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"Intellectual Property and Copyright Ethics," Business and Professional Ethics Journal, 10.2 (1991): 85-109. Reprinted in Robert A. Larmer (Ed.), Ethics in the Workplace, Minneapolis, MN: West Publishing Company, 1996, 278-293.

Intellectual Property and Copyright Ethics

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Philosophers have given relatively little attention to the ethical issues surrounding the nature of intellectual property in spite of the fact that for the past ten years the public policy debate over "fair use" of copyrighted materials in higher education has been heating up. This neglect is especially striking since copyright ethics are at stake in so many aspects of academic life: the photocopying of materials for classroom use and scholarly work, access to electronic texts, and the cost and availability of single-source information technology such as Dialogue, library card catalogues, the Oxford English Dictionary, and a variety of other print and electronic resources. Of course, the ethics of copyright are not only an issue for those of us in the business of education: recent allegations of copyright infringement by Texaco, which regularly photocopied articles from scientific and technical journals for its employees, suggests that questions about copyright ethics may arise regularly for every corporation and business. While the current lawsuit against Kinko's Copies[(1)] and Texaco may settle some public policy questions in the short run, the legal discourse on fair use depends upon competing ethical intuitions which are not likely to be resolved soon.

The ethical quandaries surrounding fair use will not be resolved by appealing to well known principles of property rights. One reason for this is that copying a book involves an act of labor which, one might allege, creates property in the copy. Unlike the act of labor involved in theft, copying does not, in any obvious way, involve the removal of someone else's property or the violation of their privacy. In the course of our discussion, I will show that there are strong counter arguments to this argument. But here, at the outset, a labor theory of property offers no decisive answer. Second, the electronic transmission of data throws the whole notion of what a "copy" is into confusion: Is text from a database on a terminal a copy? Is an electronic copy of a data file analogous to a paper copy of a printed work? Third, the development of computer software threatens to blur the distinction between a copyright and a patent. Traditionally, patents protect processes or products of processes which show genuine technical innovation. In return for registering (and making public) the process, society grants a limited monopoly to the inventor. Copyrights involve similar protections (though of a longer duration) for the novel expression of ideas. Computer software is a hybrid, combining both novel expressions of old ideas (e.g. displaying a print spreadsheet on a video terminal) and new processes for doing things (e.g. the transformation of a calendar into an algorithm for displaying and printing calendars. There is no escaping the fact that computer software and hardware is transforming the distinction between processes of production (candidates for patents) and expressions of ideas (candidates for copyright).

Finally, new developments in scholarship such as the growth of film studies and the development of video technology as an instructional medium, raise difficult problems for handling copyrights to videotapes and video broadcasts. Typically the more "commercial" a product is the more the courts have been willing to protect copyright holders. When a commercial object such as a movie or documentary becomes an object of study, a confusion arises as to whether fair use should be determined by looking at the motives for its production or the demands of education and scholarship. The 1978 copyright law is far more generous in exempting from protection classroom texts rather than videos and broadcasts.

It took several centuries for public discourse to evolve a coherent way of balancing the property claims of print publishers with the society's legitimate claim to have access to cultural works and knowledge. In little more than three decades, the discourse on copyright has been challenged in ways in which the first writers of copyright laws and the most prominent philosophers of property rights could not have imagined. It is hard to imagine John Locke responding to droit morale issues such as the artist's right to prevent colorization of films, the reinstallation of contemporary sculptures, or the effect of remodelling a building on the architect's reputation. All of these cases involve copyright issues.

My central contention in this paper is that settling intellectual property questions requires us to attend to the development of the technology of intellectual production and to an ongoing social discourse about the production and value of knowledge and culture. I think these two social processes, technology and discourse about the status of knowledge, are always at work in the emergence ethical

problems about copyright[2] and I think they are also the place to look for solutions. If I am right then policy arguments which proceed primarily by a retrieval of abstract thought on the metaphysical principles of property are inadequate. I will demonstrate my thesis first by showing that our basic understanding of copyright is itself a product of clashes between technological development and social discourse about the value of knowledge and culture. Then I will discuss efforts which focus either exclusively or primarily on a retrieval of property rights talk. I find Edwin Hettinger's work particularly important in this regard, because I think he has a keen sense of the inadequacy of traditional arguments about property rights. Finally, I will show how new copyright policy can be forged by attending to the actual social processes (both technological and conversational) which create our difficulties in the first place.

I. Historical and Critical Studies of Copyright and Authorship

In order to show how policy questions arise and are settled, I would like to recount a significant episode in the history of the development of modern copyright law. My specific claim in relating this history is that social values about technology, knowledge, and culture are the real determinants of our thinking about copyright. Of course, a mere history does not tell us that these should be the determinants of our thinking. I will not be prepared to make that claim until I show the inadequacy of some other approaches, which I will do in Section II. Still, I think the story I am about to tell goes some way toward showing the reasonableness of my general claim.

The best general history of the development of copyright in England remains Lyman Patterson's Copyright in Historical Perspective, which traces the development of copyright from the origin of the printing press to the refinement of the modern copyright statutes as a result of the 18th century "Battle of the Books." Copyright began as a royal prerogative granted to the main publishing guild, the Stationers Company. The granting of a license to control copy was originally motivated by the crown's desire to control the spread of potentially threatening religious or political ideas.[3]

Until the first modern copyright statute, the 1709 Statute of Anne, the Stationers Company enjoyed an unlimited monopoly over copy, including at times, the right to search buildings and seize copy.[4]

Modern copyright laws, which recognize, as a matter of moral principle, a limit to the monopoly which control of copy entails, begin with the Statute of Anne in 1709, subtitled, "An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times herein mentioned." The act first gave legal expression to the idea that the social value of disseminating information and culture was great enough to justify limiting the property interests of publishers. The act also prepared the way for an author's copyright.

The Stationers argued for and received extensions to the statutory limits of copyright in the act. They continued to charge exorbitant prices for classics of English literature and editions of the Bible, to which they owned the copyright. The "Battle of the Books" took place during the first three quarters of the 18th century[5] as independent publishers, in sympathy with the "Society for the Encouragement of Learning," challenged copyright holders by producing unauthorized editions of popular English literature. In the celebrated case of Donaldson v. Beckett (1774), a lasting precedent against perpetual copyright was established.

Mark Rose[6]

rightly takes the Donaldson case as a turning point in our thinking about copyright. He shows, quite successfully, that behind the Donaldson case lay a variety of changes including a new attitude toward authorship, the development of a market for intellectual labor, and the application of the justification of private property to intellectual labor.

In the Donaldson case, owners of the copyright to James Thompson's The Seasons sued Alexander Donaldson for producing unauthorized copies of the popular work. The defense argued that the statutory period of monopoly granted by the Statute of Anne had run out and that the copy was therefore not protected. The plaintiff argued that copyright is a common-law property right and that statutes merely supplement, but do not absolutely limit, the enjoyment of the right. After a three week hearing before the House of Lords, which featured packed galleries and daily attention from the press, the defense won and the statutory basis of copyright was never again challenged in either England or the United States.

The legal principle at stake in the Donaldson case has significant ethical implications. If copyright is a form of limited monopoly granted through statute, based on policy considerations, and not an absolute common law right, the ethical burden of proof shifts to copyright holders to show that their property interests are more important than the public good of having access to information. The

ethical issue takes a metaphysical turn when we ask, as we shall in section II, just what it is that constitutes the intellectual property protected by copyright. Again, if the "substance" of intellectual property is constituted by statutory fiat, then the limitations of the right are not analogous to limitations of natural rights.

Two kinds of arguments for perpetual copyright were offered during the 18th century. First, the Stationers alleged, especially with regard to literature, that authors are entitled to a perpetual property right because their work is an original invention. Second, many claimed that intellectual property is analogous to real estate and that the right of ownership derives from a right of "occupation." William Blackstone argued in his Commentaries (1765-1769) that in publishing a book one is not offering something for public use, as when land is given for use as a highway. Rather, "In such a case, it is more like making a way through a man's own private grounds, which he may stop at pleasure; he may give out a number of keys, by publishing a number of copies; but no man who receives a key, has thereby a right to forge others, and sell them to other people."(7) Thus, Blackstone asserted an analogy between intellectual property and real property over which one has a right of occupation. If Blackstone is right then public access to copyrighted works is not a public right but a kind of visitation right. Copyright infringement is thus not so much theft as trespassing.

The argument from invention, on the other hand, identifies the production of the text with the person of the author. The text is uniquely tied to its origin in the personality of the author. As an extension of the person of the author, the expression embodied in the printed text is quintessentially personal property. The argument from occupation satisfies a similar intuition in a different way. It harkens back to a notion of original appropriation. Prior to its expression by the author, the work was like unowned property. Expression is a way of "staking out" or "homesteading" a territory. The peculiar strength to this argument is that it doesn't have to explain how appropriation remains legitimate once all land is originally occupied. As long as there are an infinite number of ways to express something, the author's occupation of his intellectual estate cannot be considered an unjust monopoly.

If these seem like metaphysically extravagant arguments we should look briefly at how great a burden of proof is assumed in any argument for copyright as a natural property right. While there is no question that the physical text is a piece of physical property, the proponent of copyright as a common law right must claim that a right exists in the ownership of the ideal expression which lies "behind" the text. The argument will not succeed without an appeal to some metaphysical entity which is related to the personality of the author in some way that is relevant to the author's most fundamental interests. In the following passage, William Enfield, a contemporary of Blackstone's, identifies that interest as the profitability of the work. Intellectual property is justified because it is as real a means of making a livelihood as cultivating land:

In this various world different men are born to different fortunes: one inherits a portion of land; he cultivates it with care, it produces him corn and fruits and wool: another possesses a fruitful mind, teeming with ideas of every kind; he bestows his labor in cultivating **that**; the produce is reason, sentiment, philosophy. It seems but equitable, that a fair exchange should be made of these goods; and that one man should live by the labor of his brain, as well as another by the sweat of his brow.(8)

Ultimately, the argument from invention and the argument from original appropriation dovetail, since behind both lie the intuition that through intellectual labor one makes an original acquisition of a profitable object. The difficult part of the justification is to show that one is morally entitled to the profit which can be made from regarding the ownership of the expression of ideas as an exclusive entitlement. The claim of a just property interest in the potential distribution of the object depends upon **first** regarding that object as an abstract metaphysical entity, but neither argument really justifies the existence of such an entity. The form of the argument is: If we regard intellectual property as an ideal object, then it is analogous to productive land. Alternatively, we could hold to the view that the production of a book is like the production of any other object which requires some ingenuity and labor to produce. Then the form of the argument would be: If we regard intellectual property as the objects produced by the joint labor of authors and printers, then it is analogous to the sale of a commodity. In the case of a book, the commodity happens to be reproducible, whether by copying the book longhand or by printing or photocopying. We can compare the book's reproducibility to the reproducibility of any other object. Of course, these alternatives don't tell us which way we should frame the argument, but they show that we could think quite coherently of intellectual property without the metaphysical abstraction which Blackstone's argument entails. We either need a way of choosing between the two ways of framing the argument or we need to recognize that the general argument itself is based on a consideration of social and personal interests extrinsic to the nature of intellectual activity itself.(9)

Before moving to a philosophical consideration of copyright ethics, we should identify some of the specific virtues of critical historical research on this topic. It is a commonplace of much work in ethics that the historical justifications for our ethical intuitions do not settle ethical issues in any ultimate way. The arguments put forward by Blackstone and others during the "Battle of the Books" have a kind of historical interest, but do they reveal the direction which philosophical argumentation should take?

While it is surely naive to suppose that history simply reveals fundamental ethical principles (at least without the interpretive activity of the historical philosopher), it is also unreasonable to suppose that ethical norms which have histories are always justifiable apart

from the actual social practices to which their histories refer. At a minimum the history of a norm reveals the changing needs to which the norm responds. We may decide that it was historically accidental that certain values were not recognized as fundamental long before they were in fact recognized, but in other cases we cannot help but feel that the value itself is largely motivated by historical circumstance, even if it is logically related to other, more "primary" values which seem less contingent.

In the case of copyright, this tension between a priori justification and historical contingency is particularly acute. In the context of the history of the West, it is significant that the ethical values which underlie copyright law emerge alongside the development of economic markets for intellectual labor, the decline of the patronage system, a change in the correlation between literacy and membership in an upper class or clerical class, and the development of a new explanation of intellectual production which emphasized "invention" and "original genius."

The connection between the rise of the modern understanding of copyright and the decline of older more traditional ways of thinking about the credit one deserves for intellectual achievement and the social reward system for the same is well documented.(10)

Doubtless, we are a long way from Martin Luther's warning to printers not to be covetous of the proceeds from distributing intellectual works. Luther argued, "I have freely received, freely do I give and expect nothing in return."(11) However, an awareness of the variety of ways of thinking about the values and obligations associated with intellectual production cannot help but persuade the reader that there may be no unique, ahistorical formula for understanding copyright ethics. Rather, a coherent and justified ethical understanding of copyright will have to take into account the actual historical practices governing intellectual production and the value of intellectual activity. This includes an analysis of the technological, political, and economic conditions under which copyrights are claimed. While I certainly do not think that current practices are "self-justifying," I do believe that the justifiability of our ethical intuitions about copyright are so closely connected to current institutional practices that no adequate analysis of the former can ignore the latter. That is why my own position in section III is constructed in relation to concrete problems posed by the institutional practices of publishers, libraries, and educators.

In the next section, I consider two efforts by philosophers to give abstract justifications for positions in copyright ethics. In my criticisms of these efforts I will give further support to the claim made above, that no coherent understanding of copyright can be achieved which does not consider the actual historical conditions under which intellectual labor takes place.

II. Philosophical Approaches to Copyright Ethics.

Selmer Bringsjord(12) argues on purely logical grounds that since we have strong intuitions that some forms of copying are permissible and since we cannot make a logical distinction between various forms of copying, therefore all forms of copying are morally permissible.(13)

When scholars think about whether it is morally permissible to photocopy a text, they cannot help but be struck by how much of their everyday activity involves copying in the general sense of the word. Even without considering copying technology (which really includes everything from the pencil to the text scanner), mental activity itself seems to be a form of copying. Surely no one believes that when I jot down a few notes to aid my memory, I am violating any ethical norm. Even if I make several longhand copies of a lengthy passage(14) and distribute them to my friends, it is hard to identify, at first glance, a moral harm. The introduction of copy technology, it might be alleged, doesn't introduce any new logical features. After all, at one level of use, the copying machine merely replaces the laborious work of copying text longhand. At another level, it merely obviates the need to lug large bound journals back to one's study. Apart from the speed and efficiency of the copying, there seems to be little difference between: a) reciting from memory a long poem for several friends on different occasions; b) sending them longhand copies; and c) sending them photocopies. If we consider enough cases, we may come to the same conclusion which Bringsjord does that it is morally permissible to copy anything that is in public circulation as long as you don't plan to sell the copy. Because his argument, like the one above, depends upon a gradation of similar cases, I will call such arguments gradation arguments. While gradation arguments show us some interesting features of the activity of copying, I think they are fundamentally inadequate as a means of deciding any ethical issues concerning copyright.

The actual argument schema for Bringsjord's argument is a little different than the example above. The basic idea is to argue from a case in which we have no qualms about copying through a series of cases which are not different in any obvious logical or moral sense to a case, finally, which most people (including the framers of the copyright law) would consider unethical. Since there are no logical

differences among the particular cases, the conclusion is that the judgement that the last case is unethical is unjustified. The presupposition of this approach is that there can be no differences in our moral appraisal of two cases of copying unless there is a logical difference between the two cases. To illustrate the argument schema, Bringsjord considers 12 cases of "renting a video" beginning with a person who watches the video and "replays" the events in memory, moving through cases in which the viewer has more and more vivid recollections and more and more fantastic abilities to reproduce the movie for friends, ending finally with a case in which the viewer has devised a machine for replaying the movie. It is perhaps relevant that in the fantasy of the thought experiment, we are requested to imagine that the machine has made its recording directly from the brain of the well-situated viewer. This makes the ultimate copy much like the spontaneous reproduction from memory with which the gradation of cases began.

Bringsjord's argument is quite clever and really does capture our feeling that different cases of copying really don't have different morally relevant logical features. One striking example of this concerns the distinction between fair use in scholarly research and fair use in classroom distribution of copyrighted materials. Current guidelines governing the former are much more liberal than those governing the latter. If someone were to challenge my distribution of a packet of readings, I could place the readings on reserve and require each student to copy them individually. But is there really a moral principle at issue here? We could imagine a gradation of cases between purely spontaneous individual copying, which is protected, and systematic copying, which is not, and not find a single step in the succession of cases in which a morally relevant logical difference occurred. As long as we focus on the copying activity itself, the bottom line is that a copy is a copy is a copy.

But this is just where the limitation of Bringsjord's argument becomes apparent. He assumes uncritically that the issue of the moral permissibility of copying is to be decided by looking at the logical structure of the copying activity itself. This approach ignores the fact that the same activity performed in different situations may have different moral implications. If the goal of copyright law (and with it copyright ethics) is to promote invention, discovery and intellectual achievement within the context of a free market, then some copying (e.g. systematic copying, even if not for sale) might be judged immoral even though it is no more or less an instance of copying which under other circumstances is judged moral. For example, suppose that one day I am copying from Plato's Sophist and, being scrupulous, I determine that there are no living relatives of the copyright owners (in this case the translator). The next day I copy the complete text of a new best selling novel by an up and coming young author. The two cases are logically equivalent, yet there are morally relevant contextual differences.

Bringsjord also makes a rather weak defense against an objection to the logical apparatus behind the argument. One might object, drawing on a paradox from Plato, that by the addition of incremental features, none of which by itself is morally objectionable, one can conclude, fallaciously, that the whole sum of these increments introduces no morally objectionable feature. To use Bringsjord's example, if I claim that a one inch tall man is short and that after adding one billionth of an inch to him he is still short, I might deduce from these premises that a 500 foot tall man is short. The "paradox" is that the argument "is formally valid and has apparently obviously true premises, yet the conclusion is absurd."(15) The author excuses his own argument from this fallacy because he feels the conclusion (that copying is morally permissible) is not absurd. Of course, one's choice of words in an argument is almost always crucial. The fallacy occurs not only when the conclusions are "absurd" but also when they are simply not necessarily true. While the author's conclusion is not absurd, it may or may not be true. Therefore, I think it does commit the fallacy.

But the more serious flaw in the argument was the first one. We cannot assume that moral questions about copying can be resolved without considering the substantive moral issues which underlie our intuitions. In the case of copyright ethics these issues include respect for the author's achievement, respect for property interests, and a recognition of the social claim to fruits of intellectual activity and the social right of free access to information.

Since many of these values are incorporated into natural rights and utilitarian arguments for property, we might have better luck with Edwin Hettinger's consideration of such arguments.(16)

Hettinger gives a critical assessment of two traditional justifications of copyright: 1) Copyrights are justified as personal property rights; and 2) Copyrights provide incentives to produce knowledge and cultural works and are justified on utilitarian grounds.

The first claim needs to be discussed because one of our principle texts for the justification of property rights, Locke's Two Treatises, is remarkably silent about intellectual property. One possible reason for this is that Locke lived and wrote in an age in which authorship was not proprietary. Intellectual labor was motivated by the independent production of a leisure class or a production sponsored by that class. Locke himself disclaimed authorship and property interests in the very text justifying private property. He is reported to have found the entire book selling industry objectionable on aesthetic, if not moral, grounds.(17)

Because proprietary authorship, and with it the very notion of intellectual property, is a more recent notion than private property, a question naturally arises over the possibility of justifying intellectual property with traditional arguments for private property.

Hettinger argues that natural rights arguments justifying intellectual property are weaker than one might suppose, for the following reasons: 1) Intellectual objects are "nonexclusive;" they are not consumed by their use. Since sharing them in no way hinders one's personal use of the object, the burden of proof falls on those who would justify their exclusivity. As Hettinger puts it, "Why should one person have the exclusive right to possess and use something which all people could possess and use concurrently?;"(18) 2) There is a fundamental and longstanding ethical tradition recognizing the social value of free (or at least affordable) access to information; 3) Property rights guarantee people an interest in the value added to an object by their acts of labor. But in intellectual objects it is impossible to determine what portion of the object the author deserves a property interest in. "A person who relies on human intellectual history and makes a small modification to produce something of great value should no more receive what the market will bear than should the last person needed to lift a car receive full credit for lifting it."(19) 4) In a market economy driven in part by information, one might argue that copyrights are a means by which individuals provide for their survival and security. But since most copyrights are owned by institutions, Hettinger finds this argument unpersuasive. In addition to these arguments, he argues that copyrighted works may violate Locke's proviso against waste and spoilage (if the copyright holder charges an excessive fee, for instance), but since that argument depends upon argument 1 above, we do not need to address it specifically.

In arguing against the claim that recognizing an absolute (perpetual and unrestricted) copyright is necessary to guarantee an individual's human dignity, Hettinger is quite persuasive. But some of the arguments above are not very persuasive. While I agree that the non-exclusivity of intellectual objects is an important logical feature of them, it does not follow from their nonexclusivity that the widespread availability of a copyrighted work would not limit the uses its author might make of the work if he were entitled to exploit the profitability of the work. Of course, that is not an argument that the author is so entitled, but Hettinger's argument is only valid if one has already excluded "earning money" as one of the legitimate uses of the object.(20) The question of whether limiting the profitability of the object is justified is still open. Therefore, we would do well not to base our arguments on a conception of non-exclusivity which begs the answer to that question.

The second argument is right on the mark and correctly identifies the ethical tension between individual and social values which lies at the heart of copyright ethics. It also supports Hettinger's basic intuition, with which I also agree, that justifying intellectual property by appeal to the natural rights tradition is not as simple a matter as some would have us believe.

However, I do not think the third argument is very strong. On the traditional view, we are entitled to whatever we get through original appropriation and as a result of adding value to an appropriated object through our labor. The non-exclusivity of intellectual objects guarantees, ideally,(21) that every individual can make an appropriation of his or her intellectual tradition. Thus, we are not giving undeserved credit to individuals who make an innovation in some intellectual endeavor precisely because we do not normally need to take credit away from someone else to do so. Only an absolutist agenda for intellectual property, which no one but an Objectivist(22) would argue for, would result in a wholly proprietary intellectual tradition in which even lending rights were not recognized.

The fourth argument, that the security interests people have in copyright might not be sufficient to justify intellectual property rights, is especially weak. The fact that institutions own many copyrights and patents does not show that individuals do not derive a livelihood from intellectual property. Also, I think a good case can be made that individual proprietary authors do depend for their livelihood upon the ability to control the distribution of their work for a limited period of time. The very emergence of proprietary authorship is tied to the growth of economically independent writing careers.(23) I certainly agree that security interests do not justify unlimited copyright, but again, who is really trying to justify that position?

In discussing utilitarian justifications for copyright, which are by far the most persuasive, Hettinger claims that he finds it paradoxical that a right which restricts access to intellectual property could actually promote intellectual production. I agree that there is nothing necessary about this relationship. Historically, great intellectual production occurred in the absence of any notion of copyright whatever. However, in the context of a market economy, it is not at all paradoxical that incentives, which may require copyright protection, might promote activity. If people are indeed motivated by the prospect of gain, and if gain is only possible through a control of copying, then a restriction of some uses of intellectual property might really promote production.

Hettinger concludes by arguing for greater government funding of intellectual activity and by urging that public ownership of intellectual property might replace private ownership. I think this proposal makes a certain amount of sense in some areas: for instance, if a company gained exclusive rights to a database which, because it was constantly changing, could in effect become perpetually copyrighted, we might make a strong argument that the monopolistic effect of such a system justified its regulation. This is in fact what occurred in the case of the copyright clearinghouses for the recording industry. Also, I think the government might be too uncritical (or just not business wise) in disclaiming rights to the results of the research which it currently finances.

A government program for funding intellectual and artistic production shares some features with the older patronage system under

which authors worked for centuries. Government patronage might be abusive or liberating, depending upon the circumstances. If the funds are given to professionals with a tradition of academic freedom, like university professors or independent artists, perhaps the results would be good. Of course, governments have interests that may be expressed in funding decisions no matter who the recipient is and governments may have to observe restrictions in funding decisions that private patrons do not (consider the recent NEA controversies over government funding of the arts). But the general claim that private copyright should be weakened by re-introducing a patronage system for intellectual production is quite reactionary. After all, the traditional system for intellectual production was based on such a patronage system (variously controlled by guilds, aristocracies, church and state). Whatever the dangers of proprietary authorship, it emerged in the seventeenth and eighteenth centuries partly because intellectuals wanted to be free from the constraints of a patronage system.(24)

While I have been somewhat critical of Hettinger's arguments, I should add that they become quite persuasive if one takes them as arguments against a perpetual and unrestricted copyright. Also, he correctly locates one of the major philosophical tensions in the copyright ethics debate -- the tension between a social ethic which values the availability of knowledge and the ethical foundations of private property. Still, his approach is too divorced from social practices to provide an adequate analysis of the direction which copying practices should take in the future. The interesting question for a philosopher of public policy is whether philosophy can go any further in providing an analysis of this tension which is also sensitive to the role of technology and the social values embodied in marketplace incentives.

I think that it can, but not by going back to the general tenets of a theory of private property written at the dawn of the capitalist era and prior to the emergence of contemporary information technology. If the history of proprietary authorship holds any lessons, one is that our ethical intuitions need to be worked out in relation to the concrete social circumstances which pose the ethical problem in the first place. In the 18th century and again in the 20th century the changing economics of the book industry were a guide to courts and legislators trying to weigh the harmfulness to information producers of liberalizing copyrights against the harm to society of restricting them. In the late seventies, U.S. copyright reform had to contend with the additional complications of new technologies (e.g. inexpensive copying, video and computer technology) and new uses of older media (e.g. educational uses of visual media and musical recordings). In order to get past the general thesis that neither society nor rights holders have an absolute claim on each other, we shall have to look at concrete social practices affecting the copyright debate today. That is what the next section of this paper proposes to do.

III. Property Rights, Public Access, and the Task of a Future-oriented Copyright Ethic

Like most ethical controversies, copyright ethics emerges in its contemporary form because of the breakdown of a traditional social structure or matrix of social practices within which ethical questions have either been resolved or lack a motivation. Faced with such a breakdown, we try alternately to retrieve insights from the ethical traditions which precede us and to develop new ways of formulating our justified intuitions for the future. Philosophical work on copyright ethics has so far done the former without sufficient attention to the latter. In copyright ethics, a future-oriented ethical analysis requires some familiarity with the technology and legal thinking within which many of our practices and ethical intuitions are embodied. Future-oriented copyright policy requires further the articulation of **obligations to move toward those technologies which allow us to meet competing demands**.

Current legal and public policy controversies over intellectual property have their origin in the development of xerography and electronic information technology during the sixties and seventies. Prior to that, the most serious area of dispute concerned the fair handling of copyrights to music. Radio broadcasting and sound recording technology made possible social practices similar to the broadcasting of information through telecommunications networks and the duplication of printed works through photocopying.

We might expect, therefore, that the music industry offers a model for handling problems in other areas. Two clearinghouses for collecting copyright royalties, ASCAP and BMI, emerged in the 50's and 60's and soon became recognized as the means for radio stations, bar owners and any public performer of copyrighted music to satisfy their legal (and ethical) obligations to copyright holders. As a result of monopolistic practices in the setting and collecting of royalty fees, both associations were forced by courts to adopt flat-fee pricing schemes and fair rules for imposing and collecting those fees. The flat fee format has had a generally positive impact on the availability of music to a listening public.

No such structure currently exists for the print publishing industry, although the fledgling Copyright Clearance Center is hoping to establish itself in this capacity. However, before discussing this and other approaches to resolving copyright issues in information

technology, we should look more closely at the ways in which recent technology is breaking down the traditional approaches to print and information copyrights.

The social value of free access to information is embodied in public lending practices developed during the free public library movement and in "fair use" guidelines which emerged through court cases since the turn of the century(25)

and which are currently embodied in section 107 of the current U.S. copyright law (U.S. 17) passed in 1978. They allow specific exemptions for the use of copyrighted material for personal and educational purposes provided such uses passes three tests: 1) Brevity; 2) Spontaneity; and 3) Cumulative Effect. The point of the tests is to distinguish the occasional and narrowly focused individual use of materials from uses which are systematic in the sense that they create a significant impact on the market for the copyrighted works. A similar test underlies the provisions of the same copyright law governing fair use in interlibrary loan agreements which libraries use to share resources. Interlibrary loan schemes are more prone to copyright infringement as they become systematic means of avoiding the purchase of books and journals and less infringing as they merely provide a means for individual users to request materials which the local library cannot afford to maintain. Curiously, the fair use guidelines do not apply directly to videotapes, broadcast transmissions, and software, even though the increase in educational use of these media would seem to demand some articulation of the doctrine for them.(26)

The philosophical justification for focusing on the distinction between individual and systematic use is obvious. The more systematic the use, the less one can reasonably claim that the purpose of the use is to gain personal access to information. At one extreme, the individual who systematically copies tapes and books and distributes them for sale is doing more than securing his or her own right to gain access to information. At the other extreme, the individual who photocopies even a fairly lengthy text for personal study, has no intent to infringe on the original market for that text. The fair use test of "cumulative effect" suggests that as long as the cumulative effect of that individual's activity is not materially detrimental, then the use is fair. Current discussions of fair use are therefore directly connected to the historical tension between property interests and the social utility of information. A direct line can be traced from the original limitations on perpetual copyright during the "Battle of the Books" to the current exemption allowing individuals to photocopy from books for personal use.

From a philosophical (as well as public policy) point of view, fair use guidelines are interesting because they try to preserve a distinction which is clearly vanishing in the face of current and emerging technology. The distinction between individual and systematic use is increasingly ad hoc in the following cases:

1) Interlibrary loan schemes are essentially systematic. Libraries are increasingly using "cooperative acquisitions" programs(27) to reduce spending and increase the range of texts available to users. In a related development, the great number and diversity of scientific and technical journals has led many hospital libraries to use low cost document supply houses, which provide information on a per document basis. These highly efficient behaviors cannot help but affect the market for print materials. It seems regressive to allow property considerations to slow down an inevitable and desirable shift to a system of production which depends less on the sale of hard copies of texts than on the sale of access to texts through networks. On the other hand, by merely shifting to a fee-for-use system, the notion of free access is imperiled. New means of satisfying producers' interests may need to be developed but that cannot occur by continuing to tie fair use to an outdated paradigm in which individual users retrieve individual texts without involving a complex system of distribution.

2) While fair use offers extensive protections to individual scholars, it does not address the reasonable needs of communities of scholarship (including classroom instruction, seminars and professional scholarly societies), which can only function by systematically distributing texts. By orienting fair use to individual scholarly activity, we perpetuate the myth that scholars are not working more and more in community through conferences and telecommunications. Again, what seems like an inevitable and desirable social trend may be retarded by confused and increasingly outdated distinctions between individual and systematic use.

Current legal challenges to "professor's publishing"(28) schemes are based on the notion that such activity systematically undermines the property interests of producers of anthologies and texts for the college market. Clearly, publishers have a right not to have the market for their products systematically eroded by the activities of infringing (if well intentioned) scholars. On the other hand, by limiting an instructor's ability to assemble the best available texts in an affordable and convenient form we compromise our commitment to the social value of free access to learning.

The optimal ethical balance will not be struck merely by setting arbitrary limits to the use of photocopied anthologies, as currently copyright guidelines do.(29) It is important to realize that the ethical conflict itself is exacerbated by the practice of some publishers who hold to a marketing strategy which packages educational materials in costly anthologies. To their credit, some publishers are promoting "custom publishing" services through which they offer to assemble anthologies to suit the customer's needs. The publisher

may then collect the royalties lost to the local copy center.

The existence of professor's publishing schemes is evidence of an unmet need in the market and the "custom publishing" program may be a good effort to satisfy that need while preserving author's royalties. If we focus on the places in the market at which copyright conflict emerges, I think we will see that the problem lies in the conflict between the technologies of information production and information use or consumption. The solution to these conflicts does not involve a rereading of Locke; rather, it involves a transition to new technologies and marketing practices and a recasting of our traditional intuitions in the terms of the new technologies. Only by looking forward to a future arrangement of technologies and practices in which producers receive a nominal fee for use of copyrighted materials can we overcome the current stalemate in fair use thinking. Thus, an arrangement similar to the copyright clearance houses for the recording industry may be the best future solution to the current controversy.

The Copyright Clearance Center, which operates a growing clearinghouse for print works (primarily from journals), is one part of the solution. However, its approach is fatally flawed because it collects whatever fees producers set for their works. While at first glance this practice appears entirely consistent with the ethics of the marketplace, it provides no room in the new equation for fair use or public access. If the free market pricing structure of the CCC is upheld in court, the notion of fair use on a practical level will be left further and further behind as information technology advances. As libraries and educational institutions increasingly rely on systematic practices (e.g. electronic media, library networking, faxing, and photocopying) which take us away from the traditional domain of fair use, the practical value of free or affordable access to information will be eroded.

The challenge in copyright ethics is, on the one hand, not to hold on to traditional practices when change is immanent and desirable, and, on the other hand, to reconstruct the traditional values in the new technological configuration. The move to an absolutely proprietary information system would represent a failure to meet the second challenge, and the retrenchment of the publishing industry and traditional fair use advocates would represent a failure to meet the first challenge. A flat-fee clearinghouse for photoduplicating of print materials appears to be a good solution because it would add a nominal charge to users (which would be more than offset by likely decreases in the cost of duplication) while allowing producers to recover costs at a high margin of profit (because they would not actually have to produce the copies). A computerized billing service could be established in major copy centers (Kinko's Copies stores, corporate copying facilities, and university copy centers) while leaving alone incidental copiers such as library patrons.

I think a similar arrangement could be made for videotapes and software, though these media do have special characteristics which affect our concern for producer's interests. Where production overhead for major software packages and major movie and documentary works are high, more concern might be shown for the market for these products. Economic modelling of producer's rates of return for various types of electronic media might govern decisions to include such media in a flat-fee clearinghouse.

In general then, I recommend that information producers see themselves as socially obligated to move toward technologies which facilitate the wide distribution of their works. At the same time, consumers should allow that the new information technologies they use obligate them to consider the effect of their use on information producers.

IV. Conclusion

In addition to providing a general introduction to the subject of copyright ethics, I hope I have shown that thinking about copyright cannot be divorced from the history of social practices which originally constituted it. We cannot begin to understand the competing claims of private property owners and society, unless we look at the tension between these competing interests in historical detail. On the other hand, such a history is in no way prescriptive or prospective. Philosophical approaches to copyright are needed and I considered two: Bringsford's and Hettinger's. However, we will not succeed by merely attending to the logical features of copying (as Bringsjord does). Our ethical intuitions do not possess such precision or generality. Failing that, we might hope that the philosophical tradition justifying property will guide us in thinking about intellectual property. But Hettinger successfully shows that the tradition cannot do this. I suggest the reason for this is, in part, that abstract justifications are too divorced from actual social practices to arbitrate between competing ethical values. In the case of copyright ethics we need to look at current and emerging technology and try to understand how our best intuitions about rewarding personal achievement and allowing public access can be satisfied.

1. [1]Kinko's Copies is currently being sued for infringing copyrights through its "Professor's Publishing" service which provides packets of readings for college classroom instruction.

2. To give a simple example, the dilemma over film colorization doesn't occur until the technology for colorizing film develops. Also,

the question about how to treat videos in educational contexts doesn't emerge until educators place a value of them as instructional media.

3. [3]The first three major copyright acts, the Star Chamber Decrees of 1586 and 1637, the Ordinances of 1643 and 1647, and the Licensing Act of 1662 were all primarily censorship acts. Lyman Patterson, Copyright in Historical Perspective (Nashville, Tennessee: Vanderbilt UP, 1968) 82.

4. The right to copy remained with the individual guild member who registered it. It was his property in perpetuity. The copyright could be transferred to widows of Guild members, but if the widow remarried outside the Guild, she lost the copyright and it reverted to the company.

Patterson 111.

5. The Statute of Anne (1709) and its extension in 1734 set the stage for the Donaldson case (1774), described below. In addition to traditional stationers and renegades like Donaldson, groups like the Society for the Encouragement of Learning (1734) played a part in the "battle."

6. [6]Mark Rose, "The Author as Proprietor: Donaldson v. Beckett and the Genealogy of Modern Authorship," Representations 23 (1988) 51-85.

7. [7]William Blackstone, Commentaries on the Laws of England 4 vols. (Oxford, 1765-1769) 2:406.

8. [8]William Enfield, Observation on Literary Property (London, 1774) 21-22.

9. To set this argument in context one should read Kenneth Vandevelde's, "The New Property of the Nineteenth Century: The Development of the Modern Concept of Property," Buffalo Law Review 29.2 (1980): 325-367, in which he argues that the conceptual difficulties of extending natural property rights to non-physical objects requires an appeal to the public policy benefits of recognizing such property. Thus, in the interest of logical coherence, the argument for natural property rights shifts in character to an argument about social utility.

10. [10]Martha Woodmansee, "The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the Author," Eighteenth Century Studies 17 (1984) 425-448.

11. [11]Woodmansee 434 (19n), from Martin Luther's "Warning to Printers."

12. [12]Selmer Bringsjord, "In Defense of Copying," Public Affairs Quarterly 3 (1989) 1-9.

13. [13]I realize that this simple reconstruction is perhaps not as sympathetic as it could be; however, I think this is an accurate representation of the structure of Bringsjord's argument.

14. [14]For the sake of this argument, suppose I copy more than 250 words from a long poem, thus exceeding the copyright guidelines for photocopying associated with the current U.S. copyright law.

15. [15]Bringsjord 6.

16. [16]Edwin Hettinger, "Justifying Intellectual Property," Philosophy and Public Affairs 18 (1989) 31-52.

17. [17]Peter Laslett, Introduction, Two Treatises of Government, John Locke (Cambridge: Cambridge UP, 1988) 7.

18. [18]Hettinger, p. 35.

19. [19]Hettinger, p. 38.

20. [20]This is why it is not adequate, for example, for educators to base claims to fair use solely on the notion that their use is "not for profit". Such arguments ignore the fact that widespread photocopying does diminish potential returns to rights holders.

21. [21]I recognize that if basic opportunities for education and advancement are not available then this counter argument will not succeed.

22. See for example the Objectivist position as it is articulated in, "What is the Objectivist position in regard to patents and copyrights? " The Objectivist Newsletter, May, 1964, 19-20.

23. Samuel Taylor Coleridge, William Wordsworth, and Charles Dickens, were among the first great English language authors to attempt to earn their living from the relatively new "author's copyright" which the 1934 revision of the Statute of Anne gave expression to. Dickens was especially vocal in his defense of the value of an independent profession of authorship. This trend is also noted in Rose and Woodmansee's article.

24. [24]Of course, this is not to deny that any particular market may be structured in a way that imposes oppressive constraints also.

25. [25]Leo Raskind traces the development of the U.S. fair use doctrine from the mid-19th century. However, detailed legal opinion does not emerge until cases involving the use of copyrighted material on radio, television, and film. For an excellent review of the case history, see Leo Raskind, "A Functional Interpretation of Fair Use," The Journal of the Copyright Society of the USA (1984) 601-639.

26. A recent bill before the Senate (S. 198, 101st Congress) addressing software copyrights contained a fair use exemption allowing libraries to lend software to patrons. The exemption was justified by the need to combat illiteracy and promote education, especially in rural and impoverished communities (see S. Rept. 101-265). Cited in ALA Washington Newsletter, April

30, 1990, 7-8.

27. [27]Under cooperative acquisitions schemes libraries agree to supplement rather than duplicate each others holdings.

28. [28]"Professor's publishing" is a term coined, as far as I know, by Kinko's Copies to describe its service of duplicating packets of readings for college course instruction. Kinko's is currently involved in a major copyright lawsuit over this practice.

29. [29]Current guidelines allow professors no more than 9 copyrighted works per classroom anthology and prohibit the repeated use of the same anthologies semester after semester. Since no individual article or essay may exceed 2500 words, many packets in use today do in fact violate the guidelines. These guidelines are not part of the actual legislation of 1978 Copyright Act (PL 94-553, U.S. 17), but were published as a House report (H. Repts. 94-1476 and 94-1733). Excerpts of the reports are available in the American Library Association's Librarian's Guide to the New Copyright Law (Chicago, 1978) or from Copyright Information Services', The Official Fair-Use Guidelines: complete texts of four official documents arranged for use by educators, 3rd edition (Friday Harbor, Washington) 1987.