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I come here with a sense of gratitude, to the intellectually stimulating BU community of students, staff and faculty, that has taught me so much, and grateful today especially to those who made this event possible. I would like to thank you all for coming, thank Dean ORourke for hosting this wonderful event, Mary Gallagher and Cornell Stinson for organizing it, and most especially I thank Phil Beck for his generosity to the Boston University School of Law in funding this Chair. It's immensely flattering to me having been chosen the initial recipient, and flattering to the school that Phil chose us as to receive his gift. The proverb says that imitation is the sincerest form of flattery, but I think that alumni loyalty is probably the most meaningful. The loyalty of its graduates, particularly those who like Phil Beck are leaders of the bar, is one of the best compliments a school can receive on the education and community it provides.

I am going to take you on a conceptual trip that I will narrate chronologically. I will begin back in 1970, while the Congress was considering the variety of proposals which in 1976 became the contemporary copyright act. I will move from 1970 through the present to the future. The topic is how we understand the

institution known as copyright. It's an immensely complicated historical seascape, ~~and I will~~ use my some of own work to anchor the discussion \. Our goal is to see how copyright, technology, and conceptual approaches have evolved, and are likely to continue evolving.

Our first stop is 1970 when Justice Breyer, then a professor at Harvard, wrote what he called "The Uneasy Case for Copyright". It was a largely empirical investigation into the economics of trade books and other copyright industries. The question asked was, did we need copyright in order to have a sufficient supply of books?

You may wonder, why start with that question, instead of asking what kind of rewards an author deserves. Certainly the latter question, of author's inherent rights, was the starting point for inquiry on much of the European continent. But the Anglo-American approach was more instrumental: Our constitution,much like Britain's first copyright law the Statute of Ann, stated that the purpose of copyright and ~~patent~~ was to further the Progress of Science and the useful arts. Giving exclusive rights to authors and inventors was seen as an instrument to serve the progress of learning. The instrumental nature of the right was

underlined by the way the Cositutiton stated it was for "limited times"—as James White has pointed out, the public interest nature of copyright was clear from the beginning because unlike ordinary property in land and objects, copyrights must expire, putting their treasures into the public domain for all to copy. And even during the period when ownership exsts, the most valuable parts of copyright—the ideas conveyed—passed directly to the public, free for all to use. Only the expression could be privately owned, and then only for a limited time, all for the primary purpose of advancing learning and culture.

So the question arose whether copyright did in fact serve this goal of advancing learning. The question arises in part because of the inevitable cost that copyright imposes. It's sometimes termed a conflict between 'incentives and access'. In order to provide incentives for original authors and their employres, copyright gives authors or their employers rights to control the reproduction and some other uses that ight be made of their works. The ability to close off competitors who would make and sell exact copies means that the copyright owner can to some extent control the per-copy price. By putting the price above the cost of physically manufacturing the copies – whether the copies be books or CDs or posters or whatever-- the copyright owner could try to recoup their up-front investments. The social problem was that at the high price, people who

would have been willing to pay the cost of a copy will be closed out from purchase. Though some access may still be available through libraries and the like, it will be a more restricted access than if the copies sold, as ordinary goods do, competitively. In short, the cost of giving authors a chance to recoup their expenses is that fewer people will be able to own copies. To the extent that works of authorship would come into being without copyright , then this loss of access, this loss of learning, was a cost attributable to the copyright system. So the question arose, were the benefits of the system greater than the costs.

Breyer investigated whether other avenues existed to restrain copying and keep prices high—avenues that were less all-embracing than copyright and thus might impose less deadweight loss- He noted that there were many other avenues other than copyright law available to restrict copying —avenues such as the lead time advantage that could accrue to an initial, authorized publisher if copying was difficult or costly. His conclusion, as stated by his title, was that the economic case for copyright was an uncertain one.

This is roughly where copyright theory stood at the dawn of the new copyright act. The policy question was one of cost-benefit analysis, and the big unanswered questions were empirical. We obtained many insights from the economists—such

as Landes and Posner pointing out that an increase in any one generation's copyright entitlement increased the cost of creation for the next generation. But empirical data was slow in coming

But though empirical uncertainties made it difficult to employ cost-benefit analysis to answer the biggest questions about the productivity of the copyright system, economic tools provided some answers to some more narrow questions. Consider for example the impact of changing technology on the doctrine of fair use. Fair use is a judicially-created doctrine that , roughly speaking, allows defendants to make unauthorized copies or versions of copyrighted works, when the defendants' activities further copyright's public goals. A classic area of fair use was allowing educators and reviewers to employ unauthorized quotations. Technological change made the fair use questions harder as it enabled the easy replication of exact copies. To this question I felt economics could help give an answer.

But first, a bit of background. A medical library started making copies of copyrighted journals on request; the owners of the journal copyrights brought suit. In an opinion remarkable for its length, usually a sign of uncertainty, the court of claims held that the library could continue to make photocopies of

journals, that "fair use" could be employed to make sure that medical progress was not stifled. But when the case went before the Supreme Court, they split 4-4, a technical affirmance that left the matter in some doubt. Then Congress in the 1976 Act basically wrote the library photocopying privilege into the new statute, limiting the privilege only at the point where copying s\would substitute for new subscriptions.

THen the VCR took the place of the photocopy machine at center stage, as movie studios sued to stop the home recording of copyrighted television shows. The Ninth Circuit held that fair use was not intended to embrace exact copies of the whole of a work. This was anomalos, given Congress's ratification of libraries ability to copy whole articles, and Congress's listing as an example proper for fair use photocopies for classroom use

I employed a cost-benefit approach to argue to demystify fair use; the doctrine wasn't just about customary quotations. Rather, I showed that courts had employed fair use to allow a use to go forward which would cause significant social benefit, and that would not or should not be covered by the market. This made sense: the purpose of copyright was to set up a market to generate incentives, the purpose of the incentives was to serve social benefit, and if in a

particular case the market could not serve that goal, there might be reason not to enforce the copyright. So I argued that fair use should be granted where market failiure appeared, where the social benefits of a defendant's copying outweighed the social costs,and where no substantial harm was caused to the copyright owner. One example of market failure was free speech—a clearly nonmonetizable interest, it's not well measured by the market ,Another example might be home copying, at least in the early eighties: since licensing of home users seemed impractical, there might be no way for the copyright owners to profit from their copyrights, and disallowing fair use would only stop a useful practice without generating incentives. This seemed a limited set of empirical questions that could indeed be answered. Eventually the Supreme Court repudiated the ninth circuit refusal to extend fair use to exact copies in 1983.

You may be wondering, if fair use could be based on the unavailability of licensing markets, what would happen with the advent of the internet and new institutios that might make home licensing possible? I will return to that question in a few minutes. For now, let me address the question of copyright theory--what were the methods and approaches scholars were deploying ?

Remember Justice Breyer's approach, which looked at the availability of other methods than copyright to keep incentives high. Some of those methods, as Trotter Hardy calls them, involve "technological limitations"-- difficulties that might make it hard for unauthorized copyists to duplicate and distribute competing versions. But something bothered me about making the availability of copyright depend on the happenstance of technology. It seemed to me that the efforts of authors deserved consideration in their own right. I called it 'autonomy of the intangible realm'.

I also began to question what seemed to be the basic assumption of incentive theory, that the public was entitled to the most work at the least price. Might authors not possibly deserve something? As for economics, it can tell us something about desirable resource use, but it tells us little about what might be the just distribution of the resulting gains. That's why the law and economics movement tends to recommend making the pie as big as you can via economics, then using tax and transfer to make things just. But in the real world, after the fact transfers aren't so easy. People who have legal rights tend to feel entitled to what they receive, even if they were given the legal rights only for a purpose of serving the common good. So it seemed to me that economics alone was an inadequate base for policy prescriptions.

As for authors rights, the division between the Anglo American Approach and the continental European approach might not be as great as we had imagined; Jane Giinsburg's historical work had cautioned us that the Europeans had embraced some of the instrumentalism we thought so characteristic of the US approach, and we had embraced some of the supposedly european sense that authors had natural or moral claims. And in 1985, the Supreme court even spoke of authors deserving a fair return for their labors.

There was a hint of the a concern with authorial right even in the constitutional grant empowering congress to give exclusive rights to authors and inventors. Why authors and inventors? Why not all hard-working producers of intangible benefits that were not adequately served by the common=law system? There seemed to be something about the human intellect that was special- perhaps something that made a personal connection between author and work worth particular respect in the legal system.

I and some others turned to the philosopher of natural right most influential on our nation's Founders was John Locke. His theory of property cared about productivity, but also cared about individual rights. In researching his work, I concluded that the basis of his argument was a natural right against harm: once

a person had mixed his labor with the commonly-owned heritage , he should have property in the result such that others should not harm him by taking the mixture from him. But just as the laborer should be protected against harm, so should the public. So it is no surporse Locke's theory placed a condition on the acquisition of property: it only arise provided that enough and as good was left for others. They, too, should not be harmed. This is the Lockean Proviso.

This made sense to me. And in examining the impact of the proviso, I found a key to one of the perennial problems of the authors rights tradition. That is, the conflict between two authors, and between an author and the one hand and the audience on the other that has made the author's work part of her own substance. Just as economics had within it the tension between economics and access, the authors' rights tradition had within it the claims to DESERT and personal bonding of opposing parties.

To some extent, youmight think this could be resolved by the first amendment, the free speech rights of the public. But he courts seemed resistant to a direct first amendment challenge to the occasions when copyright was over-extended. Perhaps they feared that the first amendment would eat up too much of copyright It seemed to me that a principle that BOTH defended the basic

copyright AND defended the rights of the public was needed, at least to provide courts with a heuristic guide to accommodating the disparate interests.

So I began exploring s Locke's labor theory of property. What I liked about it was its even-handedness: Locke argued that private property could arise from combining one's labor with the common heritage.... But only if enough and as good was left for others. This latter proviso, that enough and as good be left for the public, could serve as some guide for how to safeguard the public domain.

And using that criterion, I articulated a number of rights that the public should have—which expanded in some ways my prior notion of fair use.

Note that Although I had switiched the field of my intellectual battle from economics to philosophy, I was still using the same strategy: take a justification for property, and show the limits and exceptions its own internal logic generates. In economics, I had argued that when the goals of the market weren't served, enforcing copyright wasn't necessary, By focusing on the proviso, I argued that Lockean property theory iself generated a greater latitude for pubic use, both in trademark law, copyright law, and other areas, than courts or statutes currently recognized.

The proviso also provided a valuable counterbalance to a new judicial development. Although in the sixties the Supreme Court and other other courts were sensitive to the need for free completion, from the early eighties onward, the law saw a radical growth in private rights to control intangibles, both inside and outside the applicable statutory schemes. I called this the "misappropriation explosion". Much of what motivated the growth in plaintiff's rights seemed to be a judicial instinct that people should not 'reap where they had not sown.' That seemed insanely broad to many, me included— as Justice Kaplan wrote, 'if man has any natural right, it is to learn, and learning involves copying." [chk actual words] From Jefferson in the 18th century to Holmes in the turn of the last century to Rochelle Dreyfuss, Mark Lemley and others I the turn of this century, it has been recognized that value does not make property. The law needs a REASON to appropriate value to one party rather than another. Civilization and community both are based on reaping where our ancestors and colleagues have sown. I drive to this lecture in a car made possible by thousand of inventors, back to the Prometheuses that harnessed fire. If I had to pay each for the benefit repaed, I wouldn't be at school, I'd still be standing with a thumb out, hoping for a ride on a passing horse.

A potential corrective to this simple instinct was to look at the common law in all its complexity. And today, examining the diffs and similarities betw the law;s trtmt of physical property and the characteristics of intangible property like works of authorship has become a major focus of scholarly interest.

In one of the earliest examinations of the common law's relevance, I examined the common law of unjust enrichment. Among other things, I found it had a multitude of limits- some roughly analogous to the Lockean proviso00 and developed a schema for so limiting the common law claims. So once again I investigated an area and drew out its natural limits, and suggested that the strongest set of rights the common law could generate over information would be far narrower than what courts were then doing. An indirect vindication of y position came about recently when Prof Doublas Baird showed that the first case enunciating the reap without sow principle itself may have suffered from alack of adversary process- the kind of setting that can easily lead to bad judicial pronouncements.

Others looked at the link between the law of tangible property and copyright law. One of the most fruitful avenues of that sort is the recent book by my Boston Univ colleagues Jim Bessen andMike Meurer, who show that because

patent law lackes the excellent systems of notice and recordation embraced by land law , patent disserves most of the very industries that use it.

I also investigated accident law, arguing that the copyright and accident law were mirror images of each other: that just as accident law sought to make actors more sensitive to the harm they do by imposing damages, copyright law sought to make actors more sensitive to the benefits they generate by giving them rewards. Accident law sought to reduce careless behavior; copyright law sought to increase productive behavior. And both had limits. Saul LEvmore always reminds his students that it 'takes two to tort', so that it's not just the defendant who needs to be encouraged to take care. SO does the plaintiff, so the pedestrian doesn't go carelessly wandering in the road. Similarly in copyright, it's not just the initial author who needs to be encouraged to be productive; so do the potential borrowers, who can build socially and personally valuable work on what can come before. Again, a system with limits was the result.

So where had I come? I had shown that economics does not justify ulimited property rights I authorial works. I had show that philosophical iquiry of the Lockean sort did not justify unlimited property rights in authorial works. I had shown that common law traditions did not justify unlimited property rights in

authorial works. And from all of these I had drawn specific recommendations for limitations.

I had even hinted at the ways these approaches might be combined, For example, to the extent the law deprived the public of something to which it was entitled under Lockean justice, economics could properly be used to repay the public for some of what it had lost. I expanded my notion of fair use as market failure to include common law notions of excuse and justification.

During all this time, the world had been changing. First came the reproductive technologies. By 1979, the photocopier was old news, but the videocassette recorder had come on the scene. The computer gradually entered every home and office, creating immense new possibilities, many new onesof which began to be realized when the interet entered. Suddenly the pr4vate person was not just the consumer of art and literature, but a maker, a mixer, a masher-upper. She had powers of reproduction, alteration, creation, dissemination, and receipt. This was immensely valuable. Yet the advent of digital media made exact replication possible—replication without the losses that analog media like tape recorders inevitably had—which increased the possible danger to usual incentives. A search began for new models. And new conceptual approaches.

Suddenly the centrality of formal markets came into question.

The market and its requirement of formal licensing can get in the way of creativity. For example, experiments by psychologist Theresa Amabile has suggested that direct payment can in some instances result in decreased quality of work. Experiements by others suggest that many people have a strong sense of reciprocity. Contextual analysis was everywhere.

I realized that my prior work had been too abstract, focusing on authors as the generators of abstract benefits, rather than as what Julie Cohen calls SITUATED users. Authorial works are not just benefits, they are meaningful with a multitude of ways that they affect people. Now our culture and as Netanel reminds us, our democracy itself, can be affected by how copyright works. It has become increasingly obvious that it doesn't only matter how much reward an author receives, but it also matters HOW that reward comes.

Richard Stallman and his free software movement have shown that for many creators, knowing their work can be shared and not locked up is a reward enough. The Creative Commons license broadened this insight beyond software creators. Yochai Benkler and others demonstrated how voluntary efforts could

be their own reward, multiplied by network effects. Eric Von Hippel, Cathy Strandburg and others showed how users innovate—adapting what they buy to better serve their needs, and in the process creating valuable spillover benefits for others including the industry that sold the initial product, now has access to improvements it can incorporate/ Strandburg, Frishmann, and Madison build on the work of Nobel laureate elinor ostrom to explore how commonses might be created. And on the Lockean front, Seana Shifrin and others have argued that what ethical theory generates is not a right to property, but rather a right to reward, which can take other forms. Prizes and subsidies are being examined with new intensity for their possibilities.

My own primary interest is in gift. Lewis hyde has suggested that the most fecund way of encouraging new work is via voluntary exchange. Gratitude begets creativity—I've written about the gift model, but it is hard to extend beyond a limited group, and has in it potential for causing both resentment and harm. Admittedly, resentment can cause creativity as a form of self-defense and self-definition, as Bloom taught us a generation ago, but it is hard to know how best the law can encourage the best mixture.

Now it is no longer appropriateto focus solely on rewarding those who benefit us and prefenting their claims from causing harms to the public. If new instituitohs, such as gift or commons or copy left, are to evolve, issues of vitrtue ad citizenship and human flourishing need to be embraced, along with a consideration of what expressive creativity means to an individual. The future of copyright scholarship will be more political, in the sense of debate over goals, and copyright scholars are and will continue to play a role I guiding the public to think thse things through.

This doesn't mean that copyright should vanish. Many of the new schemes depend on copyright. And most depend on self-help, often structured by copyright. And some of the new learning shows new advantages to copyright== For example, as mentioned, some psychological research indicates that explcit carots and sticks can diminish creativity; by contrast, copyright as a more organic mode of reward may provide a better system than prizes and subsidies. I call it organic because a right of control may feel more natural, speak more to the interior to the creator, than a mere right to cash.

less coherent at end — Gift needs structure

Reinforce how each piece fits into overall —
I'm going to take
you through my journey
My focus has been on the justifications
of copyright and what limits emanate
from these justifications.

foreshadow

three part { eco
Locke
common law

— break after trad'l inquiry, All hell broke loose w internet.
Gift partakes of all three

forced us to
rethink models
explored previously
wh the basic
need for ©
was estab,
wh in those areas

refer back
has eco model changed
does enough + as good offer same guidance.
c-law justifs.

Scholars cast about for
found markets didn't work as well — or at least
that other modes of distrib.

~~[illegible]~~ incentive to ☐ access to ☐

Analog mndistrib technols affected uses
more freedom
more soc benefit
how alter that to ...

...ing — giving it to all of everyone

Digital + internet changed Q of inc
Cost of creation + distrib dropped down
now incentive ~~access~~ more impt

incentives to everyone — because don't know who
don't know who will be next authors.