentially the "propertization of talent"—that is, "a reward, an empowering instrument, for the talented upstarts" in a society.[7]

The fact that intellectual property is subject to various government-imposed restrictions (such as durational limits), does not diminish its status

as an inherent property right. As Judge Easterbrook has explained, it is true that "you need government to enforce your property rights by preventing strangers from using your ideas to make their own productions," but it is equally true that "you ordinarily need the government to enforce your rights in physical property against predators."[8] And real property is also subject to a number of limitations imposed by both common law and positive law—most notably, the rule that title will transfer to an adverse possessor after a certain period of time has passed. *All* property rights are qualified to some extent, and the fact that the precise scope of intellectual property rights may be shaped by positive law should not relegate them to second-class status in the hierarchy of rights.

"Thus, treating intellectual property on par with real property 'should appeal not only to utilitarians but also to libertarians,' ..."

Indeed, it is well-established that copyrights and patents—like real property and chattels—are "property right[s] protected by the due process and just compensation clauses of the Constitution." *Roth v. Pritikin*, 710 F.2d 934, 939 (2d Cir. 1983). Any "subsequently enacted statute which purport[s] to divest [the holders] of their interest in [a] copyright" would "raise a serious issue concerning the [statute's] constitutionality," and "could be viewed as an unconstitutional taking." *Id.* And the taking or diminution of an existing copyright would interfere with the copyright holder's "distinct, investment-backed expectations," *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 539 (2005), every bit as much as a taking of real property.

Thus, treating intellectual property on par with real property "should appeal not only to utilitarians but also to libertarians," as "[i]ntellectual property is no less the fruit of one's own labor than is physical property."[9] And this is not a uniquely Anglo-Saxon view of intellectual property: Article 27 of the Universal Declaration of Human Rights provides that "[e]veryone has the right to the protection of the moral and material interests resulting from any scientific, literary, or artistic production of which he is the author."[10]

B. THE ORIGINS OF ENGLISH COPYRIGHT LAW

Locke's views heavily influenced the development of copyright principles in England in the seventeenth and eighteenth centuries. During this period, copyright was widely seen as an inherent property right belonging to the author or artist, rather than a mere privilege conferred by Parliament.

From the introduction of the printing press until the late 1600s, all publishing in England was conducted by the Stationers' Company, which

"Although the Continental Congress lacked authority to adopt a nationwide copyright regime, it nonetheless strongly encouraged states to enact legislation guaranteeing the rights of authors in their works."

received a monopoly on publishing in exchange for censoring material the Crown found objectionable. Even during this early period, before the development of a formal copyright regime, unauthorized printing of books was routinely condemned as "piracy," which of course connotes the taking of another's property.[11]

In the 1690s, Parliament refused to renew the Stationers' Company's printing monopoly, and authors and booksellers in the newly competitive industry began pressing for formal protection for their works. Although he strongly opposed the Stationers' Company's monopoly, John Locke himself described literary publications as "property" and argued in a 1694 letter to Parliament that formal publishing rights should last for the life of the author plus seventy years.[12]

In 1710, Parliament enacted the Statute of Anne, which formally granted authors of existing works a 21-year exclusive publication right and authors of new works a renewable 14-year exclusive right.[13] The Supreme Court has repeatedly invoked this ancient statute as relevant to informing the interpretation of our own copyright law. *See, e.g., Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 349-50 (1998). The Statute of Anne explicitly refers to authors' "Property in every such Book," and describes copyright holders as "Proprietors."[14] Although the Statute did not necessarily "settle the theoretical questions behind the notion of literary property," it did "represent a significant moment in a process of cultural transformation."[15] That is, "[t]he passage of the statute marked the divorce of copyright from censorship and the reestablishment of copyright under the rubric of property rather than regulation."[16]

Following the enactment of the Statute of Anne, English courts and legislators repeatedly described copyright protection as an inherent property right belonging to the author.[17] For example, a 1740 judicial opinion held that the Statute of Anne "ought to receive a liberal construction, for it is very far from being a monopoly, as it is intended to secure the property of books in the authors themselves."[18] And Blackstone in his *Commentaries* described "original literary compositions" as the "property" of the author.[19]

C. COPYRIGHT UNDER THE ARTICLES OF CONFEDERATION

This history illustrates beyond doubt that "our Founders legislated in an environment where copyrights were commonly understood to protect 'property,' 'legal property,' or 'literary property.'"[20] That understanding of copyright protection was reflected in a number of state laws enacted between the Revolution and the Constitutional Convention, when copyright protection remained the responsibility of state governments.

Although the Continental Congress lacked authority to adopt a nationwide copyright regime, it nonetheless strongly encouraged states to enact legislation guaranteeing the rights of authors in their works. In May 1783, a special committee of the Continental Congress issued a report concluding that "nothing is more properly a man's own than the fruit of his study," and that "protection and security of literary property would greatly tend to encourage genius."[21]

Twelve of the thirteen former colonies answered that call to action, and their rationale for doing so made clear that the legislation was designed to protect inherent property rights, as well as serve more utilitarian goals.[22] For example, the preamble to the New Hampshire copyright law of 1783 provided:

> As the improvement of knowledge, the progress of civilization, and the advancement of human happiness, greatly depend on the efforts of ingenious persons in the various arts and sciences; as the principal encouragement such persons can have to make great and beneficial exertions of this nature, must consist in the legal security of the fruits of their study and industry to themselves; and *as such security is one of the natural rights of all men, there being no property more peculiarly a man's own than that which is produced by the labor of his mind*….[23]

The preamble to the Connecticut copyright statute—which was copied almost verbatim by North Carolina, Georgia, New York, and South Carolina—similarly provided that, "[i]t is perfectly agreeable to the Principles of natural Equity and Justice, that every Author should be secured in receiving the Profits that may arise from the Sale of his Works, and such Security may encourage Men of Learning and Genius to publish their Writings; which may do Honor to their Country, and Service to Mankind."[24]

This conception of copyright law as having both utilitarian and property rights components was consistent with prevailing public and scholarly opinion at the time. Thomas Paine argued in a 1782 pamphlet that "the works of an author are his legal property," and that it was critical for the country "to prevent depredation on literary property."[25] That same year, a prominent professor of theology at Princeton University wrote a letter to several state legislatures encouraging strong copyright protection, arguing that:

> Men of industry or of talents in any way, *have a right to the property of their productions*; and it encourages invention and improvement to secure it to them by certain laws, as has been practiced in European countries with advantage and success. And it is my opinion that it can be of no evil consequence to the state, and may be of benefit to it, to vest, by a law, the sole right of publishing and vending such works in the authors of them.[26]

"Another prominent commentator argued that '[t]here is certainly no kind of property, in the nature of things, so much his own, as the works which a person originates from his own creative imagination.'"

Another prominent commentator argued that "[t]here is certainly no kind of property, in the nature of things, so much his own, as the works which a person originates from his own creative imagination."[27]

* * *

This history flatly refutes any notion that copyright law is a matter of legislative grace intended solely to serve utilitarian ends. The Copyright Clause of the U.S. Constitution was inspired by a long intellectual tradition—extending back to the very origins of printing and publishing—in which legislators, jurists, scholars, and commentators recognized authors' inherent property rights in the fruits of their own labor.

Just as the scope of the pre-existing right informs both the contemporary public understanding of, and the Supreme Court's interpretation of, the right enshrined by the Second Amendment, *see Heller*, 554 U.S. at 592, 603, this pre-constitutional history is useful both in interpreting the scope of Congress' copyright power and in informing policy debates about how that power should be exercised. The Supreme Court itself has harkened back to the Statute of Anne in interpreting the copyright laws. *See Feltner*, 523 U.S. at 349-50. A view of the copyright laws that ignores this history is sorely incomplete.

[1] The authors are magna cum laude graduates of Harvard Law School, former law clerks in the Supreme Court of the United States, and were attorneys at Bancroft PLLC when they authored this paper. At the time, Bancroft was counsel to the Recording Industry Associations of America in various matters.

[2] Note, *Textualism as Fair Notice*, 123 Harv. L. Rev. 542, 544 & n.10 (2009).

[3] J. Locke, *The Second Treatise of Civil Government* sec. 27-28, in *Two Treatises of Government* (1698).

[4] *Id.*; *see* Alfred Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 Ohio St. L.J. 517, 523 (1990).

[5] Justin Hughes, *The Philosophy of Intellectual Property*, 77 Geo. L.J. 287, 302 (1988).

[6] Yen, *supra* at 524.

[7] Hughes, *supra,* at 291.

[8] Frank H. Easterbrook, *Intellectual Property is Still Property*, 13 Harv. J. L. & Pub. Pol. 108, 113 (1990); *see id.* at 118 (arguing that "we should treat intellectual and physical property identically in the law").

[9] Easterbrook, *supra*, at 113.

[10] *Universal Declaration of Human Rights*, G.A. Res. 217A, U.N. GAOR, 3d Sess., Supp. No. 16, at 71 (U.N. Doc. A/810) (1948).

[11] *See* Justin Hughes, *Copyright and Incomplete Historiographies: Of Piracy, Propertization, and Thomas Jefferson*, 79 S. Cal. L. Rev. 993, 1009-10 (2006).

[12] Hughes, *supra*, at 1012 (quoting Mark Rose, *Nine-tenths of the Law: The English Copyright Debates and the Rhetoric of the Public Domain*, 66 Law & Contemp. Probs. 75, 78 (2003)).

[13] Statute of Anne, 1710, 8 Anne, ch. 19, §§ 1-11 (Eng.).

[14] *Id.*

[15] Mark Rose, *Authors and Owners: The Invention of Copyright* 47-48 (1993).

[16] *Id.*

[17] *See* Hughes, *supra*, at 1015-16.

[18] *Gyles v. Wilcox*, 26 Eng. Rep. 489, 490 (Ch. 1740).

[19] William Blackstone, 3 *Commentaries* 405.

[20] Hughes, *supra*, at 1008; *see also* Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 Tulane L. Rev. 991, 999-1002, 1023 (1990) (arguing that "[i]f U.S. copyright's exponents sought to promote the progress of knowledge, they also recognized that the author's labors are due their own reward").

[21] 24 Journals of the Continental Congress 326-27 (1783).

[22] *See generally* Yen, *supra*, at 528-29 (collecting sources).

[23] Act of Nov. 7, 1783, ch. 1, 1783, 4th Sess., N.H. Laws (Vol. 4, at 521) (emphasis added). Massachusetts and Rhode Island adopted nearly identical preambles to their own copyright statutes. *See* Mass. Act of Mar. 17, 1783, reprinted in *Copyright Enactments of the United States*, 1783-1906, Copyright Office Bulletin No. 3, at 11 (1906).

[24] *See* Copyright Enactments: Laws Passed in the United States Since 1783 Relating to Copyright 1 (Copyright Office ed., Bulletin No. 3, rev. 1963); *see id.* at 15 (North Carolina statute began "[w]hereas nothing is more strictly a man's own than the fruit of his study…").

[25] 8 Life and Writings of Thomas Paine 180, 182 (Daniel Wheeler ed. 1908).

[26] N. Webster, Origin of the Copy-Right Laws in the United States, in *A Collection of Papers on Political, Literary, and Moral Subjects* 173-74 (N.Y. 1843 & B. Franklin ed. photo. reprint 1968).

[27] Bruce Bugbee, *Genesis of American Patent and Copyright Law* 111 (1967).

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Paul Clement is a partner in the Washington, D.C., office of Kirkland & Ellis LLP. He was previously a partner at Bancroft PLLC. Mr. Clement served as the 43rd Solicitor General of the United States from June 2005 until June 2008. He has argued over 90 cases before the United States Supreme Court. Mr. Clement served as a law clerk to Judge Laurence H. Silberman of the U.S. Court of Appeals for the D.C. Circuit and Justice Antonin Scalia of the Supreme Court. He is a graduate of Georgetown University, Cambridge University, and Harvard Law School.

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