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INTELLECTUAL PROPERTY

by

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Chapter 36

Intellectual Property

SEANA VALENTINE SHIFFRIN

Intellectual property theory grapples with intriguing questions about the political and personal significance of our mental labour and creativity, the metaphysics of art and expression, the justifications for private property, and conflicts between property and free expression rights. This chapter begins with an introduction to the nature of intellectual property, comparing intellectual property to physical property. It continues with an overview of some arguments for, and criticisms of, the legal protection of intellectual property, and concludes with some ethical issues about illegal downloading.

What is Intellectual Property?

'Intellectual property' is used ambiguously. Sometimes it refers to the system of legal protection over useful or expressive inventions, expressions and products the generation of which typically involves the creative use of the mental faculties. Others use the term, as I will, to refer to inventions and products themselves – those things, schemes, objects and ideas – that *may* in turn be the subject of strong legal protection. I will use 'intellectual property rights' to refer to private forms of legal protection and power given over intellectual property, such as the rights conferred by copyright. (For convenience, I will mine the particulars of US intellectual property law for concrete examples.)

The forms of intellectual property are diverse, including letters, books, essays, other written materials, musical compositions, recordings, plays, films, sculptures, paintings, photographs, other forms of artwork, architectural blueprints, logos, inventions, computer programs, and perhaps even visages, names and features of a person's life history, personality and reputation. More controversially, some include biological materials that have been humanly manipulated or whose discovery depended on complex investigative processes, such as some genes, cell lines, genetically altered bacteria, mice and human proteins (Munzer, 2002). Abstractly conceived, much intellectual property consists of those goods, roughly speaking, whose production or specific identification depends primarily upon human cognition and imagination, and only secondarily upon raw materials and physical exertion (see also Becker, 1993). Intellectual property often

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involves rendering concrete and external the unique contents of a human mind so that they may be made accessible to and usable by others. By contrast, land – quintessential physical property – does not depend for existence on cognition and imagination; neither do minerals, water, air, nor many animals and plants.

However, the existence of many physical goods, such as particular flat brooms, chairs, pies, and bred animals and plants, does partly depend on the exertion of human labour guided by mental efforts. What distinguishes intellectual property? Or, as some may pose the question, what distinguishes the intellectual property component of a particular physical good? Intellectual property is typically distinguished by its being a type for which there may be many tokens *and* by the labour involved in its production. When referring to Jane Austen's *Pride and Prejudice*, one may either refer to the ordered collection of words that together compose a narrative of characters and a story, or to a particular, perhaps well-worn, physical copy of the book. Roughly, the 'intellectual property' component of the book consists of the ordered collection of words that make up the work *Pride and Prejudice*, or perhaps the story line, characters, and some major subset of the ordered collection of words contained within an authoritative edition. Once these words have been 'fixed', collected together in a format that may be adverted to at different times (e.g. in writing or an oral recording), they may be replicated into many physical token copies. Human labour generates both the ordered collection and the physical copies. The primary labour involved in intellectual property's production is the exercise of the creative faculties supplemented by some physical labour to make these thoughts tangible, publicly accessible, and usable by others. The product itself, though, may be abstract, like the number 5. It may lack a specific spatio-temporal location, but may be partly or fully instantiated or represented in different locations, partly or fully replicated, transformed in whole or part, and used in a variety of ways. An indefinite number of copies of a book may be printed; a book may be excerpted, translated, parodied or made into a film; many physical copies of a particular musical recording may be made; a musical composition may be multiply recorded, transposed or sampled in another composition; many tokens of an invention may be produced; the underlying innovation of an invention may be used as a component of yet another invention. So, to return to the broom, no particular flat broom in your closet is intellectual property, but each instantiates a particular invention; the invention of the flat broom marks the creation of intellectual property, although its Shaker-inventor generously did not seek a patent on it (Hooper, 2003).

Generally, intellectual property *rights* give the creator control over who uses the intellectual property, and under what conditions. With important qualifications, these rights are usually transferable. Copyright and patent typically have restricted terms; currently, copyright lasts seventy years after the author's death and patent lasts twenty years. After the term expires, the work enters the public domain for unrestricted use. In most jurisdictions, intellectual property rights divide into the categories of copyright, patent, trademark, rights of publicity, trade secret law and 'moral rights'.

Copyright typically covers original written expressions such as books, articles, poems and musical compositions, but also printed images such as paintings, photographs and drawings. Subject to some exceptions for fair use, copyright affords the right-holder the ability to prevent use, copying and sampling in whole or in part, performance and

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distribution of a work. Copyright also empowers the right-holder to prevent others from making 'derivative' works; in recent years, this right had been more expansively and, thereby controversially, interpreted. Derivative works are distinct, 'spin-off' works, inspired by the original. Examples include *Brokeback Mountain*, the film version of E. Annie Proulx's short story; a novel's sequel; and comic books that imagine alternative universes from the original, such as the *Dark Empire Series,* which explores the consequences of Luke Skywalker's joining the Dark Side. Some derivative works involve perspectives on the original work of which the copyright owner disapproves, such as *The Wind Done Gone*, a retelling of *Gone with the Wind* from the perspective of the slaves (see *Suntrust Bank* v. *Houghton Mifflin Co.*, 2001).

Patent covers novel, useful and non-obvious inventions such as the telephone and the phonograph, but also chemical formulas and compositions, some computer programs, designs, some biological and chemical methods and processes, and, more controversially, some biological products and materials created or discovered through these processes. A patent holder is enabled to prevent others from using, generating or distributing tokens of the invention, or distributing variations and improvements on it. Usually, the holder will exact payment for the invention's use, although patent law permits the holder to refuse to license use no matter what payment is offered, for no reason in particular. An inventor may wish to be the exclusive manufacturer of her invention or for it not to be made at all, perhaps for perverse reasons or perhaps to avoid its competition with another, more profitable product of the same inventor's. A drug to cure cancer may compete with more expensive drugs that treat the symptoms over time; patent holders have the power to suppress all use of the cure, even though suppression may harm many patients.

Trademark standardly covers commercial names and logos, such as the name 'Nike' and the famous swoosh symbol, and permits the owner to police and prevent their use by others. Loosely, the right of publicity is the personal counterpart to trademark. The right permits a public figure, e.g. a celebrity, to exert control over others' commercial use of her name, visage and other distinctive characteristics. Because of his objection to commercial endorsements, Tom Waits used the right against a Doritos advertisement that featured singing imitative of his distinctive voice.

Trade secret empowers its holders to police the use and exposure of confidential information within an organization, typically a business, about that organization's methods, databases, formulas and production designs. The formula for Coca-Cola is perhaps the most famous trade secret.

Finally, 'moral rights' legislation enables creators to protect the integrity of their work (e.g. to forbid alterations to the structure of a sculpture or building), to require attribution (that copies of the work bear the creator's name), and sometimes to reclaim specific tokens of the work from their owners upon offering compensation. Moral rights are stronger and more common in Europe than in the USA.

Diverse issues arise with respect to these different protections and kinds of intellectual property. The chapter's remainder will focus on issues common to them and some issues that arise predominantly for copyright. Even so, space considerations preclude tackling many interesting issues that emerge out of the complexities of copyright (the angels in the details, so to speak).

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Justifications

Roughly labelled and classified, three main schools of justifications are offered for strong intellectual property protection: Lockean theories; personality-based theories; and consequentialist, incentive-oriented theories (Waldron, 1993; Fisher, 2001). In brief, Lockean theories contend that creators deserve to own and control intellectual works because they laboured to create them. Personality theories, sometimes (controversially) referred to as 'Hegelian,' appeal to the creator's expressive and dignity interests. Consequentialist theories do not, by contrast, locate the justification for strong intellectual property protection in creators' individual rights. They advocate strong protections to provide necessary incentives for the creation of intellectual works that serve the general public interest.

Before investigating these justifications, it is worth making explicit what is at stake in the debates about intellectual property. Although this is often overlooked, the real issue is *not* whether those who make intellectual property should receive compensation for their labour and production costs. In the contemporary debate, both proponents and opponents of strong intellectual property protection concur that creators of intellectual property (and those who publish, distribute or otherwise make it useful or accessible) should receive fair compensation for their training, labour and material costs. Most also agree that consumers may reasonably be charged fees for the use of intellectual works to cover the costs, if any, associated with production and use. What *is* at stake is the appropriate form of compensation, specifically: (1) whether the creator has a distinct rights-based claim to exclusive control over her works' use, distribution and price; and (2) whether, rights aside, granting creators this exclusive control is for other reasons the optimal form of compensation. Opponents of strong intellectual property protections advocate using alternative mechanisms that afford financial compensation and recognition to creators without also granting strong control to private parties over the price and use of works. Creators could instead be compensated through salaries, stipends, or through more complex methods that are sensitive to the level of use, such as compulsory licensing systems or taxes on ancillary products used for making copies such as blank CDs. Compulsory licensing, the system that governs the recording of musical covers, allows anyone to use a work but requires payment of a nominal set fee per use; this access fee is set at a non-prohibitive level to encourage use while providing fair compensation to providers. Such systems prise apart compensation for labour from private discretionary control over works, facilitating freer use of these works.

Thus, the central justificatory issue about intellectual property is whether private parties should have monopoly control over these resources for significant periods of time. Of most interest are private legal rights: to have broad (and sometimes complete) discretion over the conditions and prices of access to intellectual works; and to control or prohibit the production of a wide range of derivative works.

Lockean Theories

Some regard intellectual property as the most promising application of (loosely labelled) Lockean arguments about property (Locke, [1690] 1994). One popular version of

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Lockean property arguments starts from the position that, initially, resources are commonly owned: *ex ante*, no one has any intrinsic claim to any particular resources. An individual may remove resources from the common and privately appropriate them, however, through exerting her self-owned labour merely to grasp or perhaps also to improve them. She may thereby generate a claim over these particular resources so long as she leaves 'enough and as good for others' and does not waste what she takes.

There is a traditional concern that given resource scarcity, private appropriations of *physical* property cannot straightforwardly satisfy the proviso that one leave enough and as good for others, whether to use or to appropriate. Appropriation of intellectual property may seem different. First, one may think that intellectual property does not belong in the original common but comes into existence already attached to individual creators. It may be appropriated even without satisfying the proviso. Many regard some intellectual works, such as science fiction or abstract art (as opposed perhaps to historical works or to chemical processes) as 'pure' creations of intellectual sweat and genius. Because they are unique products of mental labour, their creators are not bound by the limits on private appropriation because those limits only attach to goods that exist, in whole or in part, independently of the appropriator's labour. More sophisticated versions of this argument recognize that certain ideas, e.g. the notion of unconditional love, are part of the common and are not due to any particular mind, but hold that particular expressions of those ideas may be due to their creator, such as Shakespeare's 116th Sonnet. Copyright reflects this distinction between ideas and expressions, protecting only the latter. Second, some may think the appropriation of intellectual works easily satisfies the proviso, whatever their origin or metaphysical status, because their supply is not scarce, unlike the supply of physical resources. Even if *all* intellectual works belong initially to the common, its expanse may be indefinitely vast; perhaps this also enables the permissible appropriation of physical property as well, assuming the different kinds of property are commensurable, since appropriation of physical resources will leave plenty of intellectual property behind for others.

Some take these sorts of considerations to form a strong *prima facie* case for recognizing strong intellectual property rights as an appropriate way to respect or reward creators' valuable labour (Hughes, 1988; Child, 1990; Gordon, 1993; Moore, 1997). Even so (as on all accounts), further questions would have to be resolved, including: whether these rights have indefinite or temporally restricted extension; what sorts of property qualify; whether and why originality, creativity or non-obviousness should be prerequisites for appropriation; whether others may have need-based claims to use some works; and whether there are significant externalities associated with these rights that generate restrictions on their exercise.

One may worry, though, that appropriation is morally more complicated than has been so far suggested: intellectual works should be considered part of the common; they are therefore subject to the proviso that one not appropriate without leaving as much and as good for others; but this proviso is not so simply satisfied.

Why might they belong in the common? Some products may be thought to exist independently of our labour. Therefore, they are a common resource. Some inventions have been independently discovered by different people, after all. Those who regard

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expressions as ordered collections of words, or music as ordered collections of notes, may think these sets of words and notes exist independently of any particular person's contemplation of them, although they are unearthed through creative labour. Others observe that even if expressions are pure mental creations, any individual's intellectual product is rarely entirely her own (Hettinger, 1989; Gordon, 1993; Waldron, 1993). Authors build on prior works and cultural influences, whether consciously and explicitly or not. Further, the intelligibility and value of their intellectual products depends partly on others' contributions and cultural features for which they are not responsible. There are also the further issues, familiar from other discussions in political philosophy, about whether one's talents have predominantly social sources or whether, for other reasons, their fruits should be considered social resources. Given the high degree of interweaving mutual influences, some conclude that intellectual products should be regarded as part of our commonly owned intellectual heritage. Just as they are created by borrowing from and reacting to prior materials, so they should be available to others as the raw materials from which to generate new variations and works.

On these views, private appropriations of intellectual products might then be challenged because they remove materials from the common but do not leave as much and as good for others. Not all intellectual works are equal; in some contexts, they may not have adequate substitutes. For example, in many cultural contexts, even at the time of their initial writing, it would be difficult to claim that private appropriation of the Bible or the Koran could be justified merely because others could 'discover' different works such as expressions of astronomical reports and children's stories; there may be no works 'as good' as the perceived directives of God. To take a more quotidian example, in the USA there may be no news resource as authoritative or 'as good' as the *New York Times*; to restrict access to it may, for certain purposes, leave others without a resource as good as what has been appropriated (Gordon, 1993).

A more foundational challenge to the 'Lockean' argument may be mounted (Shiffrin, 2001). So far, we have focused on the fairness of particular appropriations. But no strong positive argument was given as to why intellectual works should be privately ownable at all. Such an argument may be necessary given one understanding of the initial Lockean assumption of common ownership. That starting point need not be interpreted as an assertion about the metaphysics of intellectual works, as being independent of human creation, but rather as embodying a political view about our mutual standing. That each of us has an equal moral claim to resources in which we all have interests may be understood as a manifestation of our equal moral standing. The question of private property, then, is the question how, if at all, can any exclusive claims to goods that are useful to all or many be justified?

If privatization of *some* resources is necessary to make adequate use of them, perhaps it is therefore justified. For instance, one could not make any use of foodstuffs without private appropriation. To deliver nutrition, an apple must be taken from the common and ingested by a single party. In places, Locke seems to suggest that the same may be true for real property; its full and effective use requires agricultural development and controlled manipulation by a single or co-ordinated will. Land could not be put to its full use if it could not be subjected to planned direction and protected from disruption by the uncoordinated use of others. Hence, at least some of it must be

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privately owned. On this account, the labour of an appropriator does not provide the justification for the *institution* of private property in a sort of thing; rather, it explains how, given the justification for the institution of private property, one individual rather than another has a claim to a particular piece of property among those forms of property that are appropriately made private.

Intellectual property does not easily fit this framework. As Thomas Jefferson (the first head of the US Patent Office and a Lockean) put the point:

> He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me. That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them like fire, expansible over all space, without lessening their density in any point, and like the air in which we breathe . . . incapable of confinement or exclusive appropriation. Inventions then cannot, in nature, be a subject of property. (Jefferson, [1813] 1943)

That is, many uses of intellectual property are 'non-rivalrous': one party's use of the resource need not compete with another's. I can read Austen's *Pride and Prejudice* at the same time as you, but I cannot use a plot of land for a concert at the same time that you use it for quiet meditation. Moreover, simultaneous use of intellectual property often enhances others' use. My enjoyment of a book or a piece of music is often enhanced by others' ability to converse about it, to understand references to it, and to reveal virtues or expose flaws I failed to see. Full, effective use of intellectual property often depends upon mutual, uncoordinated use in a way that differs from many uses of physical property; intellectual property is not merely non-rivalrous but anti-rivalrous. If the argument for privatization of *some* physical property is that exclusive use is necessary for full, effective use, then that justification does not easily encompass many sorts of intellectual property. To the contrary, an interest in facilitating full, effective use would suggest a system of common property in most intellectual works in which anyone could make use of a work – whether to consume or to use to make another work – without the original creator's permission. Original creators might use stronger rights of exclusive control to quash criticism of their work or to suppress imitators whether for reasons of ego or to stifle real or perceived economic competition. These motivations, while often humanly understandable, may impede full, effective use of a work.

At least two qualifications should be registered. First, some intellectual works may require exclusive use for effective use. Works in progress may not come to their full fruition if they are published before the author consents. Unwanted input or exposure may disrupt the creative process. Some works, such as diaries or personal letters, may be intrinsically private; their proper use may be reliably ensured only by affording the author exclusive control over access to them. Second, some worry that overuse may result if intellectual property is left in common. Although most intellectual property is not exhaustible, its overuse could affect its quality (see Landes and Posner, 2003; but see Lemley, 2004). Songs may lose their resonance, poignance or appeal when they are over-played or put to tiresome, repetitive commercial use. But, it is unclear what force such an argument should exert in a free-speech culture. Usually, we do not find

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it a good argument for the wholesale restriction of (non-commercial) speech that the speech will annoy some listeners or that they will come to dislike it.

Personality-based Theories

If Lockean justifications falter because of the non-rivalrous and anti-rivalrous qualities of many intellectual works, are there other individual-rights arguments for strong intellectual property rights? Some argue that because intellectual works express authors' personalities and reflect their characters, authors deserve control over them, whether to protect their reputations, their personhood or their communicative activities (Netanel, 1993; Beitz, 2005). Mickey Mouse's creator should be able to block another's portrayal of Mickey as a swashbuckler not because his mental labour gave rise to Mickey, but because either: (a) Mickey represents him and it maligns his character if Mickey engages in crime; or, (b) as part of the general project of developing and maintaining an identity, individuals need to have property over which they exert exclusive control, defining themselves through and against these objects (Radin, 1982), and intellectual works suit these purposes well; or, (c) because, through Mickey, the creator is engaged in a specific communicative enterprise that the additions and transformations of others may distort or alter (*Walt Disney Productions* v. *Air Pirates*, 1978).

Personality-based arguments are associated with 'moral rights' legislation and rights of publicity. Mickey's mischief may reflect on his creator, so perhaps he should have a tight rein on Mickey's shenanigans. It might be asked, though, why the creator's reputational interests cannot be satisfied instead by merely directing that 'off-licence' transformative works be clearly labelled as 'non-authorized' by the original creator. In any case, such considerations do not provide much support for allowing the creator to *transfer* rights of control to others whose reputation and character are less bound up with Mickey. These arguments also suggest a shorter tenure than copyright currently provides. Terms that extend long past the author's life fit awkwardly with the argument that one needs control over property in order to develop and assert one's personality publicly. True, we do care about the reputations and the communicative intentions of the dead, but they may not provide sufficient reason to impede the expressive, personality-building opportunities of the living.

More generally, personality defenders of strong intellectual property rights must explain why priority should be given to the expressive interests of original creators over others (and for how long). Others may wish to express themselves through the unimpeded use of intellectual works. Effective self-expression may require or be significantly facilitated by using culturally familiar icons like Mickey, whether critically, creatively, or just by reference. Although creators of non-published works may have understandable privacy concerns that may support strong control over their works, authors of published works occupy a more precarious position. They introduce works into the public sphere that may have a strong influence on others' lives and personalities. Why may they attempt both to exert an influence on others *and* to retain strong control over how their audience deploys its own agency and expression to use these materials in response?

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Incentives

Another prominent justification for intellectual property rights appeals to the general social interest in facilitating innovation and expression. Some contend that intellectual property rights provide authors and innovators with necessary incentives to create. The initial production process can be arduous and costly; once a work is created, though, it is often relatively easy and inexpensive for others to copy and use the work. This makes it easy for competitors (and consumers) to 'steal' a work and undercut the creator's price. This vulnerability may deter creators from generating intellectual works. Offering periods of monopoly control may offer potential producers the incentives of secured profits and control over works that may compensate for these risks.

This argument depends on often repeated, but ill-studied, empirical claims about the need for, and overall net effect of, these particular incentives on the climate of intellectual property production and consumption (for doubts, see Heller and Eisenberg, 1998; Barnett, 2004). It is important, again, to distinguish the desire to recoup costs and to compensate for production from the more specific desire to exert monopolistic control, whether for maximal profit or power. The incentive argument must apply specifically to the latter if it is to provide a justification for strong intellectual property rights. (For an argument preferring market incentives to patronage and state subsidies, see Netanel, 1996.)

Some wonder whether granting a monopoly generates the best set of incentives for production and consumption, because monopolies hamper competition and other productive uses. One may also worry that the incentives argument underappreciates the degree to which many write and innovate for reasons other than money or power, including a native sense of curiosity and interest, the aim to create art, the urge to engage in self-expression and communication with others, the interest in prestige and acclaim, and the general interest in helping others and improving the world. Many inventors and writers, including the Shakers, Martin Luther, Benjamin Franklin, and many academic authors, have created and made their works freely available for pleasure, to serve others and for the other joys of sharing intellectual advances. In some circumstances, financial incentives may even diminish creativity (Hennessey and Amabile, 1998). (The incentives account may, however, better describe the profile of publishers and manufacturers whose collaboration with creators is often essential. The internet, however, has enabled some viable alternative forms of publication, distribution and co-operative collaboration.)

The diversity of motives for creation may generate problems for strong versions of the incentives argument's claim that a monopoly to creators provides *necessary* incentives that in turn generate the optimal environment of innovation and public use. Affording monopoly control to many authors and inventors may be unnecessary and suboptimal. It may grant economically inefficient and stultifying windfall powers to creators that merely serve as obstacles to consumers and other potential creators who would benefit from freer or cheaper access (Shavell and Van Ypersele, 2001). First, many innovators who would not require incentives of this strong sort to create may still take advantage of them if they are offered. Jeff Bezos, founder of amazon.com, reports that Amazon would have developed the '1-click' technology whether or not it

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was patentable, although Amazon took out a patent on it nonetheless (Lessig, 2001a, p. 211). Further, if enough take advantage of monopoly rights, an environment may be created in which others must as well, whether they would like to or not, in order to remain economically competitive and to remain attractive to necessary partners – e.g. publishers and manufacturers who will demand transfer of these rights.

Second, even where these incentives are necessary for some creators, they function in ethically questionable ways (see Cohen, 1992 on incentive arguments generally). They do not merely provide a carrot for a person to create a work rather than engaging in leisure or another activity. Rather, one party, who I will call the *upstream speaker*, is incentivized to produce by the fact that other parties, the *downstream speakers*, are deterred from copying, performing, producing and distributing both extant intellectual works and also new, transformative, derivative works. In the case of copyright and the derivative works protection, according to the incentive argument, expression is suppressed because its suppression is the precondition of another party's willingness to engage in expression (Tushnet, 2001).

This structure provokes some distinctive free speech concerns, representing only one of the many fruitful points of contact between free speech theory and intellectual property theory. First, suppose it is true that upstream speakers, in essence, require, as a condition of their speaking, that downstream speakers be suppressed. Is it permissible to suppress downstream speakers for this purpose? Second, if it can be permissible, *should* we prefer the upstream speakers over the downstream speakers? In some contexts, the answer to the first question seems straightforwardly 'no'. For instance, our commitment to free speech precludes suppressing a controversial speech because a hostile audience wishes it to stop; we should not accede to their demands, even should audience members threaten violence if their demands are not met. A free speech system must permit unpopular speech, whether the state or members of the public oppose it. Should it really make a difference if hostile audience members, instead of threatening violence, allowed that they were more likely to speak if the speakers they disliked were silenced?

Perhaps copyright differs. Typically, the upstream speaker does not respond to the incentive of others' suppression because she is hostile to the *content* of their speech but because their speech putatively threatens the economic returns to her original. (Some copyright enforcement, however, *is* directed at particular content disfavoured by the original author, whether because it is critical of the original or for other reasons. Using copyright, Hitler successfully prevented Alan Cranston, later a Senator, from distributing a more accurate translation of *Mein Kampf* than Hitler wished the English-speaking world to see; Netanel, 2001.) In such cases, does the economic motive for suppresion make all the difference? Is it legitimate to suppress one party's speech because its appreciation will make another party's speech less profitable? That principle seems overbroad, impinging on the ability to write critical reviews. Perhaps what matters is that some speech reduces profits by *competing* directly with the original speech, rather than, like a review, *convincing* people not to purchase the original speech. Regulating the former may seem innocuous, comparable to restricting hecklers from using megaphones to drown out an invited speaker. But copyright regulations do not merely suppress speech on certain occasions to make the original speech easier to understand on those occasions; rather, they suppress others' speech in *all* contexts for a prolonged period of time.

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Even if suppression can sometimes be permissible on these grounds, what reason do we actually have to prefer the upstream speech over the downstream speech? Is this question idle because the downstream speech depends for its existence on the upstream speech? For, either we have no speech or we have the original, upstream speech. But this is an exaggeration. We can divide original creators into three categories: (a) those who will create (and publish and distribute) without requiring or using intellectual property protections; (b) those who would create without intellectual property protections but will take advantage of them if they exist; or (c) those who will not create without intellectual property protections and will enforce them if they exist. Incentive arguments favour the speech of those who fall in category (c) at the expense of those who would produce derivative works of those who fall in category (b) (as well as those who would produce derivative works of (a) but are deterred from creation because they are unsure whether the original creators fall into category (a) or if they fall into the more unsafe categories (b) and (c)).

Why should we privilege speakers in category (c) who require intellectual property incentives over the downstream producers whose work will be chilled? It is difficult to decide on sheer grounds of quantity. It's awfully hard to know who falls in category (b) and who falls in category (c) because it serves the financial interests of those in category (b) to bluff. Further, it is difficult to assess how many downstream speakers are chilled by copyright.

One may be tempted to prefer original works over derivative works on grounds of quality; an original work may be considered more precious or significant. It is hard to assert this with broad confidence, though. Many derivative works improve dramatically on original works or take off in an entirely different creative direction. Think of *Macbeth* and *King Lear* as against Raphael Holinshed's *Chronicles of England, Scotland, and Ireland*; the film *Pirates of the Caribbean* as against the theme park ride; the Peggy Lee song 'Is That All There Is?' as against the Thomas Mann short story 'Disillusionment'; Negativland's 'The Forbidden Single: A Cappella Mix' as against U2's 'Still Haven't Found What I'm Looking For'; etc. Given the vast range of potential works, it seems difficult at best to predict which class is superior: upstream works as a class or downstream works as a class.

One might return to what many find an irresistible thought, namely that the original producers are more deserving. Their work is the catalyst and should be privileged over downstream, derivative speech. But note that by reintroducing the idea of desert, the putatively independent incentives argument for copyright protection would now depend on vindicating the previously discussed non-consequentialist arguments.

A further worry may be raised. It is not clear that the relevant upstream speakers who require incentives are more deserving than those creators who would be chilled by copyright. We are attempting to decide whose work to elicit – those who will only speak if they are guaranteed a monopoly versus those who would be suppressed by the monopoly. The former threaten to speak only if the latter do not; by hypothesis, the latter make no similar demands on others' speech. One might hazard that the downstream producers are more deserving because they act more co-operatively. They are willing to speak without making the ability to compel others' silence a condition of their speech.

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Freedom of Speech and Related Objections to Intellectual Property Protection

As this discussion amply demonstrates, free speech issues permeate intellectual property arguments. There are yet further connections between freedom of speech and intellectual property. Some assert strong individual free speech rights against certain forms of intellectual property protection, whatever the strengths of its justifications. Copyright powers that forbid others from performing a play, quoting lengthy passages from a book or creating a new derivative work enable private parties to suppress or punish others' speech. Some take the view that however innocent the purpose of these restrictions, they violate the uninfringeable rights of all individual speakers to express whatever content they wish (Baker, 2002; Rubenfeld, 2002; but see Eisgruber, 2003). Others worry that strong intellectual property rights may enable private parties to constrain the social communicative environment, thereby threatening our interests in a flourishing democracy of timely, responsive, free exchange, evaluation, and critical reflection (Netanel, 2001; Lessig, 2001b; Benkler, 2003; Balkin, 2004).

On the other hand, many copyright advocates argue that these legitimate free speech concerns can be comfortably accommodated within copyright (Nimmer, 1970). Copyright only precludes the copying and distribution of particular expressions, e.g. particular books or articles. It does not permit anyone to own an idea. Anyone may communicate an idea so long as they use their own words (or those for which they receive permission). (Derivative works raise knotty questions for this distinction because they are not mere copies of the original expression. Yet, they are somehow to be conceived as extensions of that expression rather than different expressions of the original's underlying idea.) Further, most copyright systems include rights of fair use: roughly put, they allow others to use small portions of copyrighted work, e.g. to quote for purposes of commentary, criticism or education, so long as the use does not displace the market for the original material. Some defend fair use rights on the grounds that even if creators have special rights to their own work, they also have responsibilities to their audiences to allow them to use the works to prevent any harm associated with exposure to them or, more broadly, to permit them to fully digest these materials (Gordon, 1993; O'Neil, 2006). The accommodations within copyright still seem insufficient to some free speech advocates. Those who are not articulate or creative have significant interests in self-expression and participation in public dialogue; these interests may be better advanced through endorsing and using others' exact expressions as a vehicle rather than making clunky efforts of one's own (Tushnet, 2004). Ongoing issues in copyright, then, include what sort of use and how much must be allowed to be fair and whether fair use rights can ever be sufficient to satisfy free speech interests.

Other Issues: Illegal Downloading etc.

I have been discussing whether institutions of intellectual property rights are just. Do the objections made to them, if sound, provide moral support for individuals who wish to download or copy legally protected materials without permission? Illegal copying of

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music and videos for pure consumption (and resale) are, it is said, widespread. Some copy purely for profit or convenience, without much ethical deliberation. Others act more deliberately on the grounds that copyright law or its use are unjust – whether because copyright intrinsically violates free speech rights or because copyright holders, in practice, overcharge or wrongfully restrict use of copyrighted material.

These activities raise interesting issues about when one may violate a law one regards as unjust. Consider sheer downloading just for consumption. Most who regard copyright as unjust, in essence or in practice, nonetheless affirm that creators of intellectual property (et al.) deserve some compensation. Most who download would admit they are free-riding off the producers and the consumers who do comply. May one free-ride when one's reason is that the system of production and distribution of an important good is itself unjust and there is no easily accessible alternative mode of access?

Were disagreement with institutional approaches to social problems sufficient grounds for disobedience, no political system that relies on mutual compromise could thrive among free-thinking people. On the other hand, disobeying deeply unjust political decisions such as racially discriminatory laws is often well justified. How should we regard illegal downloading?

If the downloader's objection centres on the prices of intellectual products, the situation resembles more general dissatisfactions with high prices set by owners of capital. However, it seems questionable to take and refuse to pay the grocer for an unreasonably priced litre of Coca-Cola, especially if one could agitate politically within a functional political system for price controls, freer trade or other methods to ensure fairer terms of exchange. Perhaps it is wrong to take the Coke because the grocer will lose the sale and what she paid for it. By contrast, illicitly downloaded intellectual property does not preclude bona fide consumer sales of the same property to willing, paying consumers. Still, other things equal, it seems wrong to stow away on an empty bus that overcharges, even if the stowaway will not increase operating costs or displace paying passengers.

Perhaps matters differ if the price were so high that it interfered with people's ability to fulfil basic needs, e.g. if the beverage were scarce water or milk, or the bus were the sole means of transportation. Is intellectual property like scarce milk or water? Those who regard intellectual property as common property, or expression and communication as basic human needs, may view high charges on intellectual property as akin to commandeering the public well and charging high prices for (publicly owned) water. Some may distinguish between communication for pure entertainment from communication of (other) socially, politically or personally significant facts or opinions. Illicit downloading of the latest Jackie Chan action film may differ from photocopying readings for purely educational use or downloading 'Eyes on the Prize', the seminal documentary series about the civil rights movement, long unavailable due to obstacles posed by copyright (Brown and Harris, 2005). Others resist this idea, pointing out that many intellectual products have rough substitutes. A particular product's underlying idea may be otherwise expressed; other means and works may be found or generated for entertainment and education.

Two further contrasts between illicit downloading and historical forms of civil disobedience may be drawn. First, even if illicit downloading of (some) intellectual works importantly differs from mere free-riding for convenience, it nonetheless inflicts

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disadvantages on some relatively innocent people, e.g. those whose work may not get distributed or produced because the systemic costs of free-riding reduce production of riskier works, and those paying consumers whose costs are higher because some free-ride. By contrast, many of those disadvantaged by civil disobedience to apartheid and Jim Crow laws were either more actively complicit in or benefited by the system of injustice. Second, simultaneous efforts to effect political change have standardly accompanied conscientious civil disobedience. Some illicit downloaders download as a form of public protest while actively pushing for reform – e.g. shorter, more permissive periods of intellectual property protection or alternative methods of funding production and distribution. Others, though, merely download for convenience on the grounds that the current system is unjust but do not make efforts towards a larger permanent solution. (Although, sufficiently widespread indifference to the rules may itself engender enough disrespect or despair over their inefficacy to trigger or facilitate others' efforts at social change.)

This raises the interesting question: can it be a sufficient reason to disobey the law that it is unjust, even when there are relative innocents who are (sometimes only mildly) disadvantaged, or must one also participate in positive efforts to establish a just solution? Others create unauthorized derivative works but make these works freely available to others for consumption and further transformative use. These and other practices of reciprocity nicely pose the question of whether it makes a difference to the permissibility of illicit use that it is not done to gain advantage or seek profit and that one makes one's own work available on the same basis that one takes.

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