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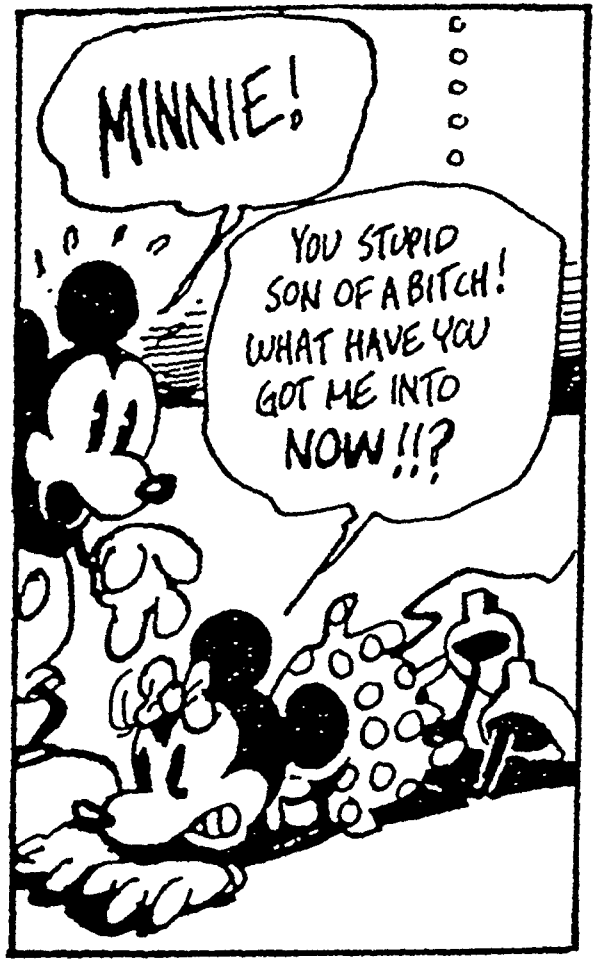

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I. INTRODUCTION

From the point of view of moral justification, the most important thing about any property right is what it prohibits people from doing: if you own Blackacre, then I may not encroach on that land without your permission. This applies to intellectual property as much as to property in material resources. If you have made a fortune out of popularizing the cheerful scrubbed faces of Mickey and Minnie Mouse, I may not depict them in my underground comic books as "active members of a free thinking, promiscuous, drug-ingesting counterculture."[1] Intellectual property like all other property places limits on what individuals are allowed to do.

Our tendency of course is to focus on *authors* when we think about intellectual property. Many of us are authors ourselves: reading a case about copyright we can empathize readily with a plaintiff's feeling for the effort he has put in, his need to control his work, and his natural desire to reap the fruits of his own labor. In this Essay, however, I shall look at the way we think about actual, potential and putative *infringers* of copyright, those whose freedom is or might be constrained by others' ownership of songs, plays, words, images and stories. Clearly our concept of the author and this concept of the copier are two sides of the same coin. If we think of an author as having a natural right to profit from his work, then we will think of the copier as some sort of thief; whereas if we think of the author as beneficiary of a statutory monopoly, it may be easier to see the copier as an embodiment of free enterprise values. These are the connections I want to discuss, and my argument will be that we cannot begin to unravel the conundrums of moral justification in this area unless we are willing to approach the matter even-handedly from both sides of the question.

II. HOHFELDIAN ANALYSIS

First some analytical comments about property rights and duties.[2] To justify private property is to justify conferring, recognizing and enforcing certain individual rights. An individual has rights of ownership in relation to some resource O if he has (R_1) the right to use O, (R_2) the right to exclude others from the use of O, and (R_3) the power to transfer

1. Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 753 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979). A quote from Kevin W. Wheelright, Comment, *Parody, Copyrights and the First Amendment*, 10 U.S.F. L. REV. 564, 582 (1976).

2. Much of the material in Part I is adapted from my article *Property, Justification and Need*, forthcoming in the CANADIAN JOURNAL OF LAW AND JURISPRUDENCE.

these rights to others by way of gift, sale or bequest.[3] Of these elements, the second, R_2, is the most important for our purposes. It is the addition of this element of exclusion that transforms the right to use into an essentially *private* right. In itself, R_1 is roughly what we all have in relation to public parks and sidewalks. It is only when we conjoin to it R_2 that we get something like a person's right to use his own land. Moreover it is only because someone has R_2 that R_3 is necessary. If the land in question were common, if others could use it without anyone's consent, there would be nothing for the owner to transfer to them.

Jeremy Bentham and Wesley N. Hohfeld have taught us the value of analyzing rights in terms of the correlative propositions about duty that they entail.[4] R_1—the right to use—is what Hohfeld would call a *privilege*. It is correlative to a negative proposition about duty: (R_1) *P has the right to use O* entails (D_1) *P has no duty not to use O*. Thus, in the first instance, R_1 is correlative to a proposition (a negative proposition) about the duties of the right-bearer. True, R_1 may also be supported by a more robust *claim*-right: (R_1*) *P has the right not to be prevented from using O*. That additional right is correlative to a proposition not about P's duties, but about the duties of *other* people: (D_1*) *Others have a duty not to prevent P from using O*.[5] And behind that may stand further propositions about P's right to set proceedings in motion to vindicate and enforce his right not to be prevented from using O, and officials' duties to respond to those proceedings. Still, so far, all this could be said of P's right to use some public park.

What distinguishes P's right as one of *private* ownership is the addition of R_2, the element of exclusion that I mentioned. This also can be analyzed in terms of its relation to propositions about duty. (R_2) *P has the right to exclude others from O* entails (D_2) *Others have a duty not to use or occupy O without P's permission.* Unlike R_1, R_2 is correlative to a proposition about the duties of persons other than the right-bearer. And, of course, just as R_1 is supported by R_1* etc., so R_2 is supported by R_2*: *P has the right to set in motion certain proceedings to have others removed from or prevented from using O if they do not have his permission, and*

3. Of course, as we have already noted, private property is really much more complicated than this; but this will do for the purposes of the present discussion. For fuller accounts, see Anthony M. Honoré, *Ownership, in* Oxford Essays In Jurisprudence (A.G. Guest ed., 1961) and JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 26-61 (1988).

4. *See* WESLEY N. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS (1923) and H.L.A. HART, ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY (1982).

5. *See* H.L.A. Hart, *Bentham on Legal Rights, in* OXFORD ESSAYS IN JURISPRUDENCE 171, 179-83 (Alfred W.B. Simpson ed., 1973) (on "liberty-rights and their protective perimeter"). This distinction between a bare privilege and a privilege conjoined with a claim-right will be important later, in Part VIII. *See infra* note 90, and accompanying text.

officials have a duty to respond to these proceedings (and if necessary to drag the miscreants away).

D_2 is what our attention should be arrested by when we attempt to justify private ownership. It is always tempting to take the perspective of the right-bearer, and show what a marvelous thing it is for him to have all these rights. They protect and promote his personality. They vindicate his right to the labor of his body. They reward his desert. They allow him to make plans, and to exercise his autonomy. The virtue of the Hohfeldian analysis is that it compels us to concentrate on the other side of the coin: the correlative duty. To think that R_2 is a good sort of right to recognize in our society is to think that D_2 is a good sort of duty to impose.

Analysis takes us this far; but the point of focusing on duties is more than merely analytic. Since legal duties are hard things for people to have—since they constrain conduct and in that sense limit freedom—we should expect the realm of duties to be the *testing ground* for claims of right. The realm of duties—the propositions about duty that a given claim of right entails—is where we should expect the problems with the right (if there are any) to surface. It is true that not all the problems of a legal institution are connected with the duties it imposes. But the duties are a good place to start, since they will take us to whatever hardships are most intimately involved in the immediate recognition and enforcement of the rights.

III. THE PERSPECTIVE OF INDIVIDUALS

Focusing on the correlativity between R_2 and D_2 has one other merit. It poses the issue of the justification of property rights strictly in individualistic terms: we match an individual right with an individual constraint. That may not sound remarkable; surely the justification of private property is always individualistic. But it is surprising how rarely the individualist case is pitted against individualist objections.

Let me begin with the debate about property in material objects. Philosophical discussions of material property commonly approach the matter from two perspectives. They approach it from the individual perspective of the rights and interests of the would-be proprietor, and they approach it, secondly, from the perspective of society as a whole.

The first perspective focuses on the person whose interest in owning something is taken to be morally significant. This is the Lockean farmer, the deserving entrepreneur, or the subject of Hegelian *Bildung*: the person who has mixed his labor with a piece of land, who has extended the

realm of his self-ownership, who has taken a risk, deserves a reward, requires an external domain for the exercise of his free will, or craves a basis for independence against the encroachments of the community and the state.

To the extent that these individualist assertions are ever opposed or evaluated critically, the claims that are cited against them are usually those of *society*. Property, it is said, is not an absolute individual right, but one that must serve a social function. As Alan Ryan puts it, there is "a consensus that 'It's his' invites the further question, 'What good does its being his do for everyone else?' "[6] So we develop arguments from a second perspective, that of the general welfare. The hard cases for private property are almost always phrased in these *social* terms: social irresponsibility, patterns of inequality, pollution, poverty, crime, and so on.[7]

Thus, from the first (individualist) perspective, the argument is all in favor of private property. It is only when one gets to the second (social) perspective, that the arguments against get a hearing.

The trouble with locating all the objections at the second or social level is the trouble with any aggregative approach to utility or the general good: the particularity of the individual's predicament disappears from view. By emphasizing *social* problems, we lose sight of the intensity or significance of *individual* costs. Now this individualist worry about social values is, of course, most often cited by the owners whose interests are the subject of the Lockean justifications (the arguments put forward from the first perspective). They are the ones who complain vociferously about the threat to individual freedom from a preoccupation with social function. Theirs, however, are not the only individual interests at stake.

When we evaluate private property in land, for example, we should surely consider, in the first instance, those individuals whose activities are most directly constrained by the rules. In a sense, of course, we are all constrained: you mustn't encroach on my land and I mustn't encroach on yours. But the individuals whose position is most deeply prejudiced are those who do not own or have any rights over privately owned land at all—the homeless. They bear all of the restraints, and

6. ALAN RYAN, PROPERTY AND POLITICAL THEORY 177 (1986).

7. LAWRENCE C. BECKER, PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS (1977) is a good example. The one chapter he devotes to "Anti-Property Arguments" (Chapter 8) divides the objections to private property into four general types: "arguments to the effect that property rights have an overall social disutility; arguments to the effect that the institution of property rights is self-defeating; arguments to the effect that private ownership produces vicious character traits . . . ; and arguments to the effect that systems of property rights produce and perpetuate unjustifiable socio-economic inequality." *Id.* at 88.

they enjoy none of the benefits, that accrue from the rights distributed in a private property regime.

Of course their interests will be counted, along with everyone else's, in any decent calculus of social advantage. But we know enough about politics to be able to say that theirs are the interests most likely to be neglected in the real world. Thus if social values are taken to be the only basis for critical evaluation of property claims, we may be in danger of leaving out of the picture the predicament of those most directly, grievously and immediately affected by the enforcement of property rules—those to whom, *above all*, a justification of property is owed.

Another way of putting the point is that when private property rights are viewed critically, they are most commonly viewed as obstacles to the carrying out of public policy.[8] For example, property development by a landowner may be viewed obstructing the conservation of a coastline or the historic character of a neighborhood. If the claims of the poor are cited at all, they tend to come in derivatively, as the distant beneficiaries of public schemes that are being frustrated by property rights. But in reality property rights impact non-derivatively on the poor, unmediated by our public policy schemes. They bear the *direct* brunt of the institution, for they are *immediately* excluded by the rules from taking and using the resources they need to live. It is wrong, then, to relegate their interests to a secondary position, behind the claims made aggregatively in the name of public policy.

The point becomes even more acute when we turn from social policy critiques to social policy defenses of private property rights. Suppose it can be shown that the institution benefits "society as a whole", by making markets possible and thereby promoting progress and prosperity. Then the minority of individuals—the poor and the homeless—who are prejudiced by private property run the risk of being overlooked altogether if their interests and objections have traditionally been assembled under the heading of "social concerns." Now that it has been established as a general principle that social functionality is the issue and that individual economic interests may not be asserted against social values, where are these few impoverished persons to turn to vindicate their "anti-social" claims?

8. In other words, we make the mistake of viewing all rights—property rights included—through Dworkin's model, the model of constitutional rights, rights against the government, rights as trumps over social policy or utility. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977). It is as though property rights were identified purely with the takings clauses of the U.S. Constitution, whereas in fact all those clauses do is add a constitutional immunity to a set of rights that already exist and have consequences. *See* WALDRON, *supra* note 3, at 17-19.

IV. INTELLECTUAL PROPERTY: INDIVIDUAL CONSTRAINTS AND SOCIAL RIGHTS

Being constrained by rules of intellectual property is a different matter from being constrained by material property rules. The homeless person may freeze or starve because he finds himself excluded from every sheltered place and prohibited from taking literally any piece of food. No one is going to die as a result of a prohibition on copying someone else's song or software. I shall return to this difference between material and intellectual deprivation later in the Essay.[9] But there are two other important distinctions between the way we think about intellectual property and the way I have said we tend to think about material property.

The first distinction is that it is much more natural in the case of intellectual property to identify individual rights as the basis of any objection. By contrast, objections to material property tend, as we saw in Part III, to be articulated in the name of social interests. Though in both cases (material and intellectual) it is easy enough to conjure up an image of the constrained individual as a sort of thief—a would-be burglar or a would-be plagiarist—in the case of intellectual property there's a sense that something more may be said on behalf of the would-be copier, or the would-be user or consumer of intellectual products. We may see him, for example, as the bearer of First Amendment rights,[10] or as a dissident citizen trying to have his say in public or cultural life, but effectively silenced by someone else's assertion of proprietary rights.[11] The image of minorities or underdogs being silenced by corporate power pervades intellectual property law. One can conjure up affecting pictures of the organizers of the Gay Olympics in San Francisco being enjoined from using the word "Olympic" by the corporation running the official Los Angeles Games,[12] or the comic book satirists of Air Pirates being silenced by the Walt Disney empire.[13] There are perspectives therefore from which to criticize intellectual property that are plainly individualist in character.

Even when First Amendment values are not at stake, there is still a

9. *See infra* part VII.

10. *See, e.g.*, Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970) and L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1 (1987).

11. I don't mean to argue here for the existence of a First Amendment based privilege analogous to, but distinct from, the privilege of fair use. Such an argument is hopeless now in view of the majority opinion in Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 559 (1985). I mean only to suggest that in the debate about the moral justification of intellectual property, values associated with free speech are often still referred to.

12. San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522 (1987).

13. Walt Disney Prods. v. Air Pirates, 581 F.2d 751 (9th Cir. 1978).

disturbing sense that ordinary people are being taxed and restricted by monopoly rights in cultural enjoyment and in the exercise of their imaginations. Lord Macaulay's observation on copyright is usually taken as the high-water mark of this opposition: "The principle of copyright is this. It is a tax on readers for the purpose of giving a bounty to writers. The tax is an exceedingly bad one; it is a tax on one of the most innocent and most salutary of human pleasures . . . ."[14] The contrast here with material property is striking. One occasionally hears private property condemned as theft,[15] but except among the followers of Henry George it is rare to hear it condemned as a form of taxation.[16] Somehow the monopoly characteristics of intellectual property make this form of individualist objection much more natural.

A second difference between material and intellectual property is that, in our legal culture, the defense of intellectual property is seldom cast in purely individualistic terms. Officially, the justification is supposed to have more to do with the social good than with the individual natural rights of authors. The U.S. Constitution empowers 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."[17] The clause emphasizes that copyright is purely a matter of positive law; it is to be a creature of statute, in contrast to the rights which are recognized in the Bill of Rights. Moreover the clause insists that the positive law of intellectual property is subservient to a specific policy goal: it is a means to an end, as the 1961 Report of the Register of Copyrights put it.[18] The point is not merely that the individual rights of authors must be *balanced* against the social good.[19] The Constitution stipulates that authors' rights are created to serve the social good, so any balancing must be done *within* the overall context of the public good, i.e. between the specific aspect of the public good that is served by intellectual property ("the Progress of Science and

14. Macaulay, *Copyright* (Speech in the House of Commons, 1841), *in* 8 WORKS 195, 201 (Trevelyan ed., 1879).

15. *See* P.J. PROUDHON, WHAT IS PROPERTY? AN INQUIRY INTO THE PRINCIPLE OF RIGHT AND OF GOVERNMENT 12 (Benjamin R. Tucker trans., 1970): "*Property is robbery!* . . . What a revolution in human ideas!"

16. *See* HENRY GEORGE, PROGRESS AND POVERTY (1942) (arguing that the private appropriation of land is pure rent-seeking behavior).

17. U.S. CONST. art. I, § 8, cl. 8.

18. HOUSE COMM. ON THE JUDICIARY, 87TH CONG., 1ST SESS., REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE UNITED STATES COPYRIGHT LAW 5 (Comm. Print 1961).

19. *Cf.* SHELDON W. HALPERN ET AL., COPYRIGHT: CASES AND MATERIALS 2 (1992): "It is for Congress to define the balance between the rights of copyright owners and the needs of the public."

useful Arts") and other aspects of the public good such as the progressive effects of the free circulation of ideas. Though many philosophers, utilitarians especially, urge something along these lines about *all* types of property,[20] there is no equivalent to it as a constitutional and doctrinal starting point in the case of the ownership of land or other material resources.

These distinguishing characteristics of our thought about intellectual property are by no means unambiguous or uncontested. On the one hand, although the official line about copyright is that it is a matter of social policy, judicial and scholarly rhetoric on the subject retains many of the characteristics of natural rights talk. On the other hand, although the person constrained by copyright is sometimes seen as the vindicator of free speech values, those values themselves—when they crop up in copyright doctrine—tend to get stated in social rather than individual terms. In the Parts that follow, I shall explore each of these tendencies in the philosophy of intellectual property in some detail. I shall consider the conversion of social defenses of intellectual property into individual defenses in Part V, and the reverse move, the conversion of individualist opposition into social policy considerations, in Part VI.

Even at this stage, however, it is worth noting how these two tendencies interact. To the extent that copyright and other intellectual rights are treated as private property, the limitation on free speech can be defended as an instance of the general principle that the First Amendment does not entitle one to abuse another's property.[21] Conversely, to the extent that free speech values are presented as considerations of social utility, it is open to defenders of intellectual property to show that those values are served, not disserved, by the free flow of ideas that copyright incentives elicit.[22]

20. *See supra* note 6 and accompanying text.

21. For the general principle that the owner of real property may exclude an unwelcome speaker from his land, see Lloyd Corp. v. Tanner, 407 U.S. 551 (1972). *But cf.* Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980) (holding that shopping malls may have a quasi-public aspect to them for the purpose of this doctrine). For application of the general principle to intellectual property, see Mutual of Omaha Ins. Co. v. Novak, 775 F.2d 247, 249 (8th Cir. 1985). There is a good discussion in Robert J. Shaugnessy, Note, *Trademark Parody: A Fair Use and First Amendment Analysis*, 72 VA. L. REV. 1079, 1111-12 (1986).

22. *See, e.g.*, Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc., 600 F.2d 1184, 1187 (5th Cir. 1979) ("[f]ree expression is enriched by protecting the creations of authors from exploitation by others . . . .") This dictum is endorsed by David E. Shipley, *Conflicts Between Copyright and the First Amendment After* Harper & Row Publishers v. Nation Enters., 1986 B.Y.U. L. REV. 983, 1042.

V. FROM SOCIAL INCENTIVES TO INDIVIDUAL DESERT

I have said that we find it easier to view copyright as a matter of positive law and social policy than to view material property in this light. The Constitution makes it clear that intellectual property rights are limited rights subordinated to a social purpose, and the point is reinforced in both judicial doctrine and legislative history. The Supreme Court insisted in 1948 that intellectual property law "makes reward to the owner a secondary consideration."[23] The point was echoed by the House Committee reporting on the 1909 Copyright Act:

> The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings, . . . but upon the ground that the welfare of the public will be served . . . by securing to authors for limited periods the exclusive rights to their writings.[24]

Despite this emphasis, however, there is a understandable tendency to develop robust doctrines of individual moral entitlement even within the social policy framework. This is due in part to the fact that natural rights ideas have never really been lost sight of in intellectual property law despite the social policy emphasis I have referred to. Natural rights formed part of the dialectical background to the emergence of modern copyright in eighteenth century England,[25] they are heard in an undertone throughout the American case law,[26] and they figure prominently in recent scholarship on the subject.[27] There is a sense that natural rights and social utility considerations need not be opposed and may well converge in the case of intellectual property—a view given some authority at the framing of the Constitution by James Madison.[28] Part of it, too, is

23. United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948). *See also* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) ("The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.").

24. H.R. Rep. No. 2222, 60th Cong., 2d Sess. 7 (1909).

25. Compare Millar v. Taylor, 4 Burrows 2303, 98 Eng. Rep. 201 (1769) and Donaldson v. Becket, 4 Burrows 2408, 98 Eng. Rep. 257 (1774).

26. Beginning with Justice Thompson's dissent in Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 669-70 (1834): "The great principle on which the author's right rests, is, that it is the fruit or production of his own labour, and which may, by the labour of the faculties of the mind, establish a right of property, as well as by the faculties of the body . . . ."

27. For Lockean themes of natural right in modern intellectual property scholarship, see Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1988) and recent articles by Wendy J. Gordon such as *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent and Encouragement Theory*, 41 STAN. L. REV. 1343 (1989) [hereinafter *An Inquiry*], *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 VA. L. REV. 149 (1992), and *A Property Right in Self Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533 (1993) [hereinafter *A Property Right in Self Expression*].

28. THE FEDERALIST No. 43, at 279 (Isaac Kramnick ed., 1987) ("The copyright of authors has been solemnly adjudged in Great Britain to be a right of common law. The right to useful

due to the natural tendency to reify rights even when they are set up and justified purely on utilitarian grounds. It seems psychologically unavoidable that rights grounded in utility will be taken as ends in themselves: too much emphasis on the utilitarian character of the premises can undermine people's sense that it is a *right* (as opposed, say, to some defeasible presumption or rule of thumb) that is grounded in this way.[29]

But the tendency I want to discuss in this Part is not a matter of pressure on the social policy framework from extraneous natural rights ideas. It is a tendency internal to the particular social policy framework that is deployed in defense of copyright.

The reasoning goes like this. The overall social good is served by the progress of science and useful arts. The progress of science and useful arts is served by the encouragement of authors. The encouragement of authors is secured by providing them with the incentive of legally secured monopoly profits from the sale and circulation of their works over a limited period of time. Incentives work by conferring benefits on those whose activity we are trying to encourage. Such a benefit may be seen as a reward for their efforts. Rewards are what we characteristically provide for moral desert; we reward the deserving and penalize the undeserving. Therefore, authors deserve the intellectual property rights that are secured to them in the name of social policy. The thought moves from *encouragement* to *incentive* to *benefit* to *reward* to *desert*, so that something which starts off as a matter of desirable social policy ends up entrenched in an image of moral entitlement.

The logical fallacy (affirming the consequent) occurs in the last step of the argument. From the innocuous premise:

(1) If someone is morally deserving, then it is appropriate to reward him;

inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals."). For a general thesis of convergence between utilitarian and natural rights considerations, see Richard A. Epstein, *The Utilitarian Foundations of Natural Law*, 12 HARV. J.L. & PUB. POL'Y 713 (1989).

29. There has been considerable discussion of this in the philosophical literature, beginning with DAVID HUME, A TREATISE OF HUMAN NATURE, § ii, 497-98 (L.A. Selby-Bigge ed., 1951) (1888)

> But however single acts of justice may be contrary to public or private interest, 'tis certain, that the whole plan or scheme is highly conducive, or indeed absolutely requisite, both to the support of society, and the well-being of every individual. 'Tis impossible to separate the good from the ill.

See also R.M. HARE, MORAL THINKING: ITS LEVELS, METHOD AND POINT 44-64, 147-68 (1981); David Lyons, *Utility and Rights*, *in* THEORIES OF RIGHTS 110 (Jeremy Waldron ed., 1984); BERNARD WILLIAMS, ETHICS AND THE LIMITS OF PHILOSOPHY 107-10 (1985); Christopher T. Wonnell, *Four Challenges Facing a Compatibilist Philosophy*, 12 HARV. J.L. & PUB. POL'Y 835 (1989).

we fallaciously infer:

(2) If it is appropriate to reward someone, then that person must be morally deserving.

And from (2) together with:

(3) It is appropriate to reward authors;

we can infer:

(4) Authors are morally deserving.

Now someone may object that the move from (1) to (2) is *not* fallacious inasmuch as the very term "reward" connotes the idea of moral desert. But just try substituting for "reward" one of the earlier terms in the series—"benefit" or "incentive"—and the fallacy is once again transparent.

We can see this with a case that provides a counter-example to the scheme of inference I have just set out. The overall social good is served by senators keeping in touch with their constituents. But keeping in touch with constituents involves travelling back and forth to one's home state, and that can be dreary and exhausting as well as expensive. Even if senators were given free air travel, they might not do it often enough. So let's suppose we provide them with free *first class* travel as an incentive: they can now enjoy themselves with free drinks as they fly back and forth between Washington D.C. and North Dakota or wherever. This incentive—the benefit of free first-class travel—might be seen as a necessary reward to the senators for keeping in touch with their constituents. But would we therefore infer that they morally *deserve* first class travel? Clearly not. Offering the benefit is simply a matter of behavioral manipulation of a class of individuals who have shown that they can be relied on to promote the public interest only when it is made coincident with their own.

That an argument is fallacious shows nothing about its judicial or rhetorical utility.[30] Two aspects of the incentive idea seem to strike judges as particularly salient in developing an undercurrent of moral desert in copyright law. One is the aspect of *talent*. Copyright is not workfare; these are not just bums or senators who are being provided with incentives to do something socially desirable. They are talented individuals, and what we are attempting to elicit from them are the works of their creative genius. A meritocratic society already associates the idea of desert with talented excellence and, as Lawrence Becker shows in his contribution to this Symposium, there is a natural enough link between talent, admiration, and the sense that the artist we applaud *ought*

30. *See infra* note 116.

to benefit from his achievement.[31]

Fortunately, this position is overshadowed somewhat in practice by the courts' sense that, for the purposes of the Constitution's reference to originality, a very modest spark of creativity will do. As Justice Holmes put it in a 1903 case concerning circus posters, "[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations."[32] But again, the life of the law is not logic, and the fact that there is no *test* of talent or genius does not prevent the resonance of those ideas from influencing the rhetoric which sustains intellectual property doctrine as a whole.

The other aspect is that of cost. Works of authorship do not appear by magic. Our romantic fancy is that authors sweat blood to produce them, usually in conditions of ignominy and penury, starving in a garret somewhere. Thus the Supreme Court in *Mazer v. Stein*,[33] having given a perfectly good account of the social welfare rationale for copyright, went on to sum it up in language worthy of the Last Judgment: "Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered."[34] True, the Court has now scotched the idea that being the product of hard labor in and of itself qualifies an intellectual product (such as a telephone book) as an original work deserving of copyright protection. The test, Justice O'Connor has insisted, is *originality*, not "sweat of the brow."[35] Nevertheless Justice O'Connor's own jurisprudence suggests that the costliness to the author of his creative efforts remains a necessary, even if it is not a sufficient, condition for according copyright protection. In *Harper & Row, Publishers, Inc. v. Nation Enterprises*, she insisted that "[t]he rights conferred by copyright are designed to assure contributors to the store of knowledge *a fair return for their labors*."[36]

The same attitude is sometimes taken towards publishers' costs as well. As Zechariah Chafee notes, one reason for allowing publishers to hold copyrights is that this is an indirect way of benefiting authors. But a second reason, he says, is "that it is only equitable that the publisher should obtain a return on his investment."[37] The view is an odd one.

31. *See* Lawrence C. Becker, *Deserving to Own Intellectual Property*, 68 CHI.-KENT L. REV. 609 (1993).

32. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903).

33. 347 U.S. 201 (1954).

34. *Id.* at 219.

35. Feist Publications, Inc. v. Rural Tel. Serv. Co., 111 S. Ct. 1282, 1295 (1991) (rejecting Jeweler's Circular Publishing Co. v. Keystone Publishing Co., 281 F. 83 (1922)).

36. Harper & Row, Publishers, Inc., v. Nation Enters., 471 U.S. 539, 546 (1985).

37. Zechariah Chafee, Jr., *Reflections on Copyright Law: I*, 45 COLUM. L. REV. 503, 509 (1945).

Where else do we say it is a matter of equity that investors should make a profit? Usually our view is that investors venture out into any market at their own risk. If a given market happens to be structured in such a way as to yield poor returns, that may be a matter of utilitarian or economic concern, but it is hardly a matter for intervention on grounds of fairness to cover investors' costs.

It is certainly true that the economic theory of copyright underlying the social policy rationale makes *returns to costs* the central issue. The idea is that since the creation of a new work is costly to the author[38] in time, effort and money, it will be undertaken only when it promises benefits to him greater than the costs he can expect to incur. Now presumably, the author receives some satisfaction directly from his own product, either from the contemplation of his achievement, from fame, or from the immediate utility of what he has created, if it happens to be useful to him.[39] Absent any profits from the sale of the work, authors will not produce new works unless these direct personal benefits outweigh the costs. But intellectual products are likely to be useful also to many persons other than the author, and the social desirability of eliciting new works should be determined by that as well. Society wants new works produced whenever total benefits (to everyone) outweigh authors' costs. Thus, assuming authors are self-interested, some way must be found of bringing the benefits to others to bear on the motivation of the author. Intellectual property rights do this by prohibiting anyone from using or enjoying the work except on terms agreed with the author. The author may charge a price for access, and he can expect to benefit from that to the extent that others in the marketplace expect to be able to benefit from his work. Thus, at the margin, his decisions about the investment of time and effort in creative activity will be responsive to the expected utility *to everyone* of the product of that time and effort. By this means, useful works will be elicited through the rational self-interest of authors up to the point at which their social costs exceed their social benefits.

Economic arguments like the foregoing have all sorts of difficulties; fortunately it is not my task to evaluate them here.[40] If they are valid,

38. "Author" should be understood here to include the publisher, and anyone who both bears and makes decisions about any of the initial fixed costs in producing and disseminating a new idea. *See also infra* Part IX.

39. These benefits are not usually at issue in an intellectual property context.

40. For a discussion, see Gillian K. Hadfield, *The Economics of Copyright: An Historical Perspective*, 38 COPYRIGHT L. SYMP. (ASCAP) 1 (1992). For doubts about the economics, see Steven Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970); ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 112-16, 139-44 (1988).

however, they are valid on grounds of market efficiency. Despite the reference to individual cost, these grounds have nothing to do with fairness or moral desert. The same point can be made about economic arguments generally. A number of economists have commented adversely on the practice, noticeable particularly in the United States, of presenting Marginal Productivity Theory as though it were a theory of reward for merit, a theory of the just distribution of incomes.[41] In fact, the obstacles to an identification of marginal productivity with moral desert are overwhelming. The marginal productivity of a given worker does not even entail causal responsibility for the product that is made possible by the addition of his work.[42] And the market worth of his marginal productivity is, of course, determined by complex forces of supply and demand at least as much as by his own character and effort.[43] Such forces of supply and demand will certainly benefit some producers (and perhaps penalize others). But they should not therefore be construed as a matter of desert.

The point is most clearly stated by F.A. Hayek, and his argument is worth quoting at length:

> [T]he importance for the functioning of the market order of particular prices or wages, and therefore of the incomes of the different groups and individuals, is not due chiefly to the effects of the prices on all of those who receive them, but to the effects of the prices on those for whom they act as signals to change the direction of their efforts. Their function is not so much to reward people for what they *have* done as to tell them what in their own as well as in general interest they *ought* to do . . . . [T]o hold out a sufficient incentive for those movements which are required to maintain a market order, it will often be necessary that the return of people's efforts do *not* correspond to recognizable merit, but should show that, in spite of the best efforts of which they were capable, and for reasons they could not have known, their efforts were either more or less successful than they had reason to expect.[44]

41. *See* FRIEDRICH A. HAYEK, LEGISLATION AND LIBERTY 67-78 (1976); PETER D. MCCLELLAND, THE AMERICAN SEARCH FOR ECONOMIC JUSTICE 50-66, 231-84 (1990).

42. Suppose a car needs to be pushed out of a mire and the job requires the efforts of two people. The car's owner, having pushed ineffectively by himself, solicits the help of a passerby and between them they succeed. The marginal value of the passerby's contribution is the rescue of the car, and the owner, if he is rational and has no other recourse, will pay up to the value of the automobile which he would otherwise lose. But it can hardly be said that the rescue of the car is due to the passerby's efforts alone.

43. MCCLELLAND, *supra* note 41, at 60.

44. HAYEK, *supra* note 41, at 71-72. Hayek later reinforces the point by noting that in a market,

> [t]he consequence must be that all but the marginal sellers make a gain in excess of what was necessary to induce them to render the services in question—just as all but the marginal buyers will get what they buy for less than they were prepared to pay. The remuneration of the market will therefore hardly ever seem just in the sense in which somebody might endeavor justly to compensate others for the efforts and sacrifice incurred for his benefit.

Id. at 77.

This argument of Hayek's is certainly not intended as an argument against markets. On the contrary, he regards it as a virtue that market rewards have nothing to do with moralistic considerations of individual desert, and he observes that:

> It is probably a misfortune that, especially in the USA, popular writers like Samuel Smiles and Horatio Alger, and later the sociologist W.G. Sumner, have defended free enterprise on the ground that it regularly rewards the deserving, and it bodes ill for the future of the market order that this seems to be the only defence of it which is understood by the general public. That it has largely become the basis of the self-esteem of the businessman often gives him an air of self-righteousness which does not make him more popular.[45]

The Hayekian argument applies to rewards for intellectual work as much as to other market rewards. Economically, the point of prohibiting a "pirate" from copying someone else's song and selling it to members of the public is that such piracy would distort the self-interested calculations that the composer must make about how to invest his marginal energies. Should he regale the public with yet another tune or is his style now just contributing to *ennui*? He cannot decide this question—or, the knowledge that he has about this (from Hit Parades, etc.) will not have the appropriate impact on his motivation—unless members of the public pay *him* every time they want to hear a song of his. Their readiness to do so may be based on all sorts of factors that have nothing to do with him—how many other catchy tunes there are on the market this week, whether the state of the world fosters a general desire to be cheered up, and so on. It may thus have no connection with anything we could plausibly call his desert. He cannot infer from the fact that his product sells well that he is a good person; all he can infer is that it is probably worth writing another song.

To sum up so far. We begin with an initial contrast between material property and intellectual property—the latter tending to be based much more directly on considerations of social utility than the former. We find, however, that for various understandable reasons—though reasons which defy logical or economic analysis—social policy arguments for intellectual property tend to get converted into individualist arguments, and thus to be assimilated much more closely to rhetoric associated with material property rights.

VI. FREE SPEECH AND FAIR USE AS SOCIAL POLICIES

In the previous Part, we examined the tendency of social policy ar-

45. *Id.* at 74.

guments to transform themselves into arguments of individual entitlement. On the other side, the reverse ambiguity creeps in. Though the person constrained by copyright is often seen through the lens of free speech values as the valiant defender of dissident or satirical ideas, those free speech values themselves—when they crop up in copyright doctrine—tend to get stated in social terms.

This is not unique to intellectual property law. In the jurisprudence of free speech generally, there is great nervousness about giving a purely individualist account of the right. Following the lead of John Stuart Mill, the tendency is almost always to try to ground individual rights in considerations relating to the importance of truth, progress and social utility, and to avoid adducing justifications for rights which are themselves right-based.[46] Jurists seem embarrassed about insisting on grounds of autonomy that some individual has a right to speak out if he wants to, if they cannot show that autonomy in turn serves some other social goal.

Be that as it may, free speech is almost always seen as a social good in copyright and trademark law. Its value is that it sustains our democratic process, or it contributes to the dissemination of information. Even Justice Brennan's dissent in *Harper & Row*[47] characterized First Amendment values in terms of "the robust public debate essential to an enlightened citizenry."[48] In *Rosemont Enterprises, Inc. v. Random House, Inc.*,[49] the issue was put like this: "The spirit of the First Amendment applies to the copyright laws at least to the extent that the courts should not tolerate any attempted interference with the public's right to be informed regarding matters of general interest . . . ."[50] From a right-based point of view, the wording here is remarkable. Far from being an individual right to vindicate one's autonomy by speaking out as and when one wants—an active right that connotes liberty—the First Amendment on this account becomes a matter of the public's right to be the passive recipients of information.

Even those legal scholars who express concern about the easy over-

46. JOHN STUART MILL, ON LIBERTY 14 (Currin V. Shields ed., 1956):

> It is proper to state that I forego any advantage which could be derived to my argument from the idea of abstract right as a thing independent of utility. I regard utility as the ultimate appeal on all ethical questions; but it must be utility in the largest sense, grounded on the permanent interests of man as a progressive being.

For the idea of "right-*based*" arguments, see DWORKIN, *supra* note 8, at 169-77.

47. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985).

48. *Id.* at 579.

49. Rosemont Enters., Inc. v. Random House, Inc., 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 386 U.S. 1009 (1967).

50. *Id.* at 311.

riding of First Amendment considerations in earlier decisions[51] appear to have a fastidious aversion to couching those values in terms of individual liberty rights. L. Ray Patterson will go no further than to observe that "[i]f the pen is mightier than the sword, making the pen a monopoly of entrepreneurs who disseminate ideas threatens the very foundation of our free society."[52] Melville Nimmer was prepared to say that free speech is important as an end in itself not merely as a means to the achievement of a democratic society: "the very nature of man is such that he can realize self-fulfillment only if he is free to express himself."[53] But in developing his own suggestions about the limits on an author's right to limit others' use of the form in which he has expressed his ideas, Nimmer retreats to the terminology of the public good. His argument is that in certain rare cases the very expression of information or ideas may be so infused with public interest that First Amendment considerations should prevail.[54] He cited the instance of photographs of the My Lai massacre as a case where "[t]he photographic expression, not merely the idea, became essential if the public was to fully understand what occurred in that tragic episode."[55] My point is not to evaluate or criticize Nimmer's suggestion, but to observe that once again free speech values are identified here as matters of social interest rather than individual right. Once again, the individualist resources for opposing a proprietary claim are trumped by the general good.

Something similar is true of the related doctrine of "fair use." That, too, can conjure up images of individual freedom; but they are images that are quickly hijacked by utilitarian considerations. Though fair use is now enshrined in statute,[56] the doctrine is equitable in origin and its statutory form is intended to mirror its development as judge-made law.[57] The usual analysis is that fair use is a "privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent notwithstanding the monopoly granted to the owner."[58]

51. *See, e.g.*, Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977); Walt Disney Prods. v. Air Pirates, 581 F.2d 751 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979).

52. Patterson, *supra* note 10, at 66.

53. Nimmer, *supra* note 10, at 1188.

54. *Id.* at 1197-1200. I have adapted here David Shipley's characterization of Nimmer's views. *See* Shipley, *supra* note 22, at 996-97.

55. Nimmer, *supra* note 10, at 1197. A post-Vietnam reader might regard the videotape of the Rodney King beating as a more current example.

56. Copyright Act, 17 U.S.C. § 107 (1976).

57. *See* H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 65-66 (1976).

58. HORACE BALL, COPYRIGHT AND LITERARY PROPERTY 260 (1944), *cited in* Rosemont En-

We saw in Part II that a privilege may be understood in Hohfeldian terms simply as the absence of a duty: *P has a privilege to use O* is equivalent to *P has no duty not to use O*. But the absence of a duty constraining one's action may be conceived in two subtly different ways.

(a) One might take the view that we all begin with a legal privilege to do everything—and that privileges are only abrogated by specific impositions of legal duty and then only to the extent of the specific duty that has been imposed. That P has a privilege to do X is therefore an indication that X has so far not been made the subject-matter of a duty.

(b) Alternatively, one might take the view that claims about privilege are made only when we want to indicate a specific exemption from a duty that would normally apply. According to this view, to talk of privilege is to concede the general applicability of social obligation or obligation to others, but to indicate that there may occasionally be reasons for departing from, limiting or overriding such obligation.

On the first reading, the baseline is liberty, and our legal privileges are the residuum of our liberty after all our legal duties have been taken into account.[59] On the second interpretation, the baseline is some broad sense of duty, and our privileges are regarded as extraordinary departures from what would otherwise be the general scope of the duty.

Pragmatically, these interpretations seem appropriate in different areas. When we speak of the privilege of self defense, we seem to do so in sense (b), because we are talking about a quite specific derogation from the otherwise general duty to refrain from homicide. When the law speaks, however, of a police officer's privilege to put questions to any member of the public (though not necessarily to have them answered), sense (a) seems more appropriate: he's just doing what anyone may do; the specific constraints associated with his office do not extend to ordinary conversation.

Given the widespread judicial perception of copyright as a monopoly and as *prima facie* undesirable for that reason, and given its status as a specific and limited creature of statute rather than a matter of natural obligation owed to authors, one might have thought that a privilege of fair use would be best interpreted in sense (a). Surely the baseline in the land of liberty is to be free from the constraints of monopoly rights set up by statute. Indeed, the Constitution insists that such constraints are to be strictly limited in time and scope, and privileges of fair use simply

ters., Inc. v. Random House, Inc., 366 F.2d 303, 306 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967).

59. This is similar to Hobbes's view that "Lyberties . . . depend on the Silence of the Law." *See* THOMAS HOBBES, LEVIATHAN 152 (Richard Tuck ed., 1991).

reflect those limitations, as seen from the side of those whom the statutory rights would otherwise constrain. According to this model, one should not have to *make a case* for a particular use, or persuade the courts to make a dispensation from the normal rigor of intellectual property on grounds of fairness. The situation of the fair user should be no different, analytically, from the situation of the person who makes use of another's work after the copyright expires.

It is clear, however, that this is not how fair use is seen. Partly, it is a matter of the doctrine's early development in equity at a time when intellectual property was seen more as a matter of right than as a matter of social policy. But now that the rationale *is* social policy, the idea seems to be that claims of fair use also have to be justified on policy grounds. Whereas, sense (a) would indicate an asymmetry in the justificatory burden—the citizen does not have to justify his claim to liberty, it is the imposition of duties that needs to be justified—sense (b) takes the privilege to be part and parcel of a whole package every bit of which must be articulated and justified on social policy grounds.

The other thing that is going on—and we have seen this already in Part V—is that the courts do not treat copyright unambiguously as a matter of social policy. Often the rhetoric is that of fair use versus fundamental *individual* rights, rather than of two aspects of social policy in tension with one another. Thus we find, for example, the Second Circuit insisting that "[t]he fair use doctrine is not a license for corporate *theft*, empowering a court to ignore a copyright whenever it determines the underlying work contains material of possible public importance."[60] The idea seems to be that all use of an author's work by another without his permission is putatively dishonest and larcenous, and that "fair use" represents a strictly limited departure from that background prohibition on stealing, a departure justified purely on the basis of some overriding social interest. Thus, to the extent that intellectual property itself is viewed in an individualistic light, fair use seems in need of a social justification, like any other constraint on private ownership.

These considerations are reinforced by the way the courts have sometimes insisted on fair use as a privilege extended to copiers only in their capacity as members of a community organizing and contributing to public discussion (a community of scholars, for example) rather than as free individuals in their own right. Said Justice Blackmun in his dis-

60. Iowa State Univ. Research Found., Inc. v. American Broadcasting Cos., Inc., 621 F.2d 57, 61 (1980) (emphasis added).

sent in *Sony Corp. of America v. Universal City Studios:*[61] "I am aware of no case in which the reproduction of a copyrighted work for the sole benefit of the user has been held to be fair use."[62]

> When the ordinary user decides that the owner's price [that is the price laid down by the owner of the copyright in some work the ordinary user wants to use] is too high, and forgoes use of the work, only the individual is the loser. When the scholar forgoes the use of a prior work, not only does his own work suffer, but the public is deprived of his contribution to knowledge. The scholar's work, in other words, produces external benefits from which everyone profits. In such a case, the fair use doctrine acts as a form of subsidy—albeit at the first author's expense—to permit the second author to make limited use of the first author's work for the public good.[63]

I have quoted this passage for its rhetoric, not its authority—though there's no doubt that it summarizes a long line of doctrine. It indicates how easy it is to construe limitations on the copyright monopoly as matters of social good rather than individual freedom.

Interestingly, however, the majority in *Sony* came much closer to construing fair use as a privilege in sense (a) above. Language like the following in Justice Stevens' opinion indicates a refreshing willingness to recognize a baseline of individual liberty in fair use discussions rather than a baseline of obligation to authors:

> The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit . . . . An unlicensed use of the copyright is not an infringement unless it conflicts with one of the specific exclusive rights conferred by the copyright statute . . . . [A] use that has no demonstrable effect upon the potential market for . . . the copyrighted work need not be prohibited in order to protect the author's incentive to create . . . . What is necessary is a showing by a preponderance of the evidence that *some* meaningful likelihood of future harm exists. If the intended use is for commercial gain, that likelihood may be presumed. But if it is for a noncommercial purpose, the likelihood must be demonstrated . . . . One may search the Copyright Act in vain for any sign that the elected representatives of the millions of people who watch television every day have made it unlawful to copy a program for later viewing at home . . . .[64]

It's the last sentence in particular that embodies the approach I want to urge. Though Justice Stevens talks of "millions of people," his is not a doctrine of the *social* good. The claim is rather that there's a danger whenever we extend intellectual property rights that we will restrict the

61. 464 U.S. 417 (1984).
62. *Id.* at 479 (Blackmun, J., dissenting).
63. *Id.* at 477-78.
64. *Id.* at 429, 447, 450, 451, & 456.

freedom of countless ordinary individuals one by one. The people jeopardized are not necessarily academics or satirists contributing to the dissemination of knowledge and social criticism, but just plain folks trying to live their lives and exercise their liberty in a world that surrounds and purports to entertain them with stories, programs and ideas.

VII. SOCIAL UTILITY AND THE "NO HARDSHIP" ARGUMENT

I said at the beginning of this Essay that if we are seriously interested in the moral justification of copyright and other forms of intellectual property, we should consider them from the perspective of those whose behavior they constrain. The perspective of the person constrained is particularly important when we are dealing, as we are in the case of intellectual property, with a practice that claims justification on utilitarian grounds. We say glibly that we are conferring rights as a means to the greater public good, and that sounds fine and socially respectable. Intellectual property rights are rewards or incentives, and they serve the excellent purpose of encouraging authors. But the rewards here are not just medals or Nobel prizes; the incentives we dole out amount literally to restrictions on others' freedom that may be exploited for authors' benefits. It sounds a lot less pleasant if, instead of saying we are rewarding authors, we turn the matter around and say we are imposing *duties*, restricting *freedom*, and inflicting *burdens* on certain individuals for the sake of the greater social good. In moral philosophy, where suspicion of utilitarian arguments is rampant, that rings alarm bells. To say that rights are a means to an end is one thing; but the correlative proposition that some should be forced to bear sacrifices for the greater social good smacks dangerously of throwing Christians to the lions for the delectation of Roman society. It sounds like a typical utilitarian violation of Kant's injunction about not using persons as means.[65]

Now obviously it would be quite wrong to say that one must *never* use people as means, or *never* impose a duty on any one as a means to others' good. We use cabdrivers as means all the time, and we impose numerous duties on public officials for our good not theirs. In fact, Kant's second formulation of the categorical imperative instructs us to "[a]ct in such a way that you always treat humanity, whether in your own person or in the person of any other, never *simply* as a means, but always *at the same time* as an end."[66] The italicized phrases indicate a

65. IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 96 (Herbert Paton ed., *sub nom.* THE MORAL LAW 1956).

66. *Id.* (emphasis added).

couple of crucial questions to be asked.

First, when we impose duties on certain people in order to provide incentives for others for the sake of the general good, are the interests of those who bear the duties also served by the overall good we are promoting. Are they "ends" in this process as well as "means?" The answer is sometimes "no" in the case of utilitarian calculations. If we execute a murderer purely in order to deter later acts of murder, we may promote the general good (if the deterrence theory works), but we will not benefit the person who was executed. *He* will not have a greater security against homicide as a result. So, absent some other justification for punishing him in this way, he is being used *merely* as a means to others' ends. Probably this is not true, however, of those who bear the burdens of copyright. The theory of the Constitution seems to be that everyone benefits from "the Progress of Science and useful Arts." The benefits will be widely diffused—as widely as the culture itself—and there is no reason why the beneficiaries will not include those whose copying activities have had to be restrained in order to provide an incentive to authors.

Secondly, if we insist that a person's humanity must never be treated *merely* as a means, we imply that there are limits on what may be done to him for the sake of the social good. A rowdy individual may be lobotomized for the sake of peace and quiet and no doubt he, in his post-operative state, will enjoy that tranquility as much as anyone. But his distinctive rational capacities have been done away with as a means to that end, and that seems offensive to the Kantian principle. Anyway, Kant or no Kant, even a utilitarian is going to want to ascertain the *extent* of the costs that are opposed on those who are burdened for the sake of the social good. Unless we know how heavy those costs are, we will not know how advantageous the social benefits have to be in order to outweigh them.

How much of a hardship, then, is it to be prevented from copying or using another's work of authorship without his permission? At first sight, the burdens seem relatively trivial. Justice Stevens' image of millions of people being prevented from taping their favorite television show seems about as serious as it gets.[67] As I said earlier,[68] we are seldom dealing here—as we are, sometimes, in the case of material property—with matters of life and death.

It would be wrong, however, to leave the matter there. People do not pursue costly litigation for the sake of trivia. Usually, of course, the

67. *See supra* note 63 and accompanying text.
68. *See supra* part 4.

issue is a matter of *profits*. Let's take an example, this time from the music industry. A singer and a music publisher make millions by recording a song that embodies a feature that musicologists call an "evaded resolution," a feature which just happens to have been copied (along with various other phrases) from a tune composed by somebody else.[69] The original composer sues for infringement of copyright. If his complaint is sustained, the defendant may have to pay all his profits from the second song to the plaintiff in damages or restitution. Surely it can be said that this is a serious burden. The response—from the side of the original composer—will be that it only seems a burden from an *ex post* perspective. Suppose, *ex ante*, that the second composer is contemplating the use of the first composer's evaded resolution. He has a hunch that he could make millions from a song incorporating the device, but reluctantly he refrains out of respect for intellectual property (and because he foresees the costly law suit that did in fact ensue). If he now draws attention to the hardship of this self-denial, is there anything in his complaint that we should take seriously? John Locke, for one, would say there is not: " 'tis plain he desired the benefits of another's Pains, which he had no right to."[70] Unfortunately, however, the Lockean rhetoric settles nothing in the context of our discussion, because whether or not the second composer has "no right" to benefit from the musical phrases of the first is precisely the point at issue.

It is difficult, then, to state the issue in a way which does not beg the question. Certainly all sides can agree to the following. Once the phrase in question has been introduced into the world by the first composer, there is a potential for a lot of money to be made by incorporating it into other songs. Suppose the first composer knows that the second composer has such a song in mind. Then there are two possibilities: either (i) the second composer is permitted to market the song without the first composer's consent, or (ii) he is not. In case (i) but not case (ii), the second composer can expect to make a lot of money. Thus he may prefer case (i) to case (ii) and regard case (ii) as a hardship to him in the straightforward sense that he will be worse off in that regime than he would be under case (i). The opposite applies to the first composer. He will prefer case (ii) and will reasonably regard case (i) as a hardship in the sense that he will be worse off under that regime. So far their situations seem symmetrical.[71]

69. Gaste v. Kaiserman, 863 F.2d 1061, 1068 (2d Cir. 1988). The defendant's work was the well-known song "Feelings."

70. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 291 (Peter Laslett ed., 1988).

71. A similar claim of symmetry is considered in Gordon, *An Inquiry*, supra note 27, at 1422-

Maybe we can break this deadlock along the following lines. The existence and activities of the second composer pose a threat to the well-being of the first, in a way that the existence and activities of the first composer do not pose a threat to the well-being of the second.

Had the second composer never lived or worked, the first composer would have gone on enjoying all the profits that may be milked from the public's appreciation of the *frisson* derived from the particular musical phrases he invented. Anyone who wanted that particular quality of enjoyment would have to deal with him. Now that the second composer has come along, however, and composed his tune, the first composer faces a threat to his profits, a threat which can only be fended off by insisting on regime (ii).[72]

If we consider the opposite case—the difference made to the second composer by the existence of the first—we do not get a symmetrical result. Had the first composer never lived, the contested phrase might not have come into the world at all and so the issue would not have arisen. The second composer would have had to do exactly what he is required now to do by the first composer's copyright—write his own songs. Under regime (ii), then, the second composer is no worse off than he would be absent the first composer's activity; and possibly he is better off under regime (ii), for the two of them can perhaps come to some mutually advantageous agreement with regard to royalties in the new tune.

The underlying argument here—that those whom intellectual property rights constrain are no worse off as a result, and that there are thus no net losers in a system of intellectual property—may be discerned in a number of early economic and utilitarian treatises.[73] Jeremy Bentham, for example, who was adamant in other contexts that all property limits liberty, insisted that copyright "produces an infinite [beneficial] effect,

35. But Professor Gordon's thesis is that the issues of freedom are also symmetrical as between the parties. I shall show in Part VIII that this is not the case. *See infra* notes 88-94 and accompanying text.

72. Of course this branch of the argument is a little far-fetched, for it assumes that there is only a limited amount of profit to be made from the musical use of the contested phrase. It assumes in other words some sort of zero-sum game as between the first and second composer. That, I think, *is* the presupposition of much intellectual property jurisprudence. In reality, of course, the situation is likely to be positive-sum. By embodying the first composer's evaded resolution in a new song, the second composer may enhance the public appetite for such music and may even create a demand for other songs of that type (including the first composer's song) that would not have existed but for the second composition. Having heard "Feelings," the public may well be *as* inclined or even *more* inclined to purchase the plaintiff's song "Pour Toi" than they were before. I am grateful to Carol Sanger for this point.

73. I am indebted to Hadfield, *supra* note 40, at 26-33, for some of these sources.

and it costs nothing."[74] The theme is echoed in the following discussion of patents by an economist in 1907. The owner of intellectual property:

> is allowed to have an exclusive control of something which otherwise might not and often would not have come into existence at all. If it would not,—if the patented article is something which society without a patent system would not have secured at all,—the inventor's monopoly hurts nobody. It is as though in some magical way he had caused springs of water to flow in the desert or loam to cover barren mountains or fertile islands to rise from the bottom of the sea. His gains consist in something from which no one loses, even while he enjoys them . . . .[75]

And it is summed up by John Stuart Mill to defend in general the recognition of private property rights for producers over the objects they have made. "It is no hardship to any one, to be excluded from what others have produced: they were not bound to produce it for his use, and he loses nothing by not sharing in what otherwise would not have existed at all."[76]

However, although the "no hardship" argument sounds plausible, there is a fallacy in it, which a hypothetical example will illustrate.[77]

Suppose Q is dying of a disease for which he knows there is no cure; he resigns himself to his fate and prepares for a stoic death. Then the news comes in: a drug has been developed which will remit the disease. The person who made and tested it, P, did so in his own laboratory with his own hands using his own materials. P makes the drug available to a number of his friends, but excludes Q because he dislikes Q's politics. Clearly Q will suffer *something* as a result of this. Instead of the stoic death he prepared for, it is likely that the rest of his life will be spent in painful bitterness and anger as he endures the thought that he *might* have lived and flourished but will not, thanks to P's exercise of this exclusionary right.

Someone may object that although Q certainly *suffers*, he suffers no real loss or injury. In strictly material terms, they will say, he is no worse off than he was before P acquired and exercised his property right. Indeed—to pursue the line we were taking—he is no worse off than he

74. JEREMY BENTHAM, A MANUAL OF POLITICAL ECONOMY 71 (John Bowring ed., 1839), *cited in* Hadfield, *supra* note 40, at 26.

75. CLARK, ESSENTIALS OF ECONOMIC THEORY 360-61 (1907), *cited in* Hadfield, *supra* note 40, at 28.

76. 2 JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY WITH SOME OF THEIR APPLICATIONS TO SOCIAL PHILOSOPHY, ch. 2, § 6, *excerpted in* PROPERTY: MAINSTREAM AND CRITICAL POSITIONS 96 (C.B. Macpherson ed., 1978).

77. What follows is adapted from Waldron, *supra* note 2.

would have been had P never existed at all, or never gone into the pharmaceutical business.

But the point is not conclusive. Material loss, relative to a given baseline, need not be the only sort of hardship people experience. Clearly the establishment and exercise of the property right that we have outlined occasions some degree of suffering and in that sense makes the remainder of the diseased person's life somewhat worse (for him) than it would otherwise have been. Q is not *feigning* his distress at the knowledge that P proposes to withhold the drug. There is real misery here that could be relieved, a real bitterness that could be assuaged, and these feelings are directly related to the recognition of exclusive property rights in the new artifact. Until we have said something about why such experiences of additional suffering do not matter, we have not finished addressing the question of justification so far as P's property rights are concerned.

In other words, there is a host of questions to be asked before we can conclude that intellectual property rights pose no hardship to those whom they constrain. Does deprivation take on a different character, objectively or subjectively, depending on the counterfactuals implicit in the "no hardship" argument? Are humans the sort of creatures who are constantly able to refer their suffering to the existence of such baselines, so that they take comfort from the fact that they are no worse off than they would be under some alternative scenario? Does this affect how certain deprivations are experienced, and how easy it is to endure them? Does it alter the impact of a given deprivation on self-esteem? If it does not, what are the consequences for persons likely to be when such hardships are nevertheless imposed? These are the questions that must be answered, and their general character indicates that a premise of "no hardship" is perhaps the least fruitful starting point for a genuine justificatory inquiry.[78]

Let me briefly summarize where we have got to. The "no hardship" argument was introduced to break what appeared to be a deadlock in the suggestion that intellectual property restrictions are costly for those on whom they are imposed. The deadlock arose out of an attempt by the

78. Very similar issues are involved also in discussions of material property. Many theorists defend a version of what is sometimes known as "the Lockean Proviso"—that a unilateral appropriation of material resources as private property by some individual is permissible if (and only if) no one else's situation is worsened thereby. *See* LOCKE, *supra* note 70, at 291; *cf.* Jeremy Waldron, *Enough and as Good Left for Others*, 29 PHIL. Q. (1979). *See also* ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 175-82 (1984); DAVID GAUTHIER, MORALS BY AGREEMENT 190-232 (1986). Wendy J. Gordon discusses the issue at length in her piece, *A Property Right in Self Expression*, *supra* note 27.

defenders of intellectual property to characterize harm to copiers as no more than the opportunity cost of their refraining from inflicting harm on authors. It seemed possible to describe the matter either way—either authors' rights impose losses on copiers or copiers' privileges impose losses on authors. The "no hardship" argument fails to break this deadlock because, as we have just seen, it is simply not true that people never suffer from being denied something that would not have existed but for another's efforts. So we are back with the deadlock again.

VIII. THE ISSUE OF LIBERTY

Perhaps instead of looking at the matter in terms of loss and harm, with all the attendant confusions about baselines and counterfactuals—who would have suffered what, if someone else hadn't existed, etc.—we should approach the matter in terms of the effect of intellectual property upon *liberty*. I have hinted at this already, in the discussion of Hohfeldian correlativity in Part II and the discussion of various senses of "privilege" in Part VI. To impose a duty (e.g., a duty of non-copying without consent of a work of authorship) one must limit the freedom of ordinary people, the argument would run, and that is *prima facie* an objectionable thing to do, certainly something not to be undertaken lightly.

The initial difficulty with this libertarian perspective is that *liberty*—at least, in any sense which could sustain a moral presumption of the kind just mentioned—is a heavily contested concept.[79] *All* laws limit liberty in *some* sense; so unless one's baseline is anarchism, there is still a question about whether laws of intellectual property affect liberty in any specially important sense that would take them out of the run of ordinary legislation, so far as moral justification is concerned.

If the suggestion is, for example, that intellectual property infringes a moral *right* to liberty, then the behavior it constrains must be identified as having a special moral significance. For a right to liberty cannot be a right to negative freedom as some sort of undifferentiated commodity. As Charles Taylor points out, "we make discriminations between obstacles as representing more or less serious infringements of freedom."[80] A law that forbids me from worshipping according to my beliefs is a blow to liberty in a way that a law that regulates traffic at intersections is not. In the latter case, Taylor argues, "we are reluctant to speak . . . of a loss

79. *See, e.g.*, W.B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC'Y 167 (1955-56); John Gray, *On Liberty, Liberalism and Essential Contestability*, 8 BRIT. J. POL. SCI. 385 (1978).

80. Charles Taylor, *What's Wrong with Negative Liberty?*, *in* THE IDEA OF FREEDOM: ESSAYS IN HONOR OF ISAIAH BERLIN 182 (Alan Ryan ed., 1979).

of liberty at all; what we feel we are trading off is convenience against safety."[81]

Which category do the restrictions imposed by intellectual property fall into? Are they more like restrictions on freedom of worship, or are they like the restrictions that form part of ordinary traffic law. There are a number of different ways of answering this question, a number of different ways in which we might try to differentiate between those freedoms that are important enough to be the subject of a right and those that are not.

A. Hardship

One way of approaching the matter would be to show that there is something particularly *onerous* about the limitation on liberty that intellectual property imposes—to show, in other words, that the restrictions in this case impose hardship or are difficult to bear. But that would take us straight back to the deadlock established in the previous Part.

B. "Natural" Liberty

A slightly different approach—but a variation on the "no hardship" argument—is suggested by some remarks of Henry Sidgwick. Sidgwick acknowledged that there was some plausibility to the view that copyright limits freedom. After all, he said, copyright consists of prohibitions.[82] He regarded it nevertheless as ultimately superficial: "It can hardly be an interference with A's natural liberty to exclude him, in the interest of B, from the gratuitous use of utilities which he could not possibly have enjoyed except as a result of B's labour."[83]

The emphasis here is on "*natural* liberty"—a concept that was used often by Adam Smith to define the baseline of a free economy.[84] But what does it mean to call a class of liberties "natural"? To sustain Sidgwick's argument, the class of A's natural liberty must comprise those

81. *Id.* A similar approach had already been taken by Ronald Dworkin. *See* DWORKIN, *supra* note 8, at 269:

> If the government chooses to make Lexington Avenue one-way down town, it is a sufficient justification that this would be in the general interest, and it would be ridiculous for me to argue that for some reason it would nevertheless be wrong. The vast bulk of the laws which diminish my liberty are justified on utilitarian grounds, as being in the general interest or for the general welfare; if, as Bentham supposes, each of these laws diminishes my liberty, they nevertheless do not take away from me any thing that I have a right to have.

82. HENRY SIDGWICK, PRINCIPLES OF POLITICAL ECONOMY 83 (1887), *quoted in* Hadfield, *supra* note 40, at 32.

83. *Id.*

84. *Cf.* 2 ADAM SMITH, THE WEALTH OF NATIONS 208 (E. Cannan ed., 1976) ("All systems either of preference or of restraint, therefore, being thus completely taken away, the obvious and simple system of natural liberty establishes itself of its own accord.").

actions he could perform absent any action by or interaction with other people. But why does "natural-ness" in this sense count for anything? Why privilege this class of actions as those to which important issues of liberty peculiarly pertain? After all, we do not live in a Rousseauian state of nature, wandering independently and barely ever running across one another. We live in a world constituted by the actions and achievements of others, and that now is the only environment in which there can be any question of our freedom. Which liberties are important to us and which are not must be defined in relation to *our* world and not in relation to some primeval state of nature.

C. Self-Regarding versus Other-Regarding Freedoms

A third approach is to say that there is a special moral presumption in favor of a right to perform actions that do not encroach on the freedom of action of anyone else. This of course is John Stuart Mill's position in *On Liberty*: "The only part of the conduct of anyone for which he is amenable to society is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute."[85] Actions that impinge on others' actions may be dealt with, quite properly, by ordinary legislation justified on utilitarian grounds. It is only self-regarding actions that attract the special protection of a moral right to liberty. This is also Immanuel Kant's position: the coercion of the law, Kant argued, may be used only to restrain coercion.[86] It follows that if the copier's actions do not impinge on anyone else's freedom, they should not be made the target of coercive laws (such as copyright).

Do the actions that our copier wishes to perform encroach upon others' freedom? Do they, in particular, encroach upon the authors' freedom or that of the assignees of his copyright? This is an intriguing question, and one that needs to be approached carefully.

Objects of property can be divided into two classes: those that are "crowdable" and those that are "non-crowdable." An object is "crowdable" if one person's use of it is an obstacle to at least one other's use of it.[87] The computer that I am using as I compose this sentence is crowd-

85. MILL, *supra* note 46, at 13.

86. IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 36 (John Ladd ed., 1965):

> Coercion . . . is a hindrance or opposition to freedom. Consequently, if a certain use of freedom is itself a hindrance to freedom according to universal laws (that is, is unjust), then the use of coercion to counteract it, inasmuch as it is the prevention of a hindrance to freedom, is consistent with freedom according to universal laws; in other words, this use of coercion is just.

87. For the distinction, see MICHAEL LAVER, THE POLITICS OF PRIVATE DESIRES: THE GUIDE TO THE POLITICS OF RATIONAL CHOICE 30-32 (1981).

able; it is a small desk-top machine that can be used for word-processing only by one person at a time. Any attempt by you to use it would interfere with my freedom to use it. The apple I am eating is crowdable in a slightly different sense; my consumption of it makes it unavailable for others' use forever, not just during the period of my use. The striking thing about intellectual products is that they are *non*-crowdable. Although only one person can read a given copy of a novel at a given time, any number of people may enjoy the prose contained therein without diminishing anyone else's enjoyment, and of course it's the prose not the physical book that is the subject of intellectual property. The point seems to apply to copying as much as to reading. If I copy a passage from one of the other essays in this Symposium, the other essay remains as it was, undiminished, for others to read (and, if they want, to copy) as before. Copying a piece of prose does not wear it out; any number of people can copy the same passage (provided they have access to its physical embodiment) at the same time.

It seems to follow from this feature of non-crowdability, that a copier's use of an author's prose can not impact on anyone else's actions, and so *a fortiori* cannot impact on the author's freedom of action. Since all objects of intellectual property have this feature, it seems to follow that all the infringements which intellectual property rules prohibit fall into the Kant/Mill category of acts that have no discernable impact on anyone else's freedom. This conclusion—if it can be sustained—would provide the basis for a powerful libertarian objection to intellectual property rules.

Few people think it can be sustained. In my experience the argument of the previous two paragraphs is viewed by ordinary folks (particularly authors) as a piece of academic sophistry. Of course the author's freedom is affected, they will retort. And many of them add: "He is no longer free to make the profits that he could have made in the absence of the copier's infringement."

Among intellectual property scholars, however, only Wendy Gordon has attempted to develop this retort into a broad, abstract argument against the libertarian position.[88] Gordon wants to show that the issue of liberty is as deadlocked as the issue of harm and hardship that we discussed in Part VII. She argues as follows:

> If compulsion were sufficient grounds for the copier to object to a legal regime of copyright, then compulsion would also be sufficient grounds for the work's creator to object to the user's compulsion, because the

88. Gordon, *An Inquiry*, *supra* note 27, at 1425-35.

> user will employ his privilege to do things with the work which the creator would prefer he not do. In many ways, then, the user's and creator's interests in being free from compulsion appear symmetrical.[89]

This argument, as it stands, does not work. The mere fact that some action is performed which the author would *prefer* were not performed is not at all an encroachment on his freedom. I would prefer that no one vote for the GOP candidate in the 1996 presidential election, but my freedom will not be affected if millions do (at least not by the mere fact of their voting Republican). Gordon may *not* say in response that the copyright case is different inasmuch as there it is a matter of the author's preference vis-a-vis his own work. Whether the work is to be regarded as *his own* in the relevant sense is exactly the point at issue. So although it is evident that the copier's activities may frustrate the author's preferences, that fact no more takes copying out of the privileged Kant/Mill category, than the fact that my Episcopalianism might frustrate a Muslim's preferences takes my religious practice out of that category.

Gordon backs up the bad argument we have just discussed with two others. In a paragraph following the one just quoted, she seems to suggest that the relevant symmetry is between the copier's being prevented from copying and the author's being prevented from *stopping* the copier from affecting his interests.[90] But this is based on a mistaken view about what a copier's privilege would amount to. At the moment a copier is under a duty to refrain from using the author's work, that duty (or its enforcement) restricts his freedom. If the duty is removed, what the copier will have is a Hohfeldian privilege, which is simply equivalent to the absence of a duty.[91] It is a further question whether this should be reinforced with a claim-right imposing a duty on the author (equally burdensome to liberty) requiring him not to do anything to copiers who use his work.[92] Those who complain that their liberty is compromised by duties

89. *Id.* at 1431.

90. I am inferring this line of argument from a response she attributes to the copier: "a copier's advocate might argue that there is a real difference between being stopped from doing something . . . and being frustrated in one's ability to stop others from affecting one's interests." *Id.* Gordon goes on to present other arguments to deny this asymmetry also. *Id.* at 1432-33.

91. I suspect from some of her earlier discussions that Gordon is quite confused about the concept of a privilege. She says, "In the Hohfeldian lexicon, a *privilege* is also an entitlement—an entitlement to be free from government interference." *Id.* at 1398. In fact, it was the aim of Hohfeld's analysis to avoid claims like this: what Gordon calls an entitlement is a combination of a privilege and a claim-right (not to be interfered with). Such Hohfeldian molecules may be common, see *supra* note 4 and accompanying text, but that is no excuse for ignoring their atomic structure.

92. *Ex hypothesi*, the author cannot sue to enforce a duty, since the copier's privilege indicates the absence of any such duty. But there may be other things he could do, like harass the copier or mount a legal campaign on some basis other than an infringement of duty. For an example, see Governors of the Bd. of Hosp. for Sick Children v. Walt Disney Enters., 1 All E.R. 1005 (1967). Walt Disney Enterprises were held liable to the owners of the copyright in *Peter Pan* for objecting to

to respect copyright need not be demanding this extra level of protection. So they need not be taken, as Gordon takes them, to be proposing a symmetrical restriction on the liberty of authors.

Gordon's final argument is the familiar one that a copiers' privilege would undermine the author's freedom to make a profit from his work.[93] There is no doubt that such a privilege would undermine the profitability of authorship. But it is much less clear that it does so by restricting freedom. The profitability of authorship needs to be guaranteed by monopoly rules, since absent such rules authors would be *unable* to convince as many people to pay as much for authorized copies of their works. But inability is not the same as lack of freedom.[94] I may be unable to sell fresh water in Scotland where the stuff falls in bucketfuls from the sky, but my liberty is hardly affected thereby. No doubt, I could make a profit if the Scottish Office granted me a monopoly on water-rights (no one to use any water anywhere without a license purchased from me). Such a monopoly would be coercive so far as other people were concerned, since it would have to prohibit and prevent their free use of water. But the effect it would have on their liberty is not matched by any effect their freedom would have on mine if the monopoly were not established. Though I would receive less money, no assault would be made upon my freedom by the Scottish Office's refusal to give me exclusive water-rights.

Indeed I can think of only one feature that distinguishes water and intellectual property, so far as the monopolist's freedom is concerned. In the case of water, the commodity in question falls unbidden (and often unwelcome) from the sky.[95] In the case of intellectual property, a work of authorship is deliberately created and it is the author's decision to send it out into the public realm where it becomes in effect physically available for copiers' use. That decision may create important issues of the author's freedom, for some actions by copiers may interfere with it. In *Harper & Row, Publishers, Inc. v. Nation Enterprises*,[96] the defendant

a new movie proposal (to star Audrey Hepburn in the title role) in violation of a contractual undertaking not to do so.

93. Again, I am reconstructing this argument from hints in the text. Gordon observes that authors' "being unable to collect as much profit as they desire" is a "form of compulsion." *An Inquiry*, *supra* note 27, at 1431.

94. *See* ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY 122 (1970) which states:

> If I say that I am unable to jump more than ten feet in the air, or cannot read because I am blind, or cannot understand the darker pages of Hegel, it would be eccentric to say that I am to that degree enslaved or coerced . . . . Mere inability to attain a goal is not lack of political freedom.

(footnotes omitted).

95. I am thinking of Scotland; none of this applies in California.

96. Harper & Row, Publishers, Inc. v. Nation Enter., 471 U.S. 539 (1985).

magazine was sued (among other things) for infringing Gerald Ford's right to determine when and where his memoirs would be first published. Having purloined his manuscript, *The Nation* scooped Ford's publisher and their initial licensees, *Time Magazine*, giving his words an initial airing in a forum hardly congenial to the author.[97] By doing so, they clearly undermined Ford's freedom to determine where his work would first be presented to the public.[98] In this case, then, the freedom they claimed (as a matter of fair use) *did* impact on Ford's freedom, and so would not fall into the specially favored Kant/Mill category that we have been considering in this subpart. But it is a mistake, as we have seen, to generalize from this particular case to any broader proposition that a copier's activity as such necessarily compromises the liberty of the author whose work he is using.[99]

D. Liberty versus License

Whether or not copiers' actions encroach on liberty, they may still be doing something wrong.[100] Can this be used as a basis for disqualifying their claim to liberty? We often say that freedom of action which violates moral duty is not liberty but *license*.[101] If the copiers' claim is

97. *Id.* at 542.

98. *See id.* at 559. We should note, however, that the majority emphasized mainly the commercial value of the right of first publication rather than its importance as a matter of liberty. *Id.* at 562. For a more high-minded view of the importance of control over self-disclosure in this context, see Lynn Sharp Paine, *Trade Secrets and the Justification of Intellectual Property: A Comment on Hettinger*, 18 PHIL. & PUB. AFF. 247, 251-56 (1989).

99. There is not space here to discuss what are sometimes referred to as authors' "moral rights"—e.g., the insistence in Article 6 of the Berne Convention on Intellectual Property that "[i]ndependently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right . . . to object to any distortion, mutilation or other modification of . . . the said work, which would be prejudicial to his honour or reputation." Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886 art. 6 bis. Though legislation of this provision was expressly excluded by the Incorporation Act of 1988, the ideal of moral rights is nevertheless making some headway in case law. *See, e.g.*, Gilliam v. American Broadcasting Cos., 538 F.2d 14, 21, 25 (2d Cir. 1976) (holding that broadcast of a bowdlerized version of the Monty Python comedy show may constitute an infringement of copyright if the Monty Python group had consented only to their being broadcast in their entirety). For the purposes of our argument, moral rights (to the extent they are recognized) may fall into much the same category as the right to determine exactly where and how one's work may be first published.

100. *Cf.* Gordon, *An Inquiry*, *supra* note 27, at 1434 ("Alternatively, an author's advocate might abandon the debate about whether rights or privileges need justification more. She might argue instead that 'the law ought to do what is morally required' and contend that it is morally wrong for users to take unconsented advantage of others' efforts." (citation omitted) (quoting JEFFREY MURPHY & JULES L. COLEMAN, THE PHILOSOPHY OF LAW 191 (1984)).

101. The distinction is familiar to students of property from its use in John Locke's political philosophy. Though the state of nature "be a State of Liberty," he says, "yet it is not a State of Licence." 2 LOCKE, *supra* note 70, at 270:

> Freedom is not, as we are told, *A Liberty for every Man to do what he lists*: (For who could be free, when every other man's Humour might domineer over him?) But a Liberty to dispose, and order, as he lists, his Person, Actions, and Possessions, and his whole Prop-

merely a demand for license to act wrongly and irresponsibly, it can hardly be used as a basis for imposing a heavier-than-usual burden of justification on those who support intellectual property law.

Some of our moral intuitions support this position. Most of us agree that plagiarism, for example, is wrong—that it is wrong deliberately to take another's work, in whole or in part, and mislead others into thinking it is one's own. It is wrong to try to get credit (or in the academic case, advancement) by this means. But the wrongness here is largely the wrongness of deception—or, to put it bluntly, lying—about the provenance of one's work. The right to do that is seldom what the opponents of copyright are asking for. They want the freedom to build upon, incorporate, and satirize others' works in an environment where no one would be under any illusion about what was going on. The last point is important. In a world dominated by copyright, the popular assumption is that a work published under a given author's name is that author's own work and nobody else's. To incorporate elements of others' work in such a world is to give a misleading impression of originality unless there is clear notice to the contrary. But what copiers are urging is that the world cease to be dominated by copyright (and the attendant understandings) in this way.

Beyond the case of plagiarism, it is hard to sustain the liberty/license distinction in this area without resting it on one of the other arguments, or without begging other questions, that we have been considering. It is surely wrong to harm authors—we have already seen that there is a deadlock concerning the balance of harms in the intellectual property issue. It is morally right perhaps to give authors a reward for their troubles—but we have already seen that the issue is precisely whether a reward for authors should be purchased at the cost of others' freedom. It is no doubt wrong for copiers to impede the progress of the sciences and useful arts—but copiers complain that they are bearing undue costs in the quest for these benefits (and many claim also that exactly the same goal would be better served by the regime they advocate).

E. From Freedom to Autonomy

A final move that may be made in the debate about liberty is to consider whether we can connect the liberty-claim made by copiers to

erty, within the allowance of those Laws under which he is; and therein not to be subject to the arbitrary Will of another, but freely follow his own.

Id. at 306. There is an excellent discussion of the liberty versus license distinction in ROGER SCRUTON, A DICTIONARY OF POLITICAL THOUGHT 271-72 (1982). *See also* DWORKIN, *supra* note 8, at 262-65.

some deeper and more discriminating value such as individual autonomy. The move from run-of-the-mill freedom to autonomy is common in modern political philosophy.[102] The latter value has been described by Joseph Raz: "The ideal of personal autonomy is the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives."[103] An individual lives autonomously when the shape and character of his life (relationships, career, etc.) reflect choices that he has made at various points among a range of available options. The complex relation between autonomy and freedom consists in the fact that while the choices in question must be free, one does not need free choice over *everything* in order to be autonomous. Some choices are more determinative than others of how one's life will be shaped, and—though people may differ in this—we form for political and educational purposes a sense of which types of choices tend to be particularly strategic in this regard. Free choice of sexual partner, for example, and freedom of choice concerning reproduction seem absolutely fundamental to the modern conception of the autonomous individual, i.e., the individual who chooses the overall shape of his own life. These are choices that pervade the nature and quality of almost all the remainder of one's life. But no one could plausibly think that about such things as the trivial actions routinely regulated by traffic laws for the sake of the general welfare. Barring extraordinary cases, no one can say that driving in any particular direction on a one-way street is crucial or strategic for his autonomy. There is a strong presumption, then, against interfering with liberties of the former sort—and accordingly, they are characteristically made the subject-matter of rights-claims—whereas, for liberties of the latter sort, any old mundane economic justification will do.

For our purposes, the freedom-claim that may seem particularly germane to autonomy is a claim for freedom of expression. Man is a speaking being, and self-expression is part of our essence.[104] The choice of when and how to express oneself seems particularly strategic in the overall determination of the shape and character of one's life—particularly if we grant that the character of one's life is partly a matter of presentation of self to others.

The trouble is that an ideal like autonomy cuts both ways in our

102. *See* Taylor, *supra* note 80, at 181-84; JOSEPH RAZ, THE MORALITY OF FREEDOM 407-12 (1986); GERALD DWORKIN, THE THEORY AND PRACTICE OF AUTONOMY 13-14 (1988).

103. RAZ, *supra* note 102, at 369. For a discussion of Raz's conception, see Jeremy Waldron, *Autonomy and Perfectionism in Raz's* Morality of Freedom, 62 S. CAL. L. REV. 1097 (1989).

104. *See* ARISTOTLE, THE POLITICS 3 (Stephen Everson ed., 1988) ("Nature, as we often say, makes nothing in vain, and man is the only animal who has the gift of speech.").

debate. Authors will claim that the integrity of their self-expression is compromised by the use and adaptation of its content by others.[105] Walt Disney may feel that his purpose in creating the cheerful scrubbed faces of Mickey and Minnie Mouse is undermined by the Air Pirates' caricature—and the latter can hardly deny that this was their intention.[106] In turn, copiers will claim that their ability to express themselves autonomously—as parodists, pastiche artists or whatever—is impeded by the restrictions that authors' rights place upon them. So once again we have an impasse; invocation of the value of autonomy settles nothing.

For copiers, especially, the impasse is complicated by a philosophical connection between autonomy and the very idea of authorship. "Autonomy is an ideal of self-creation," says Joseph Raz, "The autonomous person is part author of his life."[107] The connection presents them with something of a dilemma. On the one hand, copiers make demands in the name of individual liberty and of their status as autonomous agents; it seems outrageous to them that free expression and their use of cultural materials should be restricted when such expression is crucial to their self-constitution. On the other hand, it is part of their case to try and undermine the myth of originality and authorship, to stress that we are always indebted to others, always building on scraps of others' achievement, even in what seem to be our most creative moments. They argue that the law should recognize that, and accordingly remove impediments to the free and explicit circulation of ideas. That argument is fine, in itself, but it seems ironic that they are sustaining it by appeal to a value of autonomy that involves the very ideas of originality and self-creation *ex nihilo* that they are attempting to undermine.

IX. THE DECONSTRUCTION OF THE AUTHOR

The irony we have just noticed accords with the general instability we discerned earlier in the ontological terms in which moral positions on intellectual property are presented. We began in Part III with the view that private property in material resources tends to be defended in individualist terms and attacked in social terms. In Part IV, we noted that with intellectual property it is the other way round: the official defense is social utility and the objections are on grounds of individual freedom. But no sooner had we identified this contrast than it began to dissolve. The social arguments in defense of copyright tend to get converted into

105. *See, e.g.*, Shipley, *supra* note 22.
106. *See* Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 758 (9th Cir. 1978).
107. RAZ, *supra* note 102, at 370.

arguments about what individual authors deserve (Part V), and libertarian impatience with restrictions on the use of intellectual products gets transformed into arguments about what society needs for the free flow of ideas (Part VI). Since then we seem to have run into nothing but deadlock and circularity: hardship to authors is matched by hardship to copiers (Part VII); and claims of liberty just send us around the circle of argument once again, as they constantly refer to other values in a debate to which it was hoped they would offer an independent contribution.

There are many scholars to whom these paradoxes and ironies will come as no surprise. Deconstructionist or post-modernist scholars speak often of the collapse of the traditional idea of *the subject* and of the corresponding antithesis between individual and social categories.[108] That individualist and social utility ideas switch their character back and forth is exactly what one should expect on this approach.

In the areas that interest us in this Symposium, the talk is often of "the Death of the Author." It is said that the ideas about authorship and originality which characterize the rhetoric of intellectual property are not immutable Platonic categories. They are ideas of quite recent provenance—a product largely of the Romantic cult of the individual creative artists; as cultural categories they have been wrecked beyond retrieval by the conditions of modern life and the conundrums of post-modern theory. It is said that in the circumstances of contemporary cultural production, there is no entity to fill the role of *author*—source of the original spark of creative genius, responsible for something entirely new—that copyright and other intellectual property concepts make so crucial. The view, as far as I understand it, is that ideas, words and images circulate freely and haphazardly in a sort of cultural maelstrom, and that we speak more or less arbitrarily of works of authorship whenever some combination of ideas, words and images crystallizes[109] out of the maelstrom for long enough to catch our attention. This way of thinking emphasizes the unbounded nature of interpretation, with *Hamlet* being in effect rewritten or reconstructed every time it is read. It highlights the *pastiche* character of modern cultural products, with no credibility whatever attaching to the idea that anything is entirely new. At the level of the work itself, there is nothing sufficiently enduring or distinctive to be regarded as a thing whose originality must be respected. At the level of author, the general deconstruction of the human subject adds to the specific sense, in

108. *See e.g.*, John Forrester, *A Brief History of the Subject*, *in* THE REAL ME: POST-MODERNISM AND THE QUESTION OF IDENTITY (Lisa Appignanesi ed., 1987).

109. Mixed metaphors are not just excusable, but *de rigeur* in discussions like this.

the cultural context, that there is no one individual to take credit for a given production, and no enduring person in whom rights over a given production could be vested in any non-arbitrary way.[110]

Sometimes, indeed, it is said that the modern creation of the category of *the author of a work* is a response to the needs and exigencies of copyright law rather than the other way round. There is not space to retell that story here.[111] But the idea is that what law can construct, law can deconstruct. It is the contention of Jane Gaines, and other scholars in this field, that by allowing intellectual property rights to circulate as commodities—vesting often in great studios and publishing houses, to the extent that they come to rest at all—modern law shatters the connection between author and work, no less effectively than modern capitalism shatters the connection between individual laborer and the product commodity that emerges from an assembly line.[112]

If these lines of thought can be sustained, they certainly undermine any argument for authorial entitlement based on Lockean natural rights. Lockean arguments for intellectual property can seem very tempting at first sight. Copyright seems like a legal vindication of the intensely personal relation between an individual and the fruits of his intellectual labor. Indeed, intellectual property can appear more justifiable along these lines than the topic of Locke's own concern—property in material resources. Unlike the ownership of land, intellectual property does not involve giving people rights over resources that were arguably created for all men to enjoy. What copyright appears to uphold are rights of pure agency, rights in something that literally did not exist in any form before the author put his mind to work. As one author put it, "intellectual property is . . . the only absolute possession in the whole world . . . . The man who brings out of nothingness some child of his thought has rights therein which cannot belong to any other sort of property . . . ."[113]

But such an appearance is terribly vulnerable to the philosophical

110. There is an excellent discussion in JANE M. GAINES, CONTESTED CULTURE: THE IMAGE, THE VOICE, AND THE LAW 1-41, 51-83 (1991). *See also* Michel Foucault, *What Is an Author?*, 20 SCREEN 13, *in* TEXTUAL STRATEGIES: PERSPECTIVES IN POST-STRUCTURALIST CRITICISM 141 (Josué V. Harari ed., 1979); UMBERTO ECO, SEMIOTICS AND THE PHILOSOPHY OF LANGUAGE 45 (1986).

111. For a moderate version of this thesis, see L. RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE (1968). For a more radical version, see Mark Rose, *The Author as Proprietor:* Donaldson v. Beckett *and the Genealogy of Modern Authorship*, 23 REPRESENTATIONS 51 (1988). There is also a good discussion in GAINES, *supra* note 110, at 61-62. I am grateful to my colleague Robert Post for some discussion of these ideas.

112. *See generally* GAINES, *supra* note 110; BERNARD EDELMAN, OWNERSHIP OF THE IMAGE: ELEMENTS FOR A MARXIST THEORY OF LAW (1979).

113. Nathaniel Shaler, *quoted in* Thorvald Solberg, *Copyright Reform: Legislation and International Copyright*, 14 NOTRE DAME L. REV. 343, 358 (1939).

vicissitudes of the individual subject. If an individual's personality is itself a cultural product, we are hardly in a position to say with John Locke that "every Man has a *Property* in his own *Person*. This no Body has any Right to but himself."[114] And if the production of a "work of authorship," far from creation *ex nihilo*, is simply the crystallization of an arresting combination of phrases and images in the vicinity of someone sitting at a desk with a pen in his hand, the latter can hardly base claims to exclusive rights over the product on the ground that "being Master of himself . . . [he] had . . . in himself *the great Foundation of Property*."[115]

The post-modern argument, then, threatens to undermine the intellectual credentials of that portion of judicial "common-sense"[116] on intellectual property that is Lockean or natural-rights-based in character. (Of course as we have seen already a number of times, the fact that such rhetoric is intellectually disreputable seems in no way a bar to its use by judges.)

Interestingly, however, it may have little impact on the official incentives-for-social-benefit argument in favor of copyright. On the economic argument, particularly if it is understood along the lines of the Hayekian strictures I discussed in Part V, nothing whatever hinges on the integrity of the author as subject. After all, in the official story, the aim of intellectual property law is not to give Lockean credit to *authors as such*. From the economic point of view, who cares whether there are any enduring personalities—individual founts of original genius—whose talents we can match with their deserts? All the economic analysis requires is that there be *decision-makers* in the production of works of authorship—preferably self-interested decision-makers who will respond to price signals in considering whether to produce yet more items to be circulated and deconstructed in the marketplace.

Maybe the post-modernist argument tends to deconstruct rational choice as well—and that *would* pose serious difficulties for the economic approach. But then it would have nothing particular to do with "the

114. LOCKE, *supra* note 70, at 287.

115. *Id.* at 298.

116. For the idea of "common-sense" in judging, see GAINES, *supra* note 110, at 12:

> Yes, judges do apply legal rules and principles, and yes, most of what they write in their opinions pertains to the review of precedent and the clarification of points of law. But that purely legal discourse is often mixed with pithy sayings, homely analogies, personal judgments, and frank characterizations. What I mean by defining this knowledge as 'common-sense' is that it is drawn directly out of the reservoir of shared knowledge in the culture, the common pool of norms, beliefs, and values from which we all draw in our attempts to make sense of the world.

See also text accompanying note 30.

Death of the Author," and nothing particular to do with intellectual property. It would undermine all economic justifications of law and—if it were taken to an extreme—it would render meaningless concern of every kind for the fate of the individual person.

X. COPIERS AND CULTURES

Ironically, it is copiers, not authors, whose position in this debate is more affected by the post-modern arguments. We saw at the end of Part VIII that some of the claims to liberty made in behalf of copiers (particularly autonomy-based claims) are vulnerable to their own denigration of the importance of authorship and originality. Obviously the post-modern critique exacerbates this. To the extent that that critique undermines the traditional liberal subject, it of course undermines any claim for freedom or autonomy that such a subject may make.

At the same time, however, the post-modern critique can enhance our sense of the hardships and dilemmas that people—fragmented *pastiches* that they are—face in a world dominated by intellectual property. It can affect the way we judge them morally, and it can also affect our estimation of the burden they have to bear for the sake of the rewards we are conferring upon authors.

If anything like the post-modern story is accepted, or even if one just reflects a little on what it really means to write a book, compose a song or conceive an image in a modern world saturated with culture, one will hardly be surprised, let alone outraged, to hear that a given author's work incorporates or makes use of elements that are familiar to us already. In a world dominated by television, in a physical environment over-borne by advertising, in conversation increasingly loaded with, like, catch-phrases, it is the idea of *the totally new* that should surprise us. That an author's work should be completely original rather than derivative, so far from being a moral or legal requirement, would strike most sensible observers as supererogatory.

Now we all know that the law attempts to handle this with the doctrine that it is not ideas whose use is limited by intellectual property rights, but only the mode of their expression. But even the courts acknowledge the unhelpfulness of the distinction,[117] and of course from the post-modern perspectives we have been considering, such a distinction

117. Chuck Blore & Don Richman Inc. v. 20/20 Advertising, Inc., 674 F.Supp. 671, 676 (D. Minn. 1987) ("The first axiom of copyright is that copyright protection covers only the expression of ideas and not ideas themselves . . . . The second axiom of copyright is that the first axiom is more of an amorphous characterization than it is a principled guidepost.").

would be the object of derision.[118] It is not ideas that circulate in the maelstrom of modern culture—at least, not ideas considered as pristine propositional entities untainted by the form in which they were expressed. On the contrary, forms and expressions circulate—just listen, for instance, to the similarities in the speech of any two teenagers chosen at random—and they pervade each person's sense of what it is that he in particular wants to say or produce.

The situation is most poignantly captured in a case concerning George Harrison's song "My Sweet Lord," alleged to have been plagiarized from the Chiffons' "He's So Fine."[119] Having discerned extensive musical similarities between the two compositions, the District Judge made the following observations:

> Seeking the well springs of musical composition—why a composer chooses the succession of notes and the harmonies that he does—whether it be George Harrison or Richard Wagner—is a fascinating inquiry. It is apparent . . . that neither Harrison nor [collaborator Billy] Preston were conscious of the fact that they were utilizing the He's So Fine theme . . . . I conclude that the composer, in seeking musical materials to clothe his thoughts, was working with various possibilities. As he tried this possibility and that, there came to the surface of his mind a particular combination that pleased him as being one he felt would be appealing to a prospective listener; in other words, that this combination of sounds would work. Why? Because his subconscious knew it already had worked in a song his conscious mind did not remember.[120]

Despite the absence of intention or knowledge, Harrison was held to have infringed the plaintiff's rights.

It is clear that cases like this make a difference to our image of the copier. All of us—not just those in the entertainment industry—live in a world alive with song; snatches and phrases of this and that tune wander through our minds, more or less continually. One who fails to trace the particular provenance of a combination of notes that happens to "work" for him can hardly be regarded as thief. He is more like someone who has stumbled onto another's property where there is no clear boundary fence. More important, avoiding the sort of subconscious influence that the judge traced in the *Harrisongs* case would require the most rigorous and stultifying self-scrutiny. In this sense, the intellectual property rights of the Chiffons impose a duty of respect on other musicians—a duty to

118. For an example of such derision, see GAINES, *supra* note 110, at 103.

119. Bright Tunes Music Corp. v. Harrisongs Music, Ltd., 420 F. Supp. 177, 178 (S.D.N.Y. 1976), *aff'd*, ABKCO Music, Inc. v. Harrisongs Music, Ltd., 722 F.2d 988 (2d Cir. 1983).

120. *Id.* at 180 (footnotes omitted).

ensure that one is avoiding subconscious imitation in a world resonating with "original" tunes—that is in fact very burdensome.

There is one last twist to be noted. In her book *Contested Cultures*, Jane Gaines has drawn attention to the fact that those who own and propagate stories, songs, images and ideas lay a sort of trap for the people whose lives are touched by their productions.[121]

Consider the case we began with: the caricature of Disney Characters in the "Air Pirates" comic books.[122] If one were to pursue an analogy with real property, one might get the idea from the decision that Mickey Mouse was supposed to be the private domain of his creator, analogous to Walt Disney's home or a piece of land that he owned, and that all he was asking was that the courts should compel others to respect the "Keep Out" signs that defined the boundaries of his property. But of course any such analogy would be ludicrous. The whole point of the Mickey Mouse image is that it is thrust out into the cultural world to impinge on the consciousness of all of us. Its enormous popularity, consciously cultivated for decades by the Disney empire, means it has become an instantly recognizable icon, in a real sense part of our lives. When Ralph Steadman paints the familiar mouse ears on a cartoon image of Ronald Reagan, or when someone on my faculty refers to some proposed syllabus as a "Mickey Mouse" idea,[123] they attest to the fact that this is not just property without boundaries on which we might accidentally encroach (like George Harrison on "He's So Fine") but an artifact that has been deliberately set up as a more or less permanent feature of the environment all of us inhabit.

We see this happening in the attempt of every advertiser to make the brand name of his product "a household word," to so inscribe his intellectual property in the mind of every consumer as to make it a part of their everyday vocabulary. And the fact is that some of them, like "aspirin," "brassiere," "zipper," and "cellophane" do become household words—so much so that it becomes ludicrous to continue insisting on the original proprietor's right to control their use.[124] Analytically, the process is akin to a loss of property by prescription: improper use of a brand

121. GAINES, *supra* note 110, at 208-27.

122. *See* Walt Disney Prods. v. Air Pirates, 581 F.2d 751 (9th Cir. 1978). This is not a case that Gaines herself discusses, but I am adapting her analysis to apply to it.

123. "Mickey Mouse \'mik-e-'maus\ adj. [*Mickey Mouse*, cartoon character created by Walt Disney] (1938) 1 *often not cap* : being or performing insipid or corny popular music 2 : lacking importance : INSIGNIFICANT <*Mickey Mouse* courses, where you don't work too hard—Willie Cager> 3 : annoyingly petty <*Mickey Mouse* regulations>." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 749 (1990).

124. American Chicle Co. v. Topps Chewing Gum, Inc. 208 F.2d 560, 562 (2d Cir. 1953) ("That is a peril to which all such advertising is subject; its very success may prove its failure.").

name to refer to an array of goods, not just those marketed by the original inventor of the word, will in time result in the word becoming a generic term, so that its "proprietor" can no longer insist that his rights are necessary to prevent confusion between his product and somebody else's. But short of a legal determination that that has happened,[125] there are still an enormous number of images, icons and phrases that exist in a sort of grey area, still subject to intellectual property constraints, yet increasingly part of the ordinary furniture of our world.

To illustrate: since 1896 in the modern era and, before that, from classical antiquity, the idea of an olympic games—a great sports festival bridging traditional barriers of national or political antipathy—has been part of the culture of our civilization. Yet in recent years, the word "Olympic" has been held to be private property. The rights in this case were conferred specifically by statute: the Amateur Sports Act of 1978 authorized the private corporation that organized the Los Angeles games (the USOC) to prohibit any person from using the word "Olympic" for purpose of promoting, inter alia, "any theatrical exhibition, athletic performance, or competition." The U.S. Supreme Court held that it was not an unconstitutional restraint on free expression for the USOC to use this provision to restrain a San Francisco-based organization from promoting "the Gay Olympic Games."[126] The court observed that the San Francisco group could have conveyed their meaning in other words, without necessarily using what they held had become by statute a proprietary term. By this means, then one word with all its cultural resonance was simply removed from the arena of free expression—certainly dissident expression—under cover of intellectual property rights.

It is difficult to disagree with Jane Gaines's verdict on this case:

> I would read this case as a dispute over the representation of sexuality in the symbolic terrain of the sports world. The attempt to 'occupy' the trademark OLYMPIC was a strategic political maneuver on the part of gay men and lesbians . . . . Justice Brennan, the single dissenting voice on the court, seemed to recognize [this], for in his opinion he argued that the image of the Olympics would help to mainstream homosexuals. But the USOC borrowed intellectual property doctrine in its attempt to settle the meaning of "Olympic" as a sign coterminous with a "healthy" heterosexual image of male and female sport. The USOC wanted, in short, to prohibit the connotative buildup that might be produced through the association of this sign with homosexuality.[127]

125. *See* HALPERN ET AL., *supra* note 19, at 25 (intellectual property nerds call it "genericide").
126. San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522, 527-28 (1987).
127. GAINES, *supra* note 110, at 238.

The point, she insists, is that the association forged by the San Francisco group's use of the term would work both ways. It might affect the traditional sporting symbol (an effect dealt with under trademark law's doctrine of "dilution") by associating gays with "Olympics." But it might also affect the popular perception of homosexual men and women by associating "Olympics" with gays. Any attempt to prevent the one impact has the effect also of preventing the other. Yet at most it is only the former—the dilution of the trademark—that is considered and justified by the jurisprudence of intellectual property. For the rest it is simply a matter of hegemony—corporate control of the socially charged use of one of the items in our vocabulary.

All of this raises profoundly important issues that can only be touched on here. They have to do with the fact that we live not only in a material environment where every space may be appropriated as private property,[128] but also in a cultural environment whose elements too are in danger of being appropriated—"gobbled up" by the corporations of the entertainment industry, like "a game of conceptual Pac Man," in David Lange's apt image.[129] The private appropriation of the public realm of cultural artifacts restricts and controls the moves that can be made therein by the rest of us. Of course these artifacts have their originators, and one can empathize with their initial impulse to control their own work. Nevertheless what they (and their collaborators in marketing) have done—and done intentionally—is make these artifacts now part of our world. My point, then, is that this environment, having been thrust upon us by those in whose interests cultural commodities circulate, is now the only one we have, so that it is now in a sense unfair to deny us the liberty to make of it what we will.

Indeed, the argument goes beyond that. For there is also the point that we *need* some such cultural frame of reference and we *must* use the only one we have, in our thoughts and our interactions with one another.[130] Lacking direct, telepathic contact, we must address one another using, not only the resources of a common language and vocabulary, but, in a larger sense, whatever images and catch-phrases there are in the world, to provide points of mutual understanding and

128. *See* Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295, 300-02 (1991).

129. David Lange, *Recognizing the Public Domain*, 44 LAW & CONTEMP. PROBS. 147, 156 (1981). Lange's image no doubt violates the rights of the inventor of Pac Man. *See also* GAINES, *supra* note 110, at 224-25.

130. For the human need for a "world" of common reference points for speech and action, see generally HANNAH ARENDT, THE HUMAN CONDITION (1958).

orientation, and to give as much color and richness as possible to our cultural moves and counter-moves.

In the *Air Pirates* decision, the Ninth Circuit observed in a footnote that the target of the parody was "life and society" not the Walt Disney characters as such.[131] The defendants, therefore, could hardly claim that the detailed copying of the personalities of Mickey and Minnie Mouse—"their wholesomeness and their innocence"[132]—was indispensable for the point they wanted to make. The court went on to suggest that "[t]o the extent that the Disney characters are not also an object of the parody . . . the need to conjure them up would be reduced if not eliminated."[133]

To this, one is tempted to respond in Lear-like exasperation, "O, reason not the need! Our basest beggars / Are in the poorest thing superfluous. / Allow not nature more than nature needs, / Man's life is cheap as beast's."[134] That anyone could think that the progress of sciences and useful arts is served by the Ninth Circuit's careful measuring of exactly how much of an original work needs to be referred to in order to conjure up the object of a parody is quite beyond me. One has only to look at a single frame of the cartoon to see that the matter defies quantification, and that no purpose except the blunting and bleaching of dissent is served by such fastidious respect for "property." No doubt, Air Pirates *could* have manufactured a series of telling, if tedious observations on "life and society" without using or conjuring up any of the particular icons or images of contemporary culture. They could even have created new, and hence unfamiliar comic characters of their own. In this sense, I suppose, their poaching Walt Disney's efforts was strictly "unnecessary." But what a flat and colorless world it would be, if social discussion were conducted according to these standards. Our arguments—the back and forth of social and political critique—would have all the *éclat* and richness of the ponderous and respectful speeches of a Rotary Club.[135]

XI. CONCLUSION

There is of course much more to be said on all these points. I know I have not resolved very many of the perplexing issues raised in this Es-

131. Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 758 n.15 (9th Cir. 1978).

132. *Id.*

133. *Id.*

134. WILLIAM SHAKESPEARE, KING LEAR, act II, sc. 4. *See also* MICHAEL IGNATIEFF, THE NEEDS OF STRANGERS 29-53 (1984), discussing this passage and arguing that humans require the cultural richness of particular relations to flesh out the bare bones of natural need.

135. This is analogous to a point I have made elsewhere about respect for others' religious views. *See* Jeremy Waldron, *Rushdie and Religion*, in JEREMY WALDRON, LIBERAL RIGHTS: COLLECTED PAPERS 1981-91, at 139 (1993).

say. What I have tried to do is to pick at one thread trailing from a knotted tangle of intellectual property jurisprudence and see how much unravels. The thread is, I believe, a neglected one: our conception of the position or predicament of the frustrated copier as intellectual, as opposed to the position or predicament of the anxious publisher, eager for his royalties. As with all property, our tendency is to approach matters sympathetically from the perspective of the putative owner, rather than oppositionally from the perspective of those who feel the impact of his rights.

This, then, has been an Essay in oppositional analysis. Who are the other parties in the copyright equation—the ones whom intellectual property rights constrain—and how are we to think of them? Are they individuals, to be considered one by one, or are they to be considered *en masse* under the heading of "the public" or "the general interest in the dissemination of knowledge." If they are thought of as individuals, are they conceived passively or actively? Are they scholars or parodists? Are they creative geniuses, or are they as *pastiche*-like as the works they create? Are they working in an environment of their own choosing or in one already constituted by the intellectual artifacts of others?

None of these questions is easy to answer. A change of perspective, though salutary, is often a matter of wading confidently from one morass to another. Nevertheless these are the ones we should be addressing, if we are serious about the justification of intellectual property. There is a lot of talk in this literature about where the burden of proof lies, and I suppose that's a natural response to the deadlocks we have been discussing.[136] The fact is, however, that whether or not we speak of a burden of proof, an institution like intellectual property is not self-justifying; we owe a justification to anyone who finds that he can move less freely than he would in the absence of the institution. So although the people whose perspective I have taken—the copiers—may be denigrated as unoriginal plagiarists or thieves of others' work, still they are the ones who feel the immediate impact of our intellectual property laws. It affects what they may do, how they may speak, and how they may earn a living. Of course nothing is settled by saying that it is their interests that are particularly at stake; if the tables were turned, we should want to highlight the perspective of the authors. But as things stand, the would-be copiers are the ones to whom a justification of intellectual property is owed.

136. *See, e.g.*, Gordon, *An Inquiry*, *supra* note 27, at 1433 ("[A] procopyright advocate might try to put the burden of persuasion on those who would give private persons liberties to affect others' interests.").