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Against Strong Copyright in E-Business

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ABSTRACT

As digital media give increasing power to users—power to reproduce, share, remix, and otherwise make use of content—businesses based on content provision are forced to either turn to technological and legal means of disempowering users, or to change their business models. By looking at Lockean and Kantian theories as applied to intellectual property rights, we see that business is not justified in disempowering users in this way, and that these theories obligate e-business to find new business models. Utilitarian considerations support disempowering users in this way in some circumstances and for the time being, but also show that there is a general obligation to move to new business models. On these moral bases, as well as on practical bases, e-business ought to refrain from using the legally permitted strong copyright protections, and should instead find ways of doing business which support, value, and respect the technical capabilities that users have gained.

INTRODUCTION

One of the most ethically contentious areas of e-business is the assertion and enforcement of intellectual property rights by businesses based upon content provision. Businesses engaged in content delivery tend to view themselves as sellers of goods rather than service providers, and this difference in perspective has significant social, practical and ethical implications. By debunking the idea that strong copyright over content in a digital context is morally supported on Lockean or Kantian considerations, and by shifting the burden of proof on economic and utilitarian considerations against those who employ strong forms of copyright, the chapter demonstrates that there is generally a moral obligation to refrain from use of standard (or, *maximalist*) copyright protection in e-business. Thus, businesses based upon content provision should, for both moral and practical reasons, change their business model from the product to the service economy.

While it is well established in U.S. law that sweat-of-the-brow does not generate goods subject to copyrighting, there is still a strong intuition that a moral, if not a legal right over expressive works is generated through labour. By an investigation of the Lockean presumption against the right of exclusion, we can see that a viewpoint true to Locke's moral emphasis on the preservation of freedoms held within the state of nature would not support such a right given the current structure of digital media. Indeed, Locke himself, even though he wrote in a far different communications context, supported only limited intellectual property rights, which he justified on a utilitarian, not a labour-desert basis.

The Kantian basis of intellectual property rights is approached next. The Kantian view centers on author's rights, and is far removed from the current legal regime in place in the U.S. and spread internationally through the World Intellectual Property Organization, but again speaks to a strong intuition that a moral, if not a legal right to exclusion is generated in expressive works.

Here, by looking at Kant's *Metaphysics of Morals*, as well as his essay "On the Wrongfulness of Unauthorized Publication," we see that the moral basis of the right of exclusion is founded upon the communicative relationship between an author and her public, and offers no support to the use of strong copyright law in our current communications context. Instead, a Kantian perspective would today support open-content models utilizing public domain dedication or GPL/Creative Commons licensing.

Finally, a utilitarian perspective—the explicit basis of intellectual property rights in the Anglo-American legal tradition—is considered. The moral basis being found in consequences rather than in natural or moral rights, the great success of the open-source movement is the primary consideration. By looking at recent history, it can be seen that the practical necessity of a right of exclusion over expressive works within our current communications context is suspect at best. The primary utilitarian considerations holding weight today have to do with the large role played by copyright-based industries in our economy, and the disutility that would be caused by undermining the basis of these industries. This consideration, while important, is counterbalanced by considerations of the loss of public rights required by the use of strong copyright.

Several examples of currently marginal but emerging business models are then presented, including shareware, subscription, patronage, and value-added delivery models. These examples illustrate how a conceptual shift in content-delivery-based e-business from a product to a service model is able to satisfy practical utilitarian and economic considerations while remaining true to Lockean and Kantian moral considerations. In conclusion, it is argued that e-business has an obligation, on the grounds previously explained, to refrain from the use of legally available strong copyright protection.

BACKGROUND

The current debate over copyright is a tangled mess. Concerns with individual and corporate rights are intertwined with concerns about economic and social effects, and within each of these kinds of concerns there are a great number of stakeholders whose interests are not readily ranked. The rights in question include those of various parties who may or may not be the same person: the author, the creator, the copyright holder, the purchaser, the consumer, the licensee, and the user. Within larger societal concerns, the field is no less crowded: we are concerned with the freedom of the market, the freedom of the culture, and the freedom of expression; and also with the benefit of the public, of the entertainment industry, of the national economy, and of the entrepreneurial impulse. We are rightly committed to all of these concerns, and the majority of differences in opinion between those who argue the strength of copyright protection should be diminished and those who defend full use and continuation of current copyright protections arise from little else than different views on the relative importance of these concerns. Ought we to view the rights of the author as determinative of the rights of the user, or the licensee? Ought we to view a largely corporate-owned culture as an acceptable price to pay for the health of our economy? To what extent does encouraging innovation through profit motive justify governmental protection of industry practices which disable free use of purchased goods, or which infringe upon the privacy of consumers and users?

In order to decide these issues, we tend to fall back to established positions. This takes place both practically and intellectually. Practically, we often respond to these shifts in architecture—to use Lawrence Lessig's term (2006)—by attempting to fit applications of technologies into the ruts already worn by previous architectures, maintaining the economic relations, rights, and privileges required by previous technical regimes. The movement towards Digital Rights

Management (henceforth DRM) systems is straightforwardly an attempt to make the new media act like the old in order to keep stable the power relations between content producers, business, and the market. Intellectually, we also fall back to established positions; in the realm of copyright in particular, we fall back upon Lockean, Kantian, and utilitarian foundations of intellectual property rights.

The constitutionally granted power of Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries" (Federal Convention of 1787) has usually been interpreted in a strictly utilitarian manner. For example, we see Justice O'Connor's statement that "the 1976 revisions to the Copyright Act leave no doubt that originality, not "sweat of the brow," is the touchstone of copyright protection in directories and other fact-based works" (*Feist Publications v. Rural Telephone Service*, 1991). This interpretation reinforces the implication, based upon the optional nature of Congress' granting of intellectual property protection, that the law recognizes these author's and inventor's rights as artificial rather than natural, as stated before by Chief Justice Hughes: "copyright is the creature of the federal statute passed in the exercise of the power vested in the Congress. As this Court has repeatedly said, the Congress did not sanction an existing right, but created a new one" (*Fox Film Corp. v. Doyal*, 1932). Nevertheless, it seems that Lockean intuitions may underlie recent legislative action, particularly the automatic extension of copyright over works already created provided in the Sonny Bono Copyright Term Extension Act of 1998 (henceforth CTEA), and the extreme length of the term created thereby. Justice Breyer's dissent in *Eldred v. Ashcroft* (2003), while it did not claim that the CTEA emerged from Lockean intuitions, provided many strong arguments that go towards establishing such a claim, such as that the CTEA would extend copyright terms to such an extent that these rights would serve the interest of providing income for authors and their descendents at the expense of public commerce in ideas and expressions, thus promoting to an unprecedented extent intellectual property owners' right of exclusion—the right to prevent others from utilizing intellectual property (henceforth IP) for profit, non-profit, or personal purposes—over the social and utilitarian benefits of releasing those rights.

These various foundations of intellectual property rights (henceforth IPR) are rational ones, and even if the motivation to provide IPR protection falls outside of the utilitarian intent that seems implied within the constitution, it is certainly possible that the legislation may still be constitutional even as the motivation behind it is not. These various foundations have, indeed, been part of the public dialog about IPR for some time, and our interest in non-utilitarian justifications of IPR did not emerge from obscurity with the rise of digital media. And yet, the shifting architecture of the methods of articulation of IP provides radical new possibilities to authors, users, and owners of IP, and as we return to our Lockean, Kantian, and utilitarian intuitions, it is worthwhile to reconsider basic forms of the theories which underlie those intuitions in this new and changing social/technological milieu. What we find is remarkable.

In the following reconsideration of these theories, I attempt to provide evidence that, when we consider copyright protection over digital objects, not only can these traditional sources of justifications of IPR not be presupposed, but instead that, when digital objects are considered properly, the burden of proof ought to fall upon the copyright maximalists rather than the copyright minimalists. In this discussion, since I am trying to address what e-business should do today, the copyright minimalist and maximalist positions will not be approached as positions on the law—e.g. whether copyright terms should be extended to life of the author plus seventy years, as they are under the CTEA, or reduced to the earlier term of fourteen years, as in the Copyright

Act of 1790—but instead only as positions on how to use the legal structures currently in place. In this context, the *copyright maximalist* position can be defined as the position which holds that it is appropriate to use the strongest copyright protection allowed under current law; a simple "all rights reserved" assertion of copyright. The copyright minimalist position, which I advocate here, can be defined as a position which holds that only a weaker protection can be morally justified, such as those provided by Creative Commons licenses or the GNU Public License. These less extensive uses of copyright law allow users to retain various rights, such as the right to share or reproduce content with attribution, the right to remix for non-commercial use, or the right to access and use source code so long as the resulting software is shared alike.

The case argued here is a limited one in a few important ways:

First, I do not hold that any of these ethical theories are right or wrong, or that any is more important than any other. I discuss these because they are the theories that most strongly influence public opinions and beliefs, regardless of how well- or ill-founded they are on a moral, philosophical, or constitutional basis. It is for this reason that I consider these perspectives rather than others, which may arguably be more correct, useful, or productive.

Second, I am addressing digital media, and digital media alone. Issues about analog IP in an increasingly digital world are beyond the scope of this inquiry.

Third, I address only copyright, and not other forms of IPR. Digital technologies have transformed IPR of all kinds in important ways, but only in the realm of copyright have they brought about widespread public skepticism regarding the justice of providing such rights. Thus, it is here that our intuitions seem to have the greatest—or at least most apparent—mismatch with current law.

Fourth, I will not discuss international issues in IPR legislation, but will concentrate on U.S. copyright law. IPR varies in significant ways in different nations, and enforcement varies even more, but U.S. copyright-based industries have been particularly aggressive in trying to export U.S. laws to other nations, both through industry groups such as the Business Software Alliance and the Recording Industry Association of America, and through the World Intellectual Property Organization. For this reason, U.S. law is of particular global relevance. Nevertheless, in order to maximize the relevance of these arguments to all parties in global e-business, I will not concentrate on legal structures, but instead the moral arguments that may or may not serve as a foundation to a variety of legal structures.

Fifth, and finally, I will not deal extensively with contemporary reformulations, rehabilitations, or reconstructions of the canonical ethical theories discussed. As valuable and powerful as such contemporary theories are, my intention here is not to prove that these theories are unable to support strong copyright protection, but rather to show that the basic intuitions which emerge from each of these traditional justifications of IPR are tied in important ways to pre-digital media. My goal is simply to shift burden of proof by raising doubts from within canonical versions of these theories, and for this, we need not show that such proof cannot be given.

THE ETHICS OF COPYRIGHT OVER DIGITAL GOODS

We will consider Lockean, Kantian, and utilitarian justifications of copyright in the light of digital modes of articulation. In order to avoid biased terminology, I will often refer to intellectual goods rather than intellectual property. Locke and Kant both offer rights-based justifications of intellectual property laws. When considering both Locke and Kant, we will see that their theories

no longer imply a moral right that requires legal protection, and this will be sufficient to show that there is therefore no justification to use these legal protections, since they limit the rights and freedoms of others. Utilitarianism, however, even if it does support strong copyright, does not do so by asserting a moral right, but only because the granting of such an invented right of exclusion over intellectual goods is for the best for society as a whole. Here, it will be shown that this "copyright bargain" is questionable, but, due to the consequentialist reasoning involved, it can only be asserted that the burden of proof should be on those who would use strong copyright protection, not that such use will always be unjustifiable.

The Lockean Perspective

It is often suggested that the writings of John Locke—specifically the second of his *Two Treatises on Government*—may provide a justification for strong copyright laws, and public intuitions supporting IPR are often based upon Locke's labour-desert theory of property rights. A critical investigation of the Lockean theory, taking digital media into account, reveals that it no longer supports the idea of a natural right which corresponds to copyright protection, and that it instead affirms the natural right to copy and to produce derivative works.

The famous and most oft-quoted passage, from *Chapter V: Of Property* (Locke, 2005), is as follows:

> Though the earth, and all inferior creatures, be common to all men, yet every man has a property in his own person: this no body has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature hath placed it in, it hath by this labour something annexed to it, that excludes the common right of other men: for this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good, left in common for others. (Ch. V, §27)

"Mixing" of one's labour with the goods of the world, given to mankind in common by God, implies a right to the fruits of that labour, for, as Locke argues later, "if we will rightly estimate things as they come to our use, and cast up the several expenses about them, what in them is purely owing to nature, and what to labour, we shall find, that in most of them ninety-nine hundredths are wholly to be put on the account of labour" (2005, Ch. V, §40). If we follow Locke in holding that the value in the product springs from the labour mixed therein, and that the labour therein is by nature property of the labourer, the labourer then has a natural right to the value of the product with which he has mixed his labour.

This theory is a fine one when speaking of acorns and apples; when your labour provides you a good which has a use to you, whether that good emerges merely from collection of the bounty of nature or an industrial use of natural resources, you certainly have a moral claim over such a good. The idea that this theory can be applied to intellectual property, wherein what is collected and worked is not seed and soil but rather ideas, sounds, words, or facts of nature, is not an irrational one. It might additionally be argued that, the labour of the creation of such a good being of such a greater proportion than the labour involved in the subsequent utilization of it by parties

other than the author, the author should retain a proportional right over such derivative works. This is certainly the viewpoint which has guided our extension of the Constitutional allowance of the ability of Congress to provide protection over "Writings and Discoveries" to the arguably extra-constitutional (cf. e.g. S. Vaidhyanathan, 2003) ability of Congress to legislate protection over works derivative of these writings and discoveries. There is, indeed, support from Locke (2005) on this point, for he argued that

> [h]e that had as good left for his improvement, as was already taken up, needed not complain, ought not to meddle with what was already improved by another's labour: if he did, it is plain he desired the benefit of another's pains, which he had no right to, and not the ground which God had given him in common with others to labour on, and whereof there was as good left, as that already possessed, and more than he knew what to do with, or his industry could reach to. (Ch. V, §34)

Thus, if I should have words, ideas, sounds or facts of nature available to me which are as good as those already taken up by others, I have no right to meddle with those already improved by others. The Beatles do not have dominion over the sounds of which their music is made, and should I wish to make music of my own I have as much access as they to those sounds, and therefore have no right to trespass upon the particular ways in which they have been already cultivated.

We may first note a serious disanalogy that presents a problem for this application of Lockean property theory: digital objects, and songs in general, are non-rivalrous goods. When I take your acorns or apples, your cultivated land or, indeed, your book, my benefit is a rival of yours; I gain only through your loss. When I make a copy of your digital file or when I sing your song, you are not the less for it. Thus, when I copy software you have written, for example, I do not trespass upon your right to the fruits of your labour—I have in no way prevented you from reaping the benefits of your cultivation of mathematical facts. On the other hand, when you prevent me from sharing your music, making use of your source code, or remixing your movie, you prevent me from reworking those materials and being recognized for my addition of my labour.

It may be objected that I have lessened the profits that you might have realized through the sale of copies. This argument, however, is *ex post facto* and has no place here, for it already assumes that you have a right to control such copies, and this supposed right is precisely what is in question. Nevertheless, copies and derivative works are certainly a means of benefiting by the labour of another, and it may yet be that we owe to the author some share in the benefit we have therefrom taken.

If we should, for example, remix a Beatles song, we mix an amount of our own labour with the sounds, words, and ideas with which they have already mixed their labour. But these sounds, words and ideas are not found within virgin untouched nature. Do the Beatles then owe a portion of their benefit to, for example, the descendants of those who contributed to the invention of the modern guitar? To assert so would be ludicrous. The appropriation of the guitar has become akin to the appropriation of a fact of nature, for, just as Locke said regarding untamed nature, such appropriation being non-exclusive, it keeps nobody else from profiting from her own appropriation of the guitar. As Locke (2005) worded it:

> Nor was this appropriation of any parcel of land, by improving it, any prejudice to any other man, since there was still enough, and as good left; and more than the yet

> unprovided could use. So that, in effect, there was never the less left for others because of his enclosure for himself: for he that leaves as much as another can make use of, does as good as take nothing at all. No body could think himself injured by the drinking of another man, though he took a good draught, who had a whole river of the same water left him to quench his thirst: and the case of land and water, where there is enough of both, is perfectly the same. (Ch.V, §33)

The Beatles do not infringe upon the natural rights of the inventors of the guitars they used, for they have not taken anything from them, or deprived them of anything whatsoever. They, further, have taken nothing from the commons by taking the instrument for their own use, for they in so doing have kept nobody else from doing likewise. The same can be said of a later artist using the music of the Beatles. DJ Dangermouse, for example, has taken up the work of those before him, mixing the Beatles' *White Album* and Jay-Z's *Black Album* in his *Grey Album*, but he has done so in a non-rivalrous, non-exclusive way, leaving, in effect, as much commonly available after as before his appropriation.[1]

It may be that we wrong the authors in some other way by such appropriation, but we do not tread upon their property rights in a Lockean perspective. For Locke, what is questionable is exclusion. This is necessary with regard to goods whose possession is rivalrous and exclusive, such as land, and it is this necessity that motivated Locke's attempt to justify holding property. As Locke (2005) stated:

> it is very clear, that God, as king *David* says, *Psal.* cxv. 16. *has given the earth to the children of men;* given it to mankind in common. But this being supposed, it seems to some a very great difficulty, how any one should ever come to have a *property* in any thing. (Ch. V, §1)

If you have mixed your labour with elements of the earth held in common, you have, he concludes, a natural right to possess that cultivated good. If that good is, however, of a kind which does not *require* exclusion in order for you to reap profits from it, the superaddition of exclusion can find no justification in Locke, for Locke seeks only to justify the necessary evil of exclusion, not to justify exclusion when wholly unnecessary. Thus, you have a natural right to the song that you write: I ought not to deprive you of the lyrics you have written down. However, you have no right to tell me not to sing it.

Tom Bell (2004) has put the point more generally:

> [C]opyright and patent protection contradicts Locke's justification of property. By invoking state power, a copyright or patent owner can impose prior restraint, fines, imprisonment, and confiscation on those engaged in peaceful expression and the quiet enjoyment of the tangible property. Because it thus gags our voices, ties our hands, and demolishes our presses, the law of copyrights and patents violates the very rights that Locke defended. (p. 4)

If you should write a computer program, you have a right to object if I destroy your copy. In just the same way, if I should copy your program, I have taken nothing from you, and you have no right to keep me from free and full use of my copy of this program. We talk about property rights as a "bundle" which may or may not include certain particular rights, such as the right to

exclude others from one's property, to use it, to profit from it, to rent it, or to sell it. Locke provides a strong defense of some rights in some ways, but his theory offers no support for the extension of the right of exclusion over copies of digital objects.

The Kantian Perspective

It may be argued that a Kantian justification for the extension of copyright over digital objects may be given on the basis that if we consider the maxim "I intend to copy this digital object" we shall find that it is not universalizable, for if everybody copies digital goods, nobody will be able to afford to produce further originals to copy. Furthermore, it may be argued that doing so does not respect the creator of the digital object as an end to herself, but treats her merely as a means. An additional Kantian justification of the extension of copyright over digital objects, one more in line with the continental European legislative tradition of author's rights, might be given in the argument that such objects are often or always expressive in nature, and the protection of the data which constitutes an authorial expression is required if the integrity of that expression is to be adequately protected. These arguments will be addressed in this order.

First, we ask, following Nissenbaum (1995), whether the maxim to copy my neighbor's software is universalizable. It seems to many people that such behavior is equivalent to theft,[2] but this ignores the non-rivalrous nature of digital objects.

Kantian moral theory claims that unethical actions are those which fail to accord with what Kant calls the "categorical imperative": That the maxim (or, the rule that one implicitly follows in the action) should be capable of being willed as a universal law of human behavior. So, approximately, we can ask whether it is possible for all other actors to take the same action we are considering. If it is not possible, or if a world in which everyone acted in such a manner would be undesirable, then we can tell that we are making an exception of ourselves in this action. We can consider this action beneficial only because most others refrain from doing as we are doing. Hence, Kant claims that when we cannot will the maxim of our action as a universal law, we are using others for our benefit.

Consider theft of some useful analog object from my neighbor. When I take valuable property, I am thereby given a good, and my neighbor loses an identical good. In one version of the famous Kantian argument I steal from my neighbor and thereby gain a loaf of bread, which is fine and good, but we discover that this is unfortunately not universalizable, for if everybody stole bread then those in possession of bread would stop leaving it out in the open where people can get at it, or perhaps bakers would stop making it altogether.

When I copy my neighbor's digital object, I am thereby given a benefit, and my neighbor is none the less for it, for digital objects are similar to an idea in that, in Thomas Jefferson's (1813) words, "he who receives an idea from me, receives instruction himself without lessening mine." For this reason already, we see that the categorical imperative does not provide as strong an argument against copying of digital goods as it does against the seizure of analog goods. If everybody copied their neighbors' digital goods, this *in itself* should in no way cause any reticence on anybody's part, unless it can additionally be reasonably expected that such an imagined law of nature would preclude the creation of further such goods, or would so greatly diminish their number or quality that we could not will to live in such a world. To make this more clear, consider Christine Korsgaard's (1996) restatement of wherein the wrongness of an immoral action lies according to Kant: "your action would become ineffectual for the achievement of your purpose if everyone (tried to) use it for that purpose" (p. 78).

Perhaps, although my neighbor is not directly harmed by my action, I am nevertheless using others because I am neglecting to support authors of digital objects, and the corporations that employ them, in order to allow for the continued creation of such products. The question then is whether, if everybody copied digital objects, new digital objects would continue to be created. The answer here is quite clear: there would be no shortage of digital goods. It is true that the profitability of large-scale digital good production would be greatly diminished, but this is not the only source of digital goods. The software released as freeware, under GNU general public license, under open-source BSD license, or otherwise copylefted, is sufficient to replace a wide variety of proprietary programs, and the availability of the source code of proprietary programs would provide ample resources to increase the number of such non-proprietary applications, and quite likely at an higher rate of increase than that provided through production under fully proprietary licensing. Similar licensing is being applied to other digital goods, such as music, video, and written works, and many authors feel that these licenses are preferable to standard copyrighting, which tends, in many important ways already discussed, to discourage innovation and creation. Thus, we see again that the categorical imperative, in its first formulation, is not at odds with the maxim to copy my neighbor's digital objects.

It may be objected that the maxim should read instead "I intend to copy *proprietary* digital objects whenever convenient," for the above confuses the copying of freeware or copylefted goods, which is equivalent to accepting a gift or continuing a conversation, with the piracy of commercially produced content, which is arguably equivalent to theft.

Admittedly, I have a duty to respect the law, as I cannot consistently will that everybody should break the law whenever they find it convenient to do so. This does itself establish a Kantian argument against so-called piracy, but not by means of any particular aspect of the action itself. In further support of this position, we may note that the creators of these digital products had a reasonable expectation of profit from its resale, and to deprive them of that profit which the law guarantees them would treat the programmers and corporate managers and CEOs as a mere means, for they no doubt have life plans which are dependent upon the income which our unlawful behavior would deprive them of. We are in a system wherein they are playing by the established rules, and for that reason, we have a duty to hold up our end of the bargain.

This is of course a conservative Kantianism, for it would be possible to argue that we never consented to this system in any meaningful sense, or perhaps that one ought not respect legislation which requires behavior which is immoral, an allegation which some have argued. Most notable is Richard Stallman's argument that copyright in fact requires us to act immorally and erodes basic social goods, an argument which he brings together by the slogan "cooperation is more important than copyright" (2004). A more modest line is taken by Helen Nissenbaum (1995), who argues that at least some situations exist in which it is moral to ignore copyright. The most comprehensive argument along these lines of which I am aware is Michael Perelman's *Steal this Idea* (2002), which makes a book-length case against intellectual property rights in general.

Even if we stay true to the conservative Kantianism, and respect laws in place simply because they are the laws in place, this is an *ex post facto* justification, for it tells us nothing about whether the law supports or inhibits moral behavior. If the copying of proprietary digital goods cannot be shown to be wrong outside of the fact of its illegality, we should conclude that it is wrong in the way that sitting at a whites-only lunch counter may have once been wrong: to transgress here is to neglect a duty to be lawful but is otherwise acceptable behavior, and thus the law itself should be considered questionable. If the transgression of this law violates no duty other than that of lawfulness, and if this law does not continue to fulfill the obligation in the

service of which it was created, then we will conclude that copying proprietary digital objects is indeed immoral, but we must *also* conclude that *making use of* this law through asserting strong copyright is itself immoral, for it unnecessarily restricts the freedom of others.

When we look at the goals stated in the enactment of copyright law in the Anglo-American tradition, the justifications are (1) to ensure that the author of a useful expression is benefited, or at least not ruined, (2) to encourage the creation of such works, and thus (3) to benefit the public in general.[3] If we ignore, for a moment, the existence of digital media, we easily see a Kantian justification of such legislation. If we consider the creation of a useful and successful complex expression, say a manual of some kind, the production of this expression presumably requires a fair amount of labour while its reproduction requires relatively little. In this case, if we universalize the maxim of freely reprinting useful expressions, we see that this practice would not be sustainable, for nobody would find it worth their while to create such expressions. Thus, copyright law does have a clear and significant moral basis, especially if we also consider that to discourage such expressions would constitute a purposeful impediment to the realization of human potentialities, as in accord with Kant's third example in the second section of the *Groundwork*, 4:423 (1996a, pp. 74-5).

When we again take digital media into consideration we see that the law no longer has this moral basis, for the free reprinting/reproduction of digital goods can now be willed as a universal law. With regard to the obligation to assist the creator of such useful expressions, (1) above, we may easily note that the expenditures required in the creation of such complex expressions as software are no longer prohibitive, as evidenced by the fact that significant and increasing numbers of such creators choose not to receive recompense for their labour even when given the legal means to do so, and, further, that such recompense, in the cases of software and music at the least, is not limited to retail sales in its origin, but can profitably be shifted into the service economy, as will be discussed further below. This itself is enough to establish that objectives (2) and (3) no longer require these laws, but it is worth noting that there is also significant evidence that copyright over digital objects is not only unnecessary but actually detrimental, discouraging both innovation and the public benefit which is to be gained from such innovation (e.g. Nadel, 2004; Perelman 2002).

We find more concrete discussion of the issue in Kant's article "On the Wrongfulness of Unauthorized publication of Books" and the related arguments in *The Metaphysics of Morals*.[4] Kant argues that writing does not constitute a plain object, but is instead also a form of speech, and thus an expression of the will of the author. Then there is the fact that the author chooses a certain publisher, a certain provider of the "*mute instrument for delivering the author's speech to the public*" (1996c, p. 30), which can then carry out the will of the author in the name of the author. This means that another publisher which would publish without authorization would express the will of the author in his speech, yet would do so against the will of the author, for the author *cannot* authorize more than one publisher to carry his expression to the public.

It is this last point that is least obvious and most crucial. Specifically, the argument is that the author cannot authorize more than one publisher as the instrument of their speech for "it would not be possible for an author to make a contract with one publisher with the reservation that he might allow someone besides to publish his work" (1996c, p. 31), because the two would "carry on the author's affair with one and the same entire public, [and] the work of one of them would have to make that of the other unprofitable and injurious to each of them" (1996c, p. 31). So, the author as a matter of *fact* cannot *actually* authorize two publishers to publish their speech, for no publisher would agree to such an arrangement. It is for this reason that another publisher cannot

assume the permission of the author, for that permission cannot be granted, and thus they would bring the speech of the author to the public against the possible will of the author.

What is remarkable about this argument is that the claim of the authorized publisher against the unauthorized publisher is guaranteed by the impossibility of the consent of the author; an impossibility, but not a logical impossibility. We see, further, that with regard to digital objects this is no longer an impossibility, and thus the majority of the argument simply does not apply to digital objects.

Now we ask: Is it possible for an author of digital objects to authorize multiple publishers? Yes, it clearly is, for publishers need not be in competition with one another, though they speak to the same public, for they may not charge for the product at all. This conflict only arises with regard to proprietary digital goods.

Furthermore, Kant (1996c) argues that "if someone so alters another's book (abridges it, adds to it, or revises it) that it would even be a wrong to pass it off any longer in the name of the author of the original, then the revision in the editor's own name is not unauthorized publication and therefore not impermissible" (p. 35)[5] It seems this Kantian source does not support the kind of closed-source proprietary license currently prevalent, but instead supports only a license no more restrictive than the GNU GPL (General Public License), for if an adaptation is potentially sufficiently differentiated to be appropriately considered an independent work, then to prohibit the use of the first expression in the creation of an *ex hypothesi* different expression would clearly be outside of the realm of the author's rights.

So it seems that Kant may be used to support the judgment that it would be wrong to copy proprietary digital objects, for this could potentially be the act of a distributor acting in the name of the author, but against the will of the author. But it is far less clear that Kant would support making digital objects proprietary to begin with, since this is no longer necessary to express the communication of an author to her public. Even if Kant does not disallow making such goods proprietary, his writing and reasoning clearly does not support closed-source licensing, and even directly ridicules the very idea of contributory infringement.[6] So, on the basis of these arguments, it seems that Kant would require us to respect the chosen distributor of an expression unless the author authorizes multiple or unlimited distributors, but that authors and rightsholders are not justified in preventing the public from access to and use of code, or from the creation of derivative works.

The Utilitarian Perspective

Utilitarianism claims that the moral action is the action which produces the greatest net benefit for all parties involved. The utilitarian view, being based on the consequences for happiness or suffering, validates talk of "rights" only as a means to an end. Even fundamental rights, such as freedom of speech, are viewed as having an instrumental value rather than an absolute justification. Still, on a utilitarian view, some things, such as freedom of speech, are viewed as being so essential to happiness that they should not be abridged except in the most extreme cases. Hence, the utilitarian will claim that we should have a robust "right" to free speech because without it our society would be dysfunctional, ruled by prevailing opinion no longer subject to criticism, and we would feel unable to develop and express ourselves.

A utilitarian view of property rights in general is similar. Without the ability to own property, and the right to exclude others from use or enjoyment of it, we would lack many assets which seem to be basic to human happiness, ranging from the ability to enjoy the fruits of our labour to

the inability to be secure in our plans for the future. If there is a utilitarian basis to rights over intellectual goods, there must be similar widespread and basic benefits for us, either individually or as a society. As we have already discussed, though, digital goods are non-rivalrous, so this right cannot be based on our individual ability to keep possession of our creation, for copies and derivative works do not remove our copies from our possession. Instead, a justification must instead come from a larger social benefit produced through the provision of this legal protection.

The most basic utilitarian intuition behind copyright protection is that the profit motive mobilized by the granting of a temporary monopoly provides a greater diversity and amount of intellectual goods *to the public*. Closely allied to this is the claim that such goods will be of higher quality, for producers of such goods will be better able to make investments of money and time, due to the possibility of remuneration granted through the artificial monopoly created by copyright, amounting to a market-based system of patronage.[7] This is what is referred to as the "copyright bargain": The right of exclusion is granted, for a limited time, not because there is any inherent benefit in this temporary monopoly, but because the temporary public loss of the right to use that copyrighted material is counterbalanced by a public benefit when that material falls out of copyright protection. This, of course, is only a good bargain when the goods produced remain of greater balance *after* the copyright term expires than the immediate value of the (presumably fewer and worse quality) goods which might have been produced in the absence of this legal protection.

The "copyright bargain," it seems, may have hitherto been a good deal for the public on the whole, however, with the widespread availability of digital technologies, it is possible for independent members of the public to produce goods of similar utility to those produced by the IP industries, and the production of these goods is not dependent upon granting a right of exclusion, due both to increasingly effective alternate methods of mobilization of profit motive and to the increasing relevance of non-profit-based motives as production costs fall. The utilities given to the public by the "copyright bargain" may now be realized in the absence of copyright to a far greater extent, and thus the concrete benefit of copyright protection has been lessened. Concurrently, the social cost of effective copyright enforcement has risen—i.e. the "copyright bargain" is ever more onerous to the public in terms of opportunity costs, loss of freedoms, and imposition of externalities. Finally, it is reasonable to expect technological progress to continue to lessen the benefit of copyright protection relative to the absence of such protection, and to continue to increase the social costs of such protection.

The most basic and intuitive version of a utilitarian argument in favor of copyright goes approximately as follows. An exclusive right granted through copyright allowed for works to be created that would otherwise not have been. The expense required by producing and distributing copies of creative works was such that collective action was necessary; this was accomplished through granting the right of exclusion to authors, such that it could then be granted to corporations that were able to bear the costs of manufacture and sale which the author could not bear herself. Additionally, this has allowed for greater expenditures of both time and money on the part of the author, as publishing houses and their equivalents are able to use profits from other authors and prior works to speculatively support the creation of new works through book advances, record deals, upfront payment of actors, regular employment of software engineers, and so forth. Through this profit-based production, corporate support allows for the creation of works far more costly than would otherwise be produced. The concrete benefit which the public gains through these works form the basis of the copyright bargain as usually understood. The superadded value to these cultural products relative to those which would be produced in the

absence of the collective advantage provided by corporate actions—be this benefit in terms of artistic or entertainment value, or simply in terms of the volume of works created—is meant to counterbalance the loss of rights to the public in their use of these works, which loss is mitigated by the temporary nature of this loss of rights. This bargain was, of course, a better deal for the public in the past, both due to the more limited term of copyright that was in place and to the far greater necessity of involving profit-motivated concentrations of capital.

The harms caused to the public by the "copyright bargain" rise sharply with widespread increased technological capabilities. As the means of production of industries based on intellectual goods have come increasingly within the possession of the public, industrial and private employment of ideas have become increasingly indistinguishable. It is impossible to tell whether I have sent somebody a music file as a form of private communication, as I might tell somebody about a book in recommending its purchase, or whether I have sent the music file as a form of industrial manufacture, as if I had *manufactured* a book in order that its purchase should be unnecessary. The priority of the industrial interpretation has been codified in law under the No Electronic Theft (NET) Act and, thus, the public is subjected to the strict requirements with which corporations were originally burdened in order to benefit the public. These basic forms of sociality are at risk, for as our lives become increasingly involved with digital technology, my inability to lend my neighbor a copy of e.g. some software, becomes an increasingly significant intrusion of business concerns into interpersonal and community relationships (Nissenbaum, 1995). The shrinking scope of fair use is, of course, also a significant concern, as it becomes increasingly difficult through DRM for the end-user to do simple space- and time-shifting, especially as DRM is given legal protection through the anti-circumvention provisions (§1201) of the Digital Millennium Copyright Act.

In order to enforce the artificial monopoly granted to the copyright holder, increasingly significant intrusions must be made on the public. The public is limited in use, sharing, and enjoyment of cultural artifacts, and even the astronomical fines imposed seem insufficient to deter copyright infringement. From this, we should not simply conclude that music- and file-sharers are incapable of properly weighing risk and reward, but we should consider instead that sharing elements of culture with others may represent a human good as basic as freedom of speech, and that the file-sharer simply would prefer to put herself at risk of bankruptcy than to submit to a legal system which disallows her from this basic form of sociality.

These attempts at enforcement, furthermore, are not only onerous but also ineffective; perhaps doomed. In a global communications context, files can simply be hosted in localities where IPR are either weak or weakly enforced. The only options for a truly effective enforcement involve either (1) convincing the public that they ought not share, download, or remix IP, (2) spreading strong copyright law and strong copyright enforcement throughout all wired nations, or (3) monitoring individual internet connections to search for infringing packets. The first option seems both undesirable and unlikely: as noted above, sharing culture may be a human impulse basic to our social existence, and to convince the public otherwise may be difficult, and may be accomplished only at the expense of freedom of expression and a feeling of community. The second option seems an insurmountable task, unless strong moral arguments can be given why all nations should adopt strong copyright protection, and, as I have argued, sufficiently strong moral arguments may be lacking. The third option requires a thoroughgoing invasion of public rights that is hard to imagine could possibly represent the greatest good for the greatest number. The feeling of surveillance is deeply unsettling, and injurious to our privacy and security—no amount

of big-budget movies and new pop singles seems to outweigh the disutility of knowing that our communications are being monitored.

Although the industrial dependence on strong copyright protection carries these disutilities, any lessening of the use of copyright protection may carry with it significant upheaval in IP-based industries, and these disutilities on the other side of the equation must be considered as well. We cannot ignore that the industrial production of culture employs a great many Americans, and thus supports many families and provides a driving force in our national economy. Intellectual products provide emotionally and economically rewarding work to a great many—not just studio and label heads, actors, musicians, programmers, and writers, but also caterers, personal assistants, studio musicians, limousine drivers, costume designers, best boys, lawyers, and lobbyists—and are a major export commodity, most notably in the movie, music, and software industries. As industry lobbyist Jack Valenti once hyperbolically stated this point, "By leading all other manufacturing sectors in their contribution to the American marketplace, the copyright industries are this nation's most treasured assets . . . Protection of our intellectual property from all forms of theft, in particularly [sic] online thievery and optical disc piracy, must take precedent [sic] if the United States is to continue to lead the world's economy" (Motion Picture Association of America, 2002).

It is, however, one thing to argue that utilitarian considerations support copyright protection *simpliciter*, and quite another to argue that utilitarian considerations support the status quo due to the disutility of social upheaval that may follow from an otherwise beneficial change in policy—especially if a similarly disutile social upheaval is required by the maintenance of the status quo, due to the shifting architecture discussed above. Indeed, on a strictly economic basis the structure of intellectual property lends itself to public production and ownership, even considered independently from the social and legal costs necessitated by enforcement given public availability of the relevant means of production. Intellectual property based products, as they have a high fixed cost and a negligible marginal cost, are of a type of good whose production costs are best socialized rather than left to the private sector. As Michael Perelman (1991) stated,

> [w]ithin [Kenneth] Arrow's logic, computer software is an ideal public good. Once produced, software code costs virtually nothing to duplicate. One can even read Arrow's analysis of the economics of information as an economic justification for the piracy of computer software; that is, software piracy, generously interpreted, approximates the price structure that pure neo-classical economics implicitly recommends, assuming that software vendors are marketing nothing more than the information embodied in the program. (p. 194)

This is not the place to ask about whether it is best to create intellectual goods through market forces, however. Our question here is whether utilitarian considerations justify using the strong copyright laws currently provided. If the utilitarian defense of our current IP legal regime is simply that we are dependent upon it, rather than that it is and will continue to be for the greatest good, then we are perhaps justified in continuing to use copyright, but only if we do so in a way that minimizes and our dependence upon it, and minimizes the burdens placed upon end users and consumers. If this is right, in other words, we are economically dependent upon a system which will cause increasing social harms, and the proper solution is to decrease our dependency until we can afford to no longer cause these harms.

There is an ancient and probably apocryphal story about Hero of Alexandria. Having invented a steam engine—an *aeolipile*, he called it—he went to his king, excited by its great productive potential. The king saw this as a problem, rather than a solution. "What," he asked, "would we do with all the slaves?" In a situation where we are economically dependent upon a legal regime, and technological changes make that regime unjustifiable, we should not use the disutility of social upheaval as a reason to avoid change. The situation here is of course less morally dire, but structurally similar. To continue using strong copyright is to continue our dependence upon an increasingly harmful legal regime, and, therefore, while it may be justifiable in some cases and temporarily, the burden of proof in any particular case should be *against* those who would argue that strong copyright is for the best, especially when enforced through DRM.

FUTURE RESEARCH DIRECTIONS

Shareware licensing represents a viable business model that is currently underutilized. Those illegally downloading music or movies often state that if they find something they truly enjoy, they will buy the CD or DVD in order to support the artists. This is nothing but a spontaneous public employment of the shareware model over currently proprietary goods. Musicians such as John Mayer and Jonathan Coulton have used online distribution networks in order to gain notoriety, and established musicians gain from the so-called "piracy" of their back catalogue, as Janis Ian has noted (2005). Many artists already produce most of their profits from live performances, and the diminution or elimination of copyright laws would aid this by reducing the artificial scarcity in reproductions of music, thereby freeing expendable income to be spent on entertainment to be given over directly to artists. Some artists such as Radiohead and Trent Reznor have decided to make their music freely downloadable, and have shown that it is possible to regard the musician as the provider of a service, supported through ticket sales, donations, and upselling, rather than as the provider of a product (the album or track) for sale. There is no reason that these methods of utilizing an open-source shareware model, already successful in some areas of music and software development, could not be adapted to other kinds of intellectual production. As public radio demonstrates, there is no need to ensure that each and every user pays for a service in order to be able to fund the provision of that service to all who wish it.

A sponsorship model of funding is another underutilized strategy, and one which provides a patch to one of the major problems of the shareware model: the risk inherent in speculative creation of a good requiring a significant financial outlay. An example of sponsorship funding can be found in Maria Schneider's Grammy-winning album "Concert in the Garden." The album was produced through artistShare.net, which offers artists the ability to offer fans the opportunity to sponsor the production of works, similar to the way in which institutions or individuals might commission a work, but on something closer to a grass-roots model. As Maria Schneider put it, "This project was funded with the help of my fans and distributed entirely through my own website. I feel very proud of taking that first step and incredibly grateful that it has proven to work so well!" (AllAboutJazz.com, 2004). The artistShare model could equally well be applied to other areas of intellectual production, allowing businesses currently dependent upon sales for income to find an alternate and sustainable source of revenue.

The shift from a sales- to a service-based business model is already emerging in various ways in the marketplace. In software, Red Hat offers the clearest example of the potential for growth in this business model, and Richard Stallman (2004) has argued for this as a more general economic model. Red Hat has enjoyed great success selling subscriptions, support, training, and

customization of open-source and free software. As open-source and uncommodified software becomes more prevalent, we can expect demand for software servicing to increase perhaps precipitously, not only because of the obvious challenges of implementation or the obvious advantages of customization, but because of liability issues. One of the great benefits which software service providers are able to offer businesses is the ability to take a share of legal liability in cases of software-based damages, such as compromised client personal information or data loss. In this way, software service firms are able to act as informational insurance brokers, offering a greater degree of financial security, in addition to the improved data security which customization and a direct service relationships offer, as compared to centralized, mass produced software sellers.

MIT's OpenCourseWare provides a similar example of rethinking intellectual property as something to be serviced rather than sold. MIT OpenCourseWare

- Is a publication of MIT course materials
- Does not require any registration
- Is not a degree-granting or certificate-granting activity
- Does not provide access to MIT faculty (2007)

When MIT first started this open-source approach to their course materials, which makes available online all manner of information from syllabi to lecture notes to tests, there was reportedly some confusion about why MIT would give away the very goods it was in the business of selling. As Hal Abelson (2004) explained at an academic open-source conference, MIT decided the information covered in a course was not a competitive good with enrollment within that course—MIT, in other words, does not view itself as a seller of information, but rather as a supplier of services, which include not only access to information, but also presentation of that information within a particular environment of other students, accessible and responsive professors, labs, discussion groups, and various other educational resources.

CONCLUSIONS

Now that the means of industrial production of intellectual property are firmly in public hands, any reasonable assessment of the future of monopolistic and exclusive employment of intellectual goods will include increased regulation and encroachment upon the everyday lives and personal activities and projects of the public at large. The public is already denied many benefits of intellectual goods. As technological advances continue, these denials will have to become more extreme as means of circumvention become more powerful. Furthermore, the benefits which these denials remove from the public will become greater as the productive abilities which would otherwise be in public hands increase in power and as their application continues to expand in breadth through the increasing range of uses of digital technology. In the absence of any moral right of authors requiring the right of exclusion—a moral right which the Lockean and Kantian perspectives no longer supply—this increasing disutility is unjustifiable.

Given recent technological advances, the copyright bargain removes significant benefits from the many in order to benefit the few, and furthermore does so by inflicting harms upon the many by restricting basic rights, by breaking down social bonds, and by preventing the public from freely realizing their creative impulses. Given the likelihood that such advances will continue, we can expect both the benefits lost and the harms gained to steadily and continually increase.

Whatever benefits the copyright bargain still provides may be nearby and certain, but they are impure, and the harms brought about through the copyright bargain are nearby, certain, fecund, and wide-ranging.

As e-business models emerge, and as businesses increasingly become e-businesses, entrepreneurs, managers, and others involved in business have a responsibility to find revenue models which are not dependent upon asserting unjustified rights and removing rights and freedoms from others. There are many such models, as discussed in the foregoing, but the business environment is currently in flux, and these models are unstable. There are surely other such models yet to be developed. There are, however, some principles that businesses should follow.

Given that consumers are now producers and distributors; given that anyone can create, edit, publish, and remix intellectual goods; and given that the technical capabilities of the public are likely only to further increase, businesses that wish to survive as content providers must recognize that they can no longer be gatekeepers, and that they need to ask what they have to offer the consumer, rather than asking what they deserve from the consumer. Members of the public must be treated as partners and clients, not consumers. This is the primary principle I would suggest for how to use copyright in an ethical and sustainably profitable way: *think service, not product*. Digital media means consumers do not need content producers anymore: they can produce their own content if you make yours too difficult to use, restrictive, or otherwise unattractive. Don't ask how to get your user/audience to pay to access content; ask what you can do to make them value your business and the service you provide in that content delivery.

How can you do this?

1. *Don't tell your customers how to enjoy your product*.
2. *Open discussions, don't close them*.
3. *Remember that the user is supporting you, even if she might not be paying to do so*

Don't lock users into a particular device or software program if you don't have to. Don't make them feel like you're trying to take their information, privacy, or ability to choose. It's unjustifiable, and the public is increasingly unwilling to put up with it, even if it is legal. Both morally and practically, it's a bad way to do business. Give them the freedoms they need to enjoy your service on their own terms. Give them the opportunity to support you because they like your service and your content rather than trying to force them to support you if they want access or use. This is a time of great opportunity for e-businesses based in content provision, but only if business can respond in a positive and proactive way to technological changes; can recognize and respect the power that users now have; and chooses to treat the user base as partners, whether or not they have paid for the privilege of popularizing your content and bringing you publicity.

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END NOTES

[1] The argument I have presented in this section is based on the "enough and as good" portion of the Lockean proviso. For a valuable alternate approach, based upon the spoilage proviso, see Gordon Hull's "Clearing the Rubbish: Locke, the Waste Proviso, and the Moral Justification of Intellectual Property" (2009).

[2] E.g. "Piracy is theft, and pirates are thieves, plain and simple. Downloading a movie off of the Internet is the same as taking a DVD off a store shelf without paying for it" (Motion Picture Association of America, 2005). This false identity has in important ways been codified in American law under the No Electronic Theft Act of 1997 (henceforth, the NET Act). This act, besides implicitly equating copyright infringement and theft through its very name, strikes a provision in 17 U.S.C. § 506 which formerly required commercial advantage or private financial gain as a criterion for a criminal infringement offense. Under the law as modified by the NET Act, criminal infringement may be established by the willful reproduction or distribution of copyrighted material of a total retail value exceed $1000 within any 180 day period or by the receipt of commercial advantage or private financial gain. Further, the NET Act added a creative definition to 17 U.S.C. §101, stating that "the term 'financial gain' includes the receipt, or expectation of receipt, of anything of value, including the receipt of other copyrighted works" (U.S. Department of Justice, 1998). This definition states that the receipt of copyrighted works is an illegal financial gain, thereby implying that piracy is a form of theft.

[3] As stated in the Statute of Anne:
"Whereas printers, book sellers, and other persons have of late frequently taken the liberty of printing . . . or causing to be printed . . . books and other writings without the consent of the authors or proprietors of such books and writings, to the very great detriment, and too often to the ruin of them and their families; for preventing therefore such practices for the future, and for the encouragement of learned men to compose and write useful books; may it please your Majesty ..." (Parliament of England, 1710)
Cf. also Constitution of the United States, Article 1, §8, clause 8 (Federal Convention of 1787).

[4] *The Metaphysics of Morals* does not add anything of significance to these issues to his earlier comments in "On the Wrongfulness [etc.]." For those who wish to compare the two, or who do not have easy access to the less common essay, the argument addressed in following is presented in briefer form in *The Metaphysics of Morals*, §31, II., 6:289-91 (1996b, pgs. 437-8).

[5] This idea is also present in both French and German law (Assemblée nationale française, 1997; Deutscher Bundestag, 1997).

[6] In a surprising footnote, Kant asks rhetorically "Would a publisher really venture to bind everyone buying the book he publishes to the condition that the buyer would be prosecuted for misappropriating another's goods entrusted to him if the copy sold were used for unauthorized publication, whether intentionally or even by negligence?" (1996c, p. 29fn). This now may constitute "contributory infringement," wherein one may be found guilty of copyright infringement simply by offering assistance to the practice of copyright infringement in situations in which the abettor knew or ought to have known of the infringing activities. This was a primary charge in the Napster case (*A&M Records v. Napster*, 2001), and has since been used in threats directed at individuals, universities, and internet service providers.

[7] A more complete list of possible utilitarian justifications might look like this: copyright protection, in exchange for an acceptable loss of social freedoms, (1) provides a greater diversity and amount of intellectual goods to the public, (2) allows for creation of goods requiring a huge initial investment, which would not otherwise be produced, (3) allows for profit-motivated responsiveness to the desires of the public, (4) diminishes search costs on the part of users/consumers through effective marketing and distribution, (5) effectively and efficiently preserves and distributes older and less popular goods of cultural value, (6) provides rewarding labour to many Americans, (7) represents a valuable export good for the U.S. market, (8) discourages wasteful rent-seeking expenditures. Here, I only am able to address the most central intuitions about a utilitarian justification of IPR: that the copyright bargain is necessary to adequately encourage socially and economically foundational production. Landes and Posner (2003) discuss all of these possible utilitarian justifications, including those that are less obvious or intuitive, however they note that "while we discuss a number of issues relating to intellectual property rights in computer software and to the impact of the Internet on intellectual property law, readers who believe that these are *the* central issues of that law today will be disappointed with our coverage" (p. 7).