2008

Moral Philosophy, Information Technology, and Copyright

Wendy J. Gordon
Boston University School of Law

2008-03-01

Moral philosophy, information technology, and copyright: the Grokster case

14

Moral Philosophy, Information Technology, and Copyright

The Grokster Case[1]

Wendy J. Gordon

INTRODUCTION

A plethora of philosophical issues arise where copyright and patent laws intersect with information technology. Given the necessary brevity of the chapter, my strategy will be to make general observations that can be applied to illuminate one particular issue. I have chosen the issue considered in *MGM v. Grokster*,[2] a recent copyright case from the U.S. Supreme Court. Grokster, Ltd., provided a decentralized peer-to-peer technology that many people, typically students, used to copy and distribute music in ways that violated copyright law. The Supreme Court addressed the extent to which Grokster and other technology providers should be held responsible (under a theory of 'secondary liability') for infringements done by others who use the technology.

In its *Grokster* opinion, the U.S. Supreme Court ducked difficult questions about the consequences of imposing liability on such a technology provider, and instead chose to invent a new doctrine that imposed secondary liability on the basis of a notion of 'intent'. The judges have been accused of sidestepping immensely difficult empirical questions and instead taking the 'easy way out' (Wu 2005, p. 241). This chapter asks if the Court's new doctrinal use of 'intent' is in fact as deeply flawed as critics contend. To examine the issue, the chapter employs two broadly defined ethical approaches to suggest an interpretation of what the Court may have been trying to do. The first is one that aims at impersonally maximizing good consequences; the chapter

 For comments on the manuscript, I thank Iskra Fileva, David Lyons, Russell Hardin, Ken Simons, Lior Zemer, the members of the Boston University Faculty Workshop, and the editors of this volume. For helpful discussion, I thank Seana Shiffrin, and I also thank the audience at the Intellectual Property Section of the 2006 Annual Meeting of the American Association of Law Schools, where a version of the *Grokster* discussion was presented. Responsibility for all errors, of course, rests with me.

[2] *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 125 S. Ct. 2764 (2005).

uses the term 'consequentialist' for this approach. The second is neither maximizing nor impersonal; the chapter uses the term 'deontological' for this second approach.

The chapter addresses the role 'intent' can play in each category. The chapter then draws out implications for the *Grokster* case, arguing that the Court neither fully explored the consequentialist issues, nor provided an adequate account of its nonconsequentialist approach.[3] The chapter then draws on a deontological strand in John Locke's theories of property to see what might be said in defense of the Court's approach in *Grokster*. It concludes that Lockean theory fails to provide a justification for the Court's approach, and that the critics (notably Tim Wu) are right. The Court's mode of analysis in *Grokster* still stands in need of justification.

CONSEQUENTIALISM

The overall topic of this chapter is to examine the moral implications that computers and the Internet hold for copyright. At first, this seems like an odd question. We think of morality as independent of happenstance, so how can a change in technology alter one's moral judgments about whether a given act is wrong or right?

One response is to examine whether one's moral judgments are indeed independent of circumstance. There is a species of morality, consequentialism, which makes the rightness or wrongness of an action depend on outcomes. One is even tempted to say that for consequentialists (such as Benthamite utilitarians[4]) morality is totally dependent on circumstance.

But that would be an overstatement. Consequentialists must answer crucial questions whose answers cannot be 'read off' factual reality the way we can 'read off' the color of paint simply by looking at it. For example, consider this question: what kind of consequences should count (pleasure? progress? what about sadistic pleasures, or material progress that dehumanizes?). Such questions are answered by moral reasoning. Although the reasoner's conditions of life (some of which will be happenstance) will inevitably color her moral reasoning, circumstances do not 'dictate' what their moral significance or insignificance will be – the reasoner chooses which circumstances will count, and why.

[3] In stipulating these definitions, I follow an old pattern: 'For the last two centuries ethicists have focused, almost exclusively, on just two theoretical possibilities: deontology [i.e., agent-relative nonconsequentialism] and utilitarianism [i.e., agent-neutral consequentialism]' (Portmore 2001, p. 372). The landscape of today's ethical theory is of course more complex. Nevertheless, these two classic possibilities will suffice to illuminate the unsatisfactory nature of the reasoning in the *Grokster* decision.

[4] Although there are nonutilitarian consequentialist theories, this chapter will generally focus on Benthamite utilitarianism.

One might adopt a consequentialist approach that seeks to maximize the welfare of only a limited group of people – a society's aristocrats, say, or one's self.[5] But most consequentialist theories treat all persons as equals, and the 'good' that each person experiences (however 'good' is defined) has equal moral importance to the 'good' any other person experiences. It is the total good that most consequentialists seek to maximize. Consequentialism can be seen as combining a theory of value with a theory about how its promotion is related to rightness or obligation.[6]

It is sometimes said that consequentialists are 'agent neutral' in ways that some nonconsequentialists are not,[7] in the sense that reasons for action are agent-neutral in most consequentialist theories,[8] not varying with who one is. Thus, in Benthamite and other kinds of maximizing consequentialism, everyone has the same duty to maximize the net of good over bad results, and our positions affect only our abilities to execute the duty. By contrast, 'agent-relative' theories include notions of duty that vary with the identity of the persons involved. 'Deontological reasons have their full force against your doing something – not just against its happening' according to Nagel (1986, p. 177).

For example, in the commands, 'honor thy father and thy mother' or 'respect your teachers', I am an agent who owes a duty to my parents and teachers that you, as a differently situated agent, do not have. The duty is 'mine'. Even if you are in a position to affect the welfare of my parents or teachers more directly than I am, an agent-relative approach would not impose upon you a duty of the same kind I have toward them. You would have a duty to them simply as persons, not as parents or teachers, and on an agent-relative view you probably owe them less – or something different – than I do.[9]

Similarly, 'agent-relative' theories may be sensitive to what individuals *do*. The person who copies a work of authorship may morally owe something to the author that would not be owed by a third party who has not himself copied the authored work. The act of the copyist could distinguish him from the party who has not chosen to make such a copy. Yet, the copyist may be hard to locate, while the copyright owner might easily identify a third

[5] For an overview, see Frankena (1988).

[6] I am indebted to David Lyons for this last sentence.

[7] Discussion here is indebted to Thomas Nagel (1986, pp. 165–188).

[8] I am obviously simplifying the discussion. Some consequentialist theories are agent-relative, and some deontological theories are agent-neutral. See, for example, Broome 1995, p. 6. In the *Grokster* case, the Court indicated that copyright law should treat two different technology providers differently depending on their intent (an agent-relative consideration). Thus, the Court's approach could impose liability on one technology provider because it had a particular 'intent', and free another from liability if it lacked the 'intent', even if the *consequences* of putting liability on the two technologies would be the same. This is an agent-relative position.

[9] I use the example of obligations to relatives for ease of exposition. Nagel (1986, p. 165) notes that obligations to such persons might not 'resist agent-neutral justification'.

party – perhaps an Internet service provider, perhaps an entity like Napster or Grokster – possessed of some potential leverage that could be exerted over the controverted activity. Nevertheless, under 'agent-relative' approaches, the fact that the third-party technology provider could be located, and was well situated to change copying behavior, would not in itself justify a duty on the technology provider; additional questions about what constituted good grounds for responsibility would need to be asked.

By contrast, under an 'agent-neutral' theory, the questions would be complex also, but much of the complexity would be empirical in nature; moral duties and rights would be arranged according to how best to achieve a chosen goal. For example, if the goal was to encourage authorship, and if to accomplish this goal peer-to-peer copying had to be discouraged (a big and controversial 'if'), then under an agent-neutral approach, moral duties to monitor or to pay might be placed on the third-party technology provider, or even on a more distant entity, if somehow that entity had the power to control copying.

For an example of such distant entities, consider Guido Calabresi's observation about who should bear the costs of automobile accidents. Judge Calabresi noted that if an 'arbitrary third party, e.g., television manufacturers', were somehow situated so that they were the people best able to effectuate accident-avoiding precautions, from a consequentialist perspective it would be appropriate to put liability for auto accidents upon the television manufacturers rather than upon speeding drivers (Calabresi 1970, p. 136).[10] Similarly, if speeding drivers, or any other third party, were somehow situated so that they were the people best able to encourage the composition of art works and computer programs, a consequentialist might argue for giving copyright ownership to them rather than to authors.

It strains our credulity to imagine that this could happen. Even if drivers could somehow bribe or threaten artists and programmers to work harder, giving copyright ownership to drivers is less likely to be productive than giving copyright ownership to the people who make the works of authorship. But our incredulity at *possible* results does not mean that Benthamite consequentialism is wrong.

To the contrary: according to followers of Jeremy Bentham, it is just the low odds of such bizarre possibilities (such as television makers having more ability to control traffic safety than drivers do, or drivers having more ability to control television content than TV producers do) that create our senses of expectation and incredulity. The *likely* coincidence between consequentialist result and commonsense notions of responsibility, Bentham would say, makes us miss the consequentialist basis of our commonsense notions. Thus, those notions may be conditioned patterns of stimulus-response, rather than

[10] Calabresi (1970, pp. 136–152) goes on to explain why such an 'arbitrary third party' is unlikely to be appropriately situated for such imposition of liability to be effective.

morally-reliable guides. A consequentialist would argue that, if and when circumstances change, we need to be ready to change our notions of responsibility and desert. A person who has the ability to control the behavior of another may be as good a candidate for consequentialist moral duty as is the actor himself – or even a better candidate. Under a consequentialist approach, the law might make the producers of a new technology liable for copyright infringements that third parties accomplished through use of the technology, even if under some deontological notions, the technologists would seem to lack personal responsibility.

A consequentialist approach can therefore drive a wedge between usual notions of cause and effect, or at least, change our notion of how we should give moral attribution to cause and effect. Instead of asking questions like, 'you did harm, do you deserve to pay damages?', or 'you created a benefit, do you deserve to be rewarded?', we ask, 'what kinds of rules[11] about damages and rewards would create, in the long run, the greatest excess of good over bad consequences.'

That an actor intends something to happen has no *per se* importance for a consequentialist analysis. This is not to deny that intent can be relevant to the extent that intent changes consequences; among other things, intention can make something more likely to occur (Simons 1992).[12] But intention in itself does not make an act rightful or wrongful for a consequentialist; from most consequentialist perspectives, whether the act is rightful or wrongful depends on its results. By contrast, many deontological views emphasize the wrongfulness of intentionally doing harm to another (Nagel 1986), even if doing the harmful act has substantial beneficial effects.

Consequentialist approaches to copyright typically have two primary emphases – inducing creativity and encouraging dissemination of what is created. The divergence between consequentialist and nonconsequentialist approaches can be visualized if we consider the case of the compulsive creator.[13]

[11] In this chapter, I elide the differences between act and rule utilitarianism, and many other subtleties.

[12] Regarding mental state, Kenneth Simons (1992, p. 504) summarizes 'six significant conclusions of utilitarian and economic analyses' as follows:

> '(1) If an actor's mental state reflects a greater likelihood of success in causing harm, a higher sanction is warranted in order to deter him; (2) If an actor lacks a minimal awareness of the nature or likely results of his conduct, he cannot be deterred and should not be punished; (3) If a mental state reflects a higher private benefit to the actor, a higher sanction is necessary to deter him; (4) Some mental states, such as sadistic desires, reflect a private benefit that lacks social value; (5) Criminalizing some mental states would create 'steering clear' costs, inducing socially costly efforts to avoid liability; and (6) Inflicting harm with an aggravated mental state sometimes thereby aggravates the harm to the victim.'

[13] There is a parallel case of the compulsive bad driver. If nothing we can do will make the bad driver slow down – it might be better to encourage the pedestrians and all the other

According to most accounts, Picasso was a compulsive creator. His hands would turn out paintings, sculptures, collages, and prints, so long as he had shelter, supplies and enough energy to work. Let us say that sale of his individual art works would give him enough money to cover these basic needs. Should the law give him also the right to profit from people *copying* his works?

Commonsense notions of desert suggest that the answer should perhaps be 'yes'. Yet, from a consequentialist perspective, giving Picasso a right to control copying would not, ex hypothesis, make him work any harder or any more creatively. Further, giving Picasso that right would cause fewer copies to be distributed (and to bring less joy or insight) than would occur in the absence of giving him such a right. Therefore, a consequentialist might argue that, so long as an absence of right in Picasso didn't demoralize other artists into lessening their production[14] and, so long as the institutional costs of distinguishing the Picassos from ordinary creators were not too high, a prosperous compulsive creator such as Picasso should not have copyright. Putting Picasso's various collocations of shape and color into the public domain immediately, for purposes of inexpensive copying and adaptation, would make the society better off than would giving Picasso copyright in them.

For the consequentialist, then, the key question is, what rule (or choice of act) will make for better results? The perspective is looking forward, rather than looking backward at who has done what.

Thus, the copyright consequentialist begins not by asking questions that look backward, such as, 'Who created this work of art?', but rather questions, such as this, that look forward: 'To whom should we give rights in this if we want to encourage creativity in the future?' or 'How should we allocate rights in this if we want to encourage happiness (or economic prosperity, or reciprocal respect among creative people and their audiences, or some other notion of the good)?'

drivers to take care – by, for example, making those people bear any costs resulting from colliding with the bad driver. One might imagine requiring the bad driver to post a badge of identification on his car that alerts others, that here is someone who won't have to pay damages. Of course, this might not work out beneficially in practice for a multitude of reasons – not least because third alternatives, such as confiscating the bad driver's car, may be far more effective in reducing accidents than would relieving the compulsively bad driver of the responsibility to pay damages. But the counterintuitive example – that the worst driver might be the one we'd relieve of a duty to pay damages – suggests the kind of untethering from usual notions of desert that consequentialism can cause.

[14] Frank Michelman (1967, p. 1165) has suggested that utilitarians may protect rights more stringently than some other varieties of moralists because what happens to an individual can demoralize (i.e., reduce the effectiveness of positive incentives on) onlookers. A demoralization argument might support giving Picasso a copyright, not for his own sake, but for the sake of the audiences who might benefit from the arts to be produced by persons who, observing Picasso's fate, will be disheartened.

In the law of copyright, a person who copies is potentially liable as a 'direct infringer'. Someone else, who does not directly violate copyright law, may nevertheless be in a position to affect whether the law is violated. Deciding whether to make this other person liable is known as the question of 'secondary liability'.[15] As will appear, there can be both consequentialist and nonconsequentialist approaches to deciding secondary liability issues.

SEA CHANGES

So far, our most general point is this: if there is a sea change in the pattern of likely consequences – and arguably the advent of computers and the Internet constitutes such a sea change – the utilitarian consequentialist will alter his recommendation of what acts and rules are likely to be good, and which bad.

What are some of the sea changes? I will mention some of the grossest changes, and then proceed to some more subtle.

First, there is a great increase in value of 'content'. A story or song that could have reached X people in the analog world, can reach X plus Y people now, and, with each additional person reached, the value they experience adds to the world's stock of value. This potential increase in the world's stock of 'good' may shift preexisting balances.

Second, the union of digitization and the Internet causes arguably greater vulnerability to unconsented copying. Not only is copying and distribution easy; enforcement is difficult. Because of the privacy with which one typically employs computers, and because copying by computer is so widespread that any individual faces a low chance of being sued, potentially unlawful copying may increase.[16] Such copying can decrease the value of old markets and the profitability of old business models, and make it difficult for businesses to capture the same revenues in digital markets.

Third, the same union of digitization and Internet causes a drastic decrease in the costs of distribution and access. Instead of printing and binding tons of paper and sending them out in trucks to be purchased in stores located on expensive real estate, the Internet can distribute works at minimal or no cost.

[15] Sometimes secondary liability can be masked as something else. Thus, the U.S. copyright statute includes among the acts that constitute direct infringement, the act of distributing the copyrighted work to the public: 17 USC § 106(3). A store owner who doesn't realize he is selling unlawful copies is nevertheless guilty of violating the distribution right. Congress could have relied on secondary liability as a basis for copyright owners going after store owners who sell unlawful copies; by instead using a 'distribution' right, Congress made the store owners' liability primary, and made it easier for plaintiffs to take action.

[16] See also Moor (1985, p. 266) for a discussion of aspects of computer use that may affect ethics.

Because it is hard to know, empirically, what the 'best' mixture of activities might be, some commentators have reasoned from the status quo that prevailed before the ubiquity of the personal computer. One might compare the postdigital with the predigital world.[17]

From this vantage point, consider the three major developments I have mentioned. First, consider the increase in the monetary value of copyrighted works. The increase means that the same amount of money can flow to artists, even if the percentage of value they can capture decreases. That suggests, on the one hand, that post–Internet copyright can safely decrease the scope of its protection. On the other hand, the potential increase in all works' *social* value may warrant an increase in authorial productivity, and conceivably authors would create more or better works if the amount of money they received were increased. There is undoubtedly an upper limit on this responsiveness; an infinite amount of royalties will not produce an infinite supply of perfect works.[18] Nevertheless, the two forces pull in somewhat different directions; the Internet-induced increase in monetary value means that authors will retain their status-quo revenues even if their ability to employ copyright is decreased, but the increase in monetary value may mean that authors should begin obtaining more than their status-quo revenues, in order to induce an increase in the number of works.

Second, consider the increased vulnerability to copying. This may be tolerable, because the rise in overall value will preserve incentives, even in the face of decreased per-copy compensation. Or it may be dangerous in reducing incentives below a desired level. From the latter perspective, some scholars urge increasing the private use of contractual limits and 'automated rights management' technologies to limit copying (Bell 1998), or increasing centralized legal controls over copying technology.[19] By contrast, writers like Julie Cohen point out that securing additional protections for copyright owners will affect users in negative ways that prior regimes did not – and erode effective access to the public domain as well.[20]

[17] This is a methodology used by Trotter Hardy, to quite different results (Hardy 2002, pp. 226–228).

[18] See Glynn Lunney (1996, p. 483) for an intriguing discussion of other reasons why it would be unwise for the law to seek to give copyright owners all the value that their efforts generate.

[19] Thus, the Digital Millennium Copyright Act (DMCA) supplements technological barriers. The DMCA makes it unlawful to make or circulate technology that enables consumers to bypass cryptolopes and other technological access barriers that block access to copyrighted work. Similarly, as I will discuss, there is pressure to make copying technologies themselves liable for copying. On this development, see Trotter Hardy (1996, pp. 249–252).

[20] See Julie Cohen et al. (2002, p. 10) and Cohen (2005, p. 347). Decentralized methods such as contracts are not only available to make copying harder. They also can be used for the opposite result. Richard Stallman (2002) has shown individual copyright owners how to use contract (and copyright law) to make sharing conditionally mandatory. (See also the material collected by the GNU Project at http://www.gnu.org/philosophy/.) Under a 'copyleft' license of the kind Stallman developed, the author of a computer program can

Third, consider the decrease in the costs of distribution and access. In the past, much copyright revenue has been used to cover those costs. For example, as between music companies and composers or performers, the music companies often receive the bulk of the revenue. If distribution costs are drastically reduced by the Internet, and the costs of printing or making CDs are shifted to the home user, copyright and its associated revenues may be less necessary (see, for example, Litman 2004).

A host of more subtle effects are also occurring. For example, copyright law impacts on individuals in their homes and friendships in new, unexpected ways (Lange 2003, Palmer 2002). Acts that feel natural and community-building (such as sharing) may for the first time be prohibited. Old behaviors may become no longer acceptable as laws change, and as familiar choices (like a decision to share)[21] take on a digital form (Litman 1994, 2004).

In addition, the advent of computers and Internet causes a change in the 'fit' of law. Copyright law was adapted to commercial users, and is ill-equipped for noncommercial copiers (Litman 2001). The question arises, whether this new lack of 'fit' changes whatever might otherwise be a prima facie moral obligation to obey the law.[22]

Much of the debate revolves around the private person, sitting at home with his or her computer, deciding whether to make a copy of something she purchased (such as a music CD) or something she obtained from the Internet. The legal status of space-shifting, sampling, or individual downloading, is still somewhat murky, even in the United States (Cohen 2005, p. 347).

A consequentialist would ask about effects. For example, will putting a restraint on a home copyist increase the likelihood of creativity, and will that be worth more than the costs? The costs include the decrease in access, the decrease in follow-on activity, the increase in home surveillance, the loss of a sense of control over one's CD and computer, the loss of spontaneity, and the loss of a sense of 'protected space' at home.

specify that she grants permissions to anyone to copy and adapt her program – but she makes this permission conditional on the next person's imposing the same license on all those who wish to copy and adapt downstream.

[21] For example: sending our copy of an interesting book to a friend does not violate the copyright owner's 'distribution right' because any owner of a lawfully made copy has a liberty to give, sell, or rent that copy. See 17 USC §109. This liberty, a product of the limits that the 'first sale doctrine' places on the copyright owner's distribution right, continues to be valuable in the nondigital world. However, in the digital world, sharing an interesting article with a friend usually involves copying the article, and in the United States, the first sale doctrine does not apply to the copyright owner's 'right of reproduction'. Although, in some circumstances, the act of digital sharing might nevertheless be sheltered (as by the fair use doctrine), the legal analysis and result may differ. Therefore, acts with identical effects (sharing a physical paper copy and sharing a digital copy) may receive different legal treatment.

[22] On the issue of copyright civil disobedience, see Lunney (2001, p. 893–910).

Although the U.S. Supreme Court occasionally talks about 'fair return',[23] the American copyright and patent systems are generally understood to be consequentialist in nature. According to the U.S. Constitution, Art. I Cl. 8, Congress is given power to grant rights 'for limited times' to 'authors and inventors' to 'promote the progress of Science and the useful arts'. Given the great uncertainty about the empirical issues, the consequentialist moralist may turn to issues of process and institutional competence: how expert is Congress at making these difficult empirical judgments? To what extent does the legislature deserve our deference on grounds of its superior ability to process information?

Observers of the copyright lawmaking process in the United States suggest the legislature used little of its potential expertise. Jessica Litman, the 'dean of the observational corps', argues that Congress does not make most copyright policy. Rather, Congress delegates authority to industry actors who hammer out legislative provisions behind closed doors – provisions that might accommodate everyone sitting at the table, but it's a table at which the public rarely sits (Litman 2001).

SECONDARY LIABILITY: TECHNOLOGY PROVIDERS

One of the most important issues concerns the intersection of copyright and technology, namely, to what extent should the makers of a technology that enables copying and distribution be liable as 'secondary infringers' for the acts of strangers who utilize the technology to commit copyright infringement? The social stakes are large. Consider, for example, what is at issue in regard to decentralized peer-to-peer technology.

Distribution and copying technologies have great potential for disseminating culture and stimulating new thoughts and new work to come into being. Particularly when coupled with the Internet, such technologies also have significant potential for enabling copyright infringement.

The U.S. Supreme Court, in the recent *Grokster* case, had to decide whether the law should permit or restrain such a technology.[24] This is a particularly important question when the technology at issue is (like *Grokster*'s) a decentralized peer-to-peer system that allows communication among separate computer users who can copy and transmit without having to go through a central controller or hub. Such a pure peer-to-peer technology offers potential for preserving privacy and for fostering democratic grassroots development free of Big Brother supervision.[25]

[23] 'The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors'. *Harper & Row, Publishers v. Nation Enterprises*, 471 U.S. 539, 546 (1985).

[24] *Metro-Goldwyn-Mayer Studios Inc v. Grokster, Ltd.*, U.S. 125 S. Ct. 2764 (2005).

[25] In George Orwell's *1984*, 'Big Brother' was the superficially paternalistic governmental figure that had electronic access to all homes and could stop any talk of dissatisfaction before it spread.

From the perspective of democracy, what kinds of files might one want to be able to share and send widely? In the United States, one thinks of the Zapruder film that contained the sole visual recording of the Kennedy assassination, or of the Pentagon Papers, the multi-volume secret study that opened the eyes of many regarding the Vietnam War. In considering the old USSR, one thinks of suppressed texts circulated through *samizdat*. In any context, one thinks of evidence, such as records of pollution and corporate cover-ups. To keep our governments honest and our private sectors responsive, the possibility of private circulation of truth-material must be maintained. And as we come increasingly to depend on the Internet for communication, alternative sources may atrophy, increasing the importance of keeping the Internet usable.

A devil's advocate might say that the current judiciary will protect the circulation of such information, that we needn't preserve special technology to do so. Thus, in the United States, the *New York Times* and the *Washington Post* published the Pentagon Papers despite governmental opposition,[26] and when the copyright owner of the Zapruder film sued a scholar who copied it, the defendant was held free of liability under the 'fair use' doctrine.[27] Therefore (says a devil's advocate), the courts will keep us able to communicate with each other, regardless of whether decentralized and hidden modes of Internet communication are available. But we're talking about legal rules that can control technology for the indefinite future; we are talking about crafting a structure that might create a permanent block on technology. Who knows how responsive courts will be to free speech arguments in various nations at various times in the future?[28]

As Lawrence Lessig (1999) points out, computer code can be even more binding than legal code, because it changes the *physical* world. A law saying 'do not cross this river' is a less effective restraint than dismantling the bridge. In addition, as Lessig recognizes, law can also change the physical world; law can order the bridge taken down. And once the bridge is down, whatever the reasons motivated its destruction, it is unavailable for good purposes as well. Enjoining decentralized copying and distribution technology may mean that we will have systematically less privacy than we need to guard our civil liberties and our democracies. So the issues are vital, and the consequences are of immense importance.

[26] *New York Times Co. v. United States*, 403 U.S. 713 (1971).

[27] *Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130 (SDNY 1968).

[28] In addition, of course, it might be argued that utilizing the first amendment and related doctrines like 'fair use' involves uncertainty, and resolving that uncertainty requires the use of expensive lawyers. Thus, Lawrence Lessig sometimes asserts that, '"Fair use" in America is the right to hire a lawyer.' (http://lessig.org/blog/2004/03/talkback_manes.html) The resulting uncertainty can chill lawful expression. However, it is possible to overstate the chilling effect of copyright law. The recent *Documentary Filmmakers' Statement of Best Practices in Fair Use* (http://www.centerforsocialmedia.org/resources/publications/statement_of_best_practices_in_fair_use/) suggests an even more vigorous future for fair use.

The same characteristic that makes decentralized peer-to-peer technology socially valuable – the breathing room it provides through its lack of a central clearinghouse or bottleneck – makes it costly for copyright owners. Because such technology is decentralized, it provides no easy way to stop copyright infringement, even when it's happening. That makes it hard to integrate a decentralized system in to a pay-to-play system. There's no central location at which to check that payment is being made, or to stop the copying if payment is lacking.

The lack of centralized control also makes it questionable to impose liability on the technology's developers when its users copy without paying. Because the developers likely do not even know of the infringing behavior prior to its occurring, and may never learn of it, they may have no way to stop the infringement.[29] Yet, from a consequentialist perspective, their lack of knowledge or control over individual infringing acts may be irrelevant.[30] As the U.S. Supreme Court wrote: 'When a widely shared service or product is used to commit infringement, it may be impossible to enforce rights in the protected work effectively against all direct infringers, *the only practical alternative* being to go against the distributor of the copying device for secondary liability on a theory of contributory or vicarious infringement' (*Grokster* at 125 S. Ct. 2776; emphasis added).

GROKSTER

As mentioned above, decentralized systems have immense positive potential, but they can indeed also empower massive copyright violations. In *Grokster* the U.S. Supreme Court thus had to face a difficult set of conflicting imperatives. How important is copyright after all? Should copyright be a tail that wags the cultural/political dog? Did the Court want to outlaw *any* technology that uses the privacy-preserving technology of decentralized peer-to-peer? Did it want to preserve such technologies, so long as they were capable of substantial noninfringing uses? Unfortunately, instead of directly facing the consequentialist issues, the Court switched tactics, and, as Tim Wu argues, employed a 'bad actor' approach.[31]

Until the *Grokster* case, the dominant formula used to judge the legality of decentralized technologies was the formula just mentioned – whether

[29] It was this rationale that persuaded the U.S. Court of Appeals for the Ninth Circuit to give a judgment to *Grokster*. The U.S. Supreme Court reversed this, handing down a ruling that favored the copyright owners.

[30] Interestingly, the U.S. Supreme Court substituted for their lack of knowledge re individual infringements, a finding that the developers 'intended to induce' infringement in general. This is a deontological concept, arguably enlisted to serve the utilitarian end of increasing the amount of copyright enforcement.

[31] See generally Tim Wu (2005) (distinguishing 'bad actor' from 'welfarist' approaches). Wu criticizes the Court for taking this approach. My chapter's analysis of *Grokster* can be seen as a response to Wu, for I ask: Might the Court's use of a 'bad actor' approach be defended on philosophical grounds?

the technology is 'capable of substantial noninfringing uses'. This became known as the *Sony* formula, after the case where it was first enunciated.[32] If a technology was capable of substantial noninfringing uses, then under the *Sony* formula, the technology was (one thought) immune from liability and injunction. This was the formula that kept videocassette recorders free of copyright liability, even though people sometimes use them to infringe copyrights.[33]

How did the U.S. Supreme Court in *Grokster* handle the issue of secondary liability for technology? First, the Court refused to admit that anything of political significance could be lost if the technology were held liable. The Court paid only limited attention to noninfringing uses, and its tone in doing so was sometimes mocking: 'Users seeking Top 40 songs... or the latest release by Modest Mouse, are certain to be far more numerous than those seeking a free Decameron...'[34] Second – and this is the part of particular philosophical interest – the Court borrowed from the language of agent-relative morality. Instead of weighing the consequences of enjoining[35] the decentralized technology, the Court shifted to the language of 'intent'. It held that 'one who distributes a device *with the object of promoting its use* to infringe copyright... is liable for the resulting acts of infringement by third parties'.[36] Tim Wu has criticized the Court for having sought an 'easier way out'.[37]

OVERVIEW OF THE REMAINING ARGUMENT

In the beginning of the chapter, I emphasized the difficulty of the empirical and methodological questions a consequentialist would have to answer. Might the Court's shift to more deontological measures of morality such as

[32] *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 104 S. Ct. 774 (1984).

[33] It is not copyright infringement to use a VCR to make private copies of copyrighted works at home for purposes of time shifting; it can be copyright infringement to use a VCR to make copies of films for commercial purposes.

[34] *Grokster* at 125 S. Ct. 2774.

[35] The plaintiffs had sought damages and an injunction. *Grokster*, 125 S. Ct. 2764 at 2771. Although the U.S. Supreme Court's opinion did not address the issue of whether granting an injunctive remedy would be appropriate, the opinion is likely to lead to an injunction on remand.

[36] *Grokster* at 125 S. Ct. 2770 (emphasis added).

[37] Tim Wu (2005, p. 241) writes: 'Both sides warned of the terrible consequences of adjusting the *Sony* rule. The recording industry and some academics warned of chaos that might attend adopting an expanded *Sony* that declared *Grokster* legal. On the other side, the computer hardware, software, and electronics industries and others warned of the toil and trouble that would attend the destruction of their beloved *Sony* safe-harbor. Whatever the Court did with *Sony* it was sure, or so the amici seemed to suggest, would make life in America unlivable. Meanwhile there was a much easier way out.... The Court created a test designed to catch companies with a bad attitude'.

'intent'[38] constitute an improvement rather than an error in its copyright jurisprudence?[39] On the one hand, the closer the statutory legal duties track the duties that might be deontologically imposed, the more sense it would make for the U.S. Supreme Court to use a deontological approach when 'filling in the blanks' on matters, like secondary liability, that the copyright statute does not specifically address. On the other hand, the further the positive legal duties diverge from the deontological, the more the Court's apparent deontological approach would appear inconsistent with the statute the Court is interpreting. Therefore, I will look at two issues:

First, could a deontological approach impose moral duties on any copyists and their helpers?

Second, would these duties be coterminous with the legal duties that copyright statutes currently impose?

I will suggest that the first question (whether there can be any deontological duties not to copy) should be answered in the affirmative. I will employ as our vehicle an interpretation of John Locke's labor theory of property, a theory often viewed as deontological.[40] Under this theory, I will suggest, some copyist behaviors would be prima facie[41] immoral on deontological grounds.[42] These are acts of copying that occur despite the fact that the

[38] Intent also can have consequences. For example, someone with an intent to do X is more likely to accomplish X than someone who lacks the intent, and this, in turn, may affect the appropriate sanction. See Kenneth Simons (1992) and Wu (2005 pp. 249–251).

[39] Wu (2005, pp. 251–255) also notes the difficulty of the empirical questions, and raises interesting questions of institutional competence.

[40] See, for example, Kramer 2004, pp. 128–129. According to Kramer (p. 129), the deontological approach allows Locke 'to justify the specific links between persons and the products which they had shaped.'

[41] Some acts of intentional harming may be prima facie wrongful, but morally permissible on an all-things-considered basis. For example, twisting a child's arm might be justifiable if necessary to save lives. For another example, Anglo-American law provides a general liberty to inflict competitive harm, perhaps because an opposite rule would have deleterious consequences. This chapter does not need to face the question of whether consequences are ever capable of defeating a deontological duty.

[42] Locke's property theory has many strands, some of which are overtly utilitarian and others of which draw on notions we would today identify as deontological. See Simmons (1992, pp. 39–43) (noting affinities and differences between Locke and Kant). In this chapter, I articulate a deontological argument that appears capable of standing on its own, and that seems capable of generating prima-facie rights and duties that would make it wrongful to engage in some acts of nonconsensual or uncompensated copying. Seana Shiffrin has argued that Locke's general property arguments do not justify strong private rights of exclusive control over intellectual products. See Shiffrin (2001, pp. 141–143). She reads the text of the *Treatises* as 'begin[ning] with a common property presumption' that yields private property only 'when full and effective use of the property requires private appropriation' (2001, pp. 161–162). Because she sees most intellectual products as being fully usable without private rights of exclusion (2001, pp. 156–157), she would characterize those products as not being the 'sort' of things which are appropriable.

copyright claimant has left 'enough, and as good' in the common for all to use.[43] Although when the 'enough, and as good' proviso is unsatisfied an act of copying would be prima facie *moral* rather than immoral;[44] some copying would violate Lockean norms if the proviso is capable of being satisfied at least sometimes. Therefore, a deontological approach that is agent-relative and nonmaximizing[45] could impose moral duties on some copyists and, potentially, on their helpers.

As for the second question (consistency between a Lockean approach and what has been enacted in positive copyright legislation), it may appear at first glance that this question, too, can be resolved affirmatively. Because copyright law permits new artists to independently use the same public material that their predecessors used, the law's operation seems to leave 'enough, and as good' even after copyright is granted. However, I will argue that a rule that permits independent reuse of public domain material does *not* suffice to guarantee that 'enough, and as good' will be left. This is so even when the material copied would never have existed but for the efforts of the copyright claimant. Positive U.S. copyright law thus has the potential for markedly diverging from a Lockean pattern.

I then examine whether one can reformulate the 'enough, and as good' criterion into a matter of *intent*, and if so, whether that interpretation would bring copyright law in general, or the *Grokster* opinion in particular, into closer alignment with the Lockean approach. I conclude that a subset of the cases that satisfy the proviso can indeed be restated in terms of 'intent', but that this does not suffice to bring Locke and positive U.S. law into alignment.

Her reading is intriguing, and like mine results in the conclusion that violating copyright law is not equivalent to violating Lockean natural law. However, Shiffrin's argument works only against strong intellectual property rights (2001, p. 142), and the Court in *Grokster* could have premised its notion of wrongfulness on breach of a narrower natural duty, for example, to pay compensation.

Shiffrin's goal, like mine, is not to predict 'what John Locke, the person, would say' (2001, p. 141), but rather to explore what appears most valid and fundamental in his work. I see Locke's concern with equality as more fundamental than his concern with common ownership. Shiffrin (2001, p. 162) may in fact agree. I argue for an approach that implements Locke's concern with equality more directly than does Shiffrin's test for Lockean private property. See, *infra*, the section titled, 'Intent and the Lockean proviso.'

43 The condition that 'enough, and as good' be left is known as the Lockean proviso, and is discussed at some length below.

44 An example might be copying done to remedy an injury inflicted by the laborer's work or by her property claim.

45 It might legitimately be objected that Locke's labor theory also contains consequentialist elements. Yet for purposes of analyzing *Grokster*, two aspects of the typical deontological approach particularly interest us: rights and duties being linked to a particular person because of who he is or what he has done (a perspective that is agent-relative), and whether moral reasons for action are independent of whether the action will maximize a given consequence (a perspective that is nonmaximizing). As Locke's labor theory of property shares is both agent-relative and nonmaximizing, it fits the definition of deontological this chapter has stipulated.

Therefore, if the intentional acts on which the Court premises secondary liability do not necessarily amount to deontological wrongs, the Court needs to give another reason for abandoning consequential reasoning and taking refuge in an 'intent' test. That alternative justification it has not provided.

A DEONTOLOGICAL APPROACH TO COPYRIGHT

In examining the nonconsequentialist justifiability of copyright, let me briefly identify three of the many potential streams of analysis: what lawyers know as 'personhood' theories that are used by some commentators to link works to their creators; libertarian theories; and Lockean labor theory.

The legal commentators who link copyright to notions of personhood and Hegelian philosophy usually focus on the authorial person claiming copyright, emphasizing the integrity, autonomy, personality, and will that an author can express through controlling a work of authorship. Contrary implications could flow from this strand of analysis[46] by, for example, examining how the ability to use copyrighted material can affect the integrity, autonomy, personality, and will of audiences and follow-on creators. Although the very notion of authorship has been harshly criticized, this strand of argument is usually associated with strong property rights and moral rights in authors.

Another possible approach, sometimes linked with libertarianism, argues that people are not entitled to be paid for the 'fruits of their labor' except to the extent they have preexisting contracts with the people who consume those fruits. Under this view, a proper respect for the autonomy of each individual copier or user requires not imposing on that person an obligation to which the individual has not consented. Under such an approach, therefore, an inventor or writer who sells her invention or manuscript takes the risk that others will be able to copy it and sell in competition with her, unless those others have agreed with her not to do so. It is the responsibility of the author or inventor to find patrons or purchasers in advance, if she wishes to be paid for what she has produced. Under this kind of view, neither the downloaders of music, nor the technologies that they use, have violated any duty (except perhaps the prima facie duty to obey the law, which is a separate topic in itself) if they have not themselves made prior promises to refrain from copying.[47]

[46] Drahos suggests that Hegelian analysis does not support allowing 'a certain class of personality (authors, artists) . . . to make claims that other property-owning moral agents cannot' (1996, p. 80). He also argues that 'property in abstract objects increases the capacity of owners to place restrictions on the use of physical objects' (1996, p. 87), and that intellectual property rights can 'threaten the ethical life of individual communities' (1996, p. 91).

[47] For a counter-argument to this libertarian position, see Gordon (1989, pp. 1413–1436). For a libertarian attack on copyright that emphasizes the primacy of tangible over intangible property rights, see Palmer (2002).

The Hegelian and libertarian approaches lie outside our current scope. A primary issue for copyright today is how to allocate reward and control between creative generations. John Locke is the theorist who most explicitly addressed what rules should govern the relationships between an early appropriator who takes some of the common for himself and a later comer.

Many nonconsequentialist approaches would impose on the public some duties not to copy. Probably most observers have little problem with the argument that authors and inventors deserve some reward, and that, at least under some circumstances, users have some moral duty to provide reward, even if no contracts exist. As has often been observed, the larger problem is going from a moral claim to reward, to a moral claim to full property rights.

As Edwin Hettinger has argued, if a group of people are trying to lift an automobile, and another comes over to assist, should the last person get all the credit if it is his addition that makes it finally possible to lift the car?[48] Hettinger's analogy is imperfect, yet it has some 'fit'; as the last-comer built on the efforts of the other participants, all creative people build on what came before.

The usual term for the common heritage which all people are free to use is 'the public domain'. Consider how much each musician and other artist builds on his predecessors – on the people who invented the artistic genre the artist works in, the instruments the artist plays, the familiar patterns of chord changes that a new composer of popular music adapts to her own uses. Given all that, how can it be said that a musician or composer is morally entitled to 'own' the mixture of new and old which he calls his work of authorship? Might the public morally own most of what musicians and composers call their own?

The issue of 'how much credit' or reward is deserved is sharpened by examining the issue of whether natural rights and duties constrain individuals in how they use the common. Whether or not such constraints apply is usually stated in terms of whether *no one* owns the scientific and cultural heritage on which creative people build (which would be to characterize it as a 'negative' common), or whether *everyone* owns that heritage (a 'positive' common) (Drahos 1996, chapter 3; Thomson 1976, p. 664).[49] If we all own that heritage, then arguably we all should have some rights in what the heritage produces. If so, a private right of ownership that excludes other commoners would seem hard to justify, except in the unlikely event

[48] 'A person who relies on human intellectual history and makes a small modification to produce something of great value should no more receive what the market will bear than should the last person needed to lift a car receive full credit for lifting it' (Hettinger 1989, p. 38).

[49] But see Shiffrin (2001, p. 149), who suggests that the proviso 'could as easily have been posited from a no-ownership starting point – motivated by concerns of fairness about who should come to own the unowned'.

that the private claimant could obtain universal consent from all the other commoners.[50]

The most familiar theory to tackle a variant of this dilemma is John Locke's labor theory of property. He argued that under some circumstances, a person could justifiably take resources out of a common given to all mankind, and own the resources privately. The circumstances that make such an enclosure rightful are, inter alia, that the claimant has mixed the resources from the common with her own labor (for copyright, read 'labor' as 'creativity'), and that in claiming the piece of common for her own, she leaves 'enough, and as good' for others. Locke believed that the earth was originally owned by 'all in common' (a positive community)[51], and arguing for such co-ownership constituted part of his resistance to the divine right of kings. Yet, Locke's contemporaries believed that private ownership of land was justifiable, and Locke himself wished to believe that people in a state of nature who chose to enter civil government owned individualized private 'property' for whose stewardship they could hold government accountable. How could Locke square private ownership of land with a natural state where the whole earth was owned in common? His analytic solution is now known as the 'proviso' or 'sufficiency condition'.

The basic structure of his argument has two implicit stages. The first stage is centered on the laborer. Labor is mine and when I appropriate objects from the common I join my labor to them in a purposive way (Becker 1977, pp. 32–48). If you take the objects I have gathered you have also taken my labor because I have mixed my labor with the objects in question. '[N]o one ought to harm another in his Life, Health, Liberty, or Possessions' (Locke 1988, p. 271, bk. II, §6). To take my labor harms me and you should not harm me. You, therefore, have a duty to leave these objects alone. Therefore, I have a prima facie property in the objects. The second stage is centered on persons other than the laborer. Just as the laborer has a natural right not to be harmed, so do the other commoners. Therefore, when someone employs her labor to make the land or its fruits useful, 'mixing' her labor with the common, her private claim over the resulting mixture matures into a right only *provided that* she leaves 'enough, and as good' for the other commoners.[52]

[50] This was Filmer's argument in *Patriarcha*: that we know that the earth was *not* given to all men in common, but only to royalty, because initial co-ownership would be inconsistent with contemporary private property. If all persons owned the earth, private property could never exist because all the commoners would not consent to any one of them having private dominion. By contrast, vesting ownership in royalty eliminates the coordination problem.

[51] The Lockean common did not strictly follow the model of positive community as set out by Pufendorf. Rather, as Shiffrin observes, the Lockean common 'is available to nonaltering use by each and all' complemented with a 'right over exclusive use' that is 'jointly owned' (2001, p. 150).

[52] Locke argued against Filmer that unanimous consent was not required before one co-owner appropriated in circumstances where the complainer had 'as good' available. In

If the claimant's appropriation leaves 'enough, and as good', Locke reasons, then only the envious would object (and Locke cares nothing for objections of the envious).[53] If the claimant leaves 'enough, and as good', her appropriation 'does as good as take nothing at all' (Locke 1988, p. 291, §33).[54] The requirement that private property come into being only if the private appropriation leaves 'enough, and as good' for all the other commoners, is the proviso.

The proviso has additional functions within Locke's argument. For example, a principle that property results from mixing labor with the common could be absurdly overbroad, and the proviso that appropriations must leave behind 'enough, and as good' usefully limits the amount of property that can be claimed by an individual.

Thus, Robert Nozick famously asked 'if I own a can of tomato juice and spill it into the sea . . . do I thereby come to own the sea, or have I foolishly dissipated my tomato juice?' (Nozick 1974, p. 175). Once the proviso is added, Nozick's hypothetical is no longer so problematic. Artists like Christo are famous for their work in public spaces, stringing fences or wrapping areas of landscape. Suppose Christo hires tankers to stir tomato-colored dye into a bay, with the aim of changing the color of the water to complement the sunset one fine summer evening.[55] The artist would seem entitled to keep everyone else out of the colored area temporarily, to preserve his handiwork from being marred, provided that the world offers the other ocean users – boaters, swimmers, aestheticians, and water skiers – equally good and convenient areas of ocean for their use.

Some have argued that in the cases of copyright and patent the 'enough, and as good' proviso is easily satisfied.[56] This is facially plausible, given

such circumstances, the complainer was merely 'covetous' and 'quarrelsome' (Locke 1988, p. 291, §34).

53 'God gave the World. . . . To the use of the Industrious and Rational . . . not to the Fancy or Covetousness of the Quarrelsom and Contentious' (Locke 1988, p. 291, §34).

54 It may be wondered, what happens if the laborer's appropriation would cause harm, but the stranger's copying would also cause harm? The structure of Locke's argument suggests the law of nature should create no property right in this case. In another setting, I defend this result on the ground that it is less important to prevent harms by individuals acting alone, than it is for the law of nature *itself* to assist in the doing of harm (Gordon 1993, p. 1561).

55 For an analogous piece of art, see the photographs of 'Surrounded Islands' at http://www.christojeanneclaude.net/si.html.

56 Interpretations of Locke's proviso vary widely. (See, for example, Fisher (2001) discussing the proviso in the context of intellectual property.) On one interpretation, for example, the proviso constrains only minimally; it permits privatization of the common whenever the results of the privatization make non-owners better off than they would be in a rude state of nature where no such privatization were permitted. Such an interpretation privileges the 'first to grab'. Another interpretation, put forward by Michael Otsuka, is more egalitarian: 'You may acquire previously unowned worldly resources if and only if you leave enough so that everyone else can acquire an equally advantageous share of unowned worldly resources' (Otsuka, 2003, p. 24).

that someone who makes a derivative work building on the public domain gains no rights in the underlying material.[57] Thus, for example, when Richie Valens made a rock version of the folk song, *La Bamba*, his copyright extended only to what he added; others could sing the public domain song without liability[58] and even obtain copyright in their own arrangement of the public domain song.[59] Similarly, obtaining a patent in a new method of turning wind into energy leaves the public unimpeded in its ability to use whatever the prior art taught about the construction of windmills. Copyright law even allows the newcomer freedom from liability if he produces something that duplicates the copyrighted work, provided the second artist came to the duplicate result independently.[60] Thus, copyright seems to leave 'enough, and as good' of the common heritage – in fact, it seems to leave the common heritage itself intact.

Similarly, many observers see what the creative person adds as a mere boon. For Locke, strangers in the absence of exigency or waste have 'no right' to 'the benefit of another's Pains' (Locke 1988, p. 291, §34). They only have rights to be protected from harm, and keeping them from a mere boon arguably causes no harm. Such a claim has been made about patent law: 'If the patented article is something which society without a patent system would not have secured at all – the inventor's monopoly hurts nobody . . . his gains consist in something which no one loses, even while he enjoys them' (Cheung 1986, p. 6).[61] In another connection, John Stuart Mill observed that no one ever 'loses' by being prohibited from 'sharing in what otherwise would not have existed at all' (Mill 1872, p. 142). But is this true?

[57] In the United States, this rule finds expression in 17 USC §103(b): 'The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material'.

[58] Valens may have an effective monopoly on all rock versions of the song, however, because courts or juries might erroneously conclude as a factual matter that all other versions copied from Valens's hit. In American copyright law, even subconscious copying can give rise to liability. The possibility of fact-finding errors of this kind giving rise to an effective monopoly creates additional problems for the proviso.

[59] 17 USC §103.

[60] This is not necessarily true of patent. Many nations give patent owners the right to sue even independent creators; an inventor who is second-in-time, but has borrowed nothing from the inventor who preceded him, nevertheless is subject to injunction. In such cases, the second, independent inventor certainly seems to lack 'enough, and as good'. It requires some procrustean argument to suggest that the proviso is not violated, or for that matter, that the patent owner has any 'labor-based rights' that would justify his control over the independent inventor. See, for example, Becker (1993, p. 609): under the view he explores, 'authors who can show their intellectual independence from patented products [sh]ould be entitled to share the property rights in them'.

[61] Cheung goes on to note that contemporary economic scholarship recognizes that the patent system imposes significant social costs.

In making arguments about harm or loss, one must specify the baseline against which harm is measured. One baseline worth exploring is the level of welfare that the accused person had before the inventor/artist created and claimed ownership in her work.[62] By such a measure, it is *not* true that the creation of new inventions and works of authorship are necessarily harmless.

Arguments like this – that no one ever 'loses' by being prohibited from 'sharing in what otherwise would not have existed at all' (Mill 1872, p. 142) – overlook the way that creation of a new book or invention changes the social world, potentially impairing the value of the heritage, or causing other negative changes which only a freedom of copying can redress. Once an intellectual product influences the stream of culture and events, excluding the public from access to it can do harm. The same things may be in the common, but they may no longer be 'as good'. If a creative laborer *changes* the world, she should not be able to control what others can do to defend themselves from the change.

There is no way to avoid this harm by relying on the audience's foresight. How could we feasibly ask, 'Would you have wanted to be exposed to the work, knowing as you now do what it contains and that it comes with restraints on its reuse?' She could not answer without presupposing knowledge of the very sort she is supposedly deciding whether or not she wants to acquire.[63]

Moreover, we are ordinarily unable to choose what we will encounter, either in the realm of culture or of science. What looks like a boon can be (all things considered) a harm.

For example, assume that A takes substances from the common. From these, with great ingenuity, she manufactures an enzyme that greatly improves health. Because of its salutary properties, a decision is made to include the enzyme in the drinking water.

The benefits, however, come at the cost of a particular form of addiction: some people who drink the enzyme become unable to metabolize carbohydrates without continued intake of this elixir. To people so affected, much ordinary food becomes valueless for nourishment – it is useless unless eaten along with the enzyme. In such a case, the fact that the common continues to have an ample supply of both food and the elements from which the enzyme can be made is not sufficient to protect the public from harm. The addicted public also needs A's knowledge of how the enzyme is manufactured, for without it, they will starve in the midst of plenty. If, after the enzyme is put into the water supply, the inventor is given a right to prohibit others from

[62] The issue of what constitutes a proper comparison is notoriously controversial. See Simmons (1992, p. 294). In part, for reasons discussed in Gordon (1993, pp. 1570–1571), I examine whether an individual non-owner would have been better off never having been affected by a work, as compared to how he fares after being affected by (and barred from copying or adapting) a particular expressive work.

[63] This is closely related to the Arrow paradox.

using her manufacturing technique, addicted members of the community are worse off in their ability to use the common than they were before.[64]

Thus, the mere presence of abundant raw materials should not suffice to give A a right to exclude B and other strangers from the enzyme or from learning how it can be made. Giving A ownership of the enzyme or a patent over its method of manufacture would cause harm. Even if A's appropriation leaves 'as much' for others, it does not leave 'enough, and as good'. I would argue that mere quantitative identity is not enough.[65] This is essentially a reliance argument; having changed people's position, the inventor cannot then refuse them the tools they need for thriving under their new condition.

Authors no less than inventors are capable of changing the value of the common. Consider how the best-selling novel *Gone with the Wind* romanticized the practice of slave holding. Someone entranced by the novel's dramatic love story might find herself drawn into the narrator's assumptions about slavery; the reader's views of her own ancestors and of her nation's history (matters that lie in the common) might be negatively affected in a way that mere factual knowledge could not alone undo. To undo the novel's visceral effects, she might need to write or read a corrective that revisits the images or personages of the original. This is what author Alice Randall did in her novel, *The Wind Done Gone*: she wrote a book that took some of the *Gone with the Wind* characters and events, and recast them from an Afro-American perspective.

Sometimes the law must permit[66] re-use of authored work to avoid a historian or novelist permanently changing people's understanding of their heritage in ways that will devalue the common.[67] Current copyright law does not consistently permit such re-use. American law sometimes allows copyists

[64] Note that appealing to the public's ability to use the common (rather than its ownership of the common) is a controversial step.

[65] At least, this is how I interpret the proviso (1993, pp. 1562–1573). As John Simmons says, 'Neither the quantitative nor the qualitative aspects of the requirement [of leaving "enough, and as good"] wears its meaning on its face' (Simmons 1992, p. 295).

[66] Harms caused by expression raise institutional and free-speech issues beyond the scope of the instant paper. Nevertheless, the following distinction should be noted. The question is not whether the harms done by *Gone with the Wind* justify punishing its author or censoring the book. Rather, the question is whether the author of a harmful book should be given a property right that would affirmatively stop harmed parties from re-using the book to undo the injury done them. I argue that the proviso should be interpreted to stop a property right of the latter kind from arising.

[67] Said Alice Randall, 'My book is an antidote to what I perceive as the poison of the *Gone with the Wind* text' (*Alice Randall 'Speaking freely' transcript*). Randall's book was initially enjoined as a copyright infringement, and removed from bookstore shelves. Although the injunction was later lifted, the episode demonstrated a danger that copyright can pose. See *SunTrust Bank v. Houghton Mifflin Co.*, 136 F Supp 2d 1357 (ND Ga 2001) (enjoining production, display, distribution, advertising, sale, or offer for sale of *The Wind Done Gone*), rev'd, 268 F3d 1237 (11th Cir 2001) and 252 F3d 1165 (11th Cir 2001).

a privilege akin to self-defense under the doctrine of 'fair use',[68] but 'fair use' and related doctrines fall short of preserving the necessary liberty.[69] Therefore, it appears that American copyright law fails to track a Lockean approach.

INTENT AND THE LOCKEAN PROVISO

If the law of nature prohibits the doing of harm, we are entitled not to have our ability to use the common be made worse off[70] by the laborer's claim to property. This is an inherent right we would have as humans and not because of any particular act or effort on our part.[71] A Lockean copyright would arise under this schema *only* as to those persons whose exclusion from using the work would leave them no worse off (at least in regard to their ability to use the common)[72] than if the work never existed in the first place.[73] How do we identify those persons? How do we know who – if denied the liberty to copy, adapt, or otherwise make use of the creative laborer's output – would merely be restored to their status quo ante? It is only these persons who can be justifiably enjoined under the Lockean schema.

The key here may be the category so important in *Grokster*, namely, intent. Locke suggests that 'enough, and as good' is significant not only in itself, but, also because when 'enough, and as good' is present, we know something about the intent of persons complaining about the appropriation.

Locke writes:

> He that had as good left for his Improvement, as was already taken up, needed not complain, ought not to meddle with what was already improved by another's Labour:

[68] '[A]n individual in rebutting a copyrighted work containing derogatory information about himself may copy such parts of the work as are necessary to permit understandable comment'. *Hustler Magazine Inc. v. Moral Majority Inc.*, 796 F.2d 1148, 1153 (9th Cir. 1986).

[69] See Gordon (1993).

[70] One can debate how broadly to interpret both the (primary) right against harm and the (derivative) proviso against harm. John Simmons, for example, suggests that some competition (and thus some harm) might be rightful under Locke's natural law, Simmons (1992, p. 71) As for the proviso, Simmons suggests that 'Locke is prohibiting appropriation that denies others an opportunity equal to one's own for self-preservation and self-government' (1992, p. 292).

[71] In Waldron's language, this would be a 'general right.' Waldron (1988, chapter 4) explores the distinction between 'special rights' that 'arise out of some special transaction or relationship' and 'general rights' that are not so limited, and which apply to everyone.

[72] It may be that the proviso should block the formation of private property when the private claim would cause harm of any kind, and not merely when it causes harm to the common. Such an approach would raise the question of whether the Lockean approach can be squared with the general liberty to compete because many intentional and even malicious harms are done in the course of socially desirable competitive activity.

[73] If my world has changed because of exposure to the work, if I have relied on or become affected by it, then denying me the ability to copy it freely may make me worse off than if the artist had never labored and the work had never come into existence. In the second situation, I would argue, the artist's claim to private ownership is (at best) incomplete.

> If he did, *'tis plain he desired the benefit of another's Pains*, which he had no right to, and not the Ground which God had given him in common. (Locke 1988, p. 291, §34; emphasis added)

In this, Locke comes close to abandoning his props of mixing land, and labor, in favor of making a more general, quasi-Kantian point about ethics. The person who acts for the purpose of taking 'the benefit of another's Pains' (and no other purpose) we will call 'malicious'. The malicious person violates a deontological constraint when he does intentional harm. It may be that this constraint merely imposes a duty to avoid harm (e.g., by compensating) rather than a full duty to respect intellectual-property rights but that need not be fatal to the *Grokster* opinion if the Court was assuming that harm was done.[74]

The core of Kant's deontological view holds that it is wrong to treat another merely as a means rather than as an end in himself, 'to treat someone as if he existed for purposes he does not share' (Quinn 1992, p. 190 n.25). It denies the fundamental equality of persons so to prefer one's self over another. As Thomas Nagel notes:

> The deontological constraint . . . expresses the direct appeal to the point of view of the agent from the point of view of the person on whom he is acting. It operates through that relation. The victim feels outrage when he is deliberately harmed . . . not simply because of the quantity of the harm but because of the assault on his value of having my actions guided by his evil. (Nagel 1986, p. 184)

Thus, let us examine copying by an artist/user who uses a preexisting work simply to save effort and expense; for this user, the more the other person has labored, the better. He is the person who merely desires the benefit of the other's 'Pains', and who will not be worse off if copyright is enforced against him. It is he who necessarily engages in the perversion of the personal depicted by Nagel.

Nagel gives this example of the 'sense of moral dislocation' that occurs when we aim intentionally at another's harm: An actor wants something whose acquisition will save lives, but can only be obtained by twisting a child's arm. 'If you twist the child's arm, your aim is to produce pain. So when the child cries, "Stop, it hurts!" his objection corresponds in perfect diametrical opposition to your intention. What he is pleading as your reason to stop is precisely your reason to go on' (Nagel 1986, p. 182).

[74] Given the harm-based focus of Locke, one could argue that any *harmless* intentional copying is 'rightful' – even when such harmless copying is done by someone who seeks only to take advantage of 'another's Pains'. We need not reach this question. As my goal is to reconstruct the best argument the Court *could* have made for finding all infringement-inducers wrongful, I allow arguendo the assumption that harm was caused by the behavior at issue in *Grokster*.

Similarly, for the actor I call 'malicious', how does he react when he hears the laborer cry, 'Stop! I worked so hard on that!' His honest reply would be, 'To take advantage of your hard work is precisely why I seek it'.[75]

Copyright sweeps everybody into its reach. However, it is this first group, whom I call 'malicious' users, who stand as the target at copyright's conceptual core, if viewed deontologically.[76] These persons aim to take for their own use benefits toward which the author had labored, not to rectify a harm inflicted by the work, but simply because using the creation instrumentally facilitates the user's other ends. In Locke's words, the malicious person is the person who 'desired the benefit of another's Pains which he had no right to, and not the Ground' (Locke 1988, p. 291, §34) that was the common gift.

Preventing a malicious person from using the work for his own profit makes him no worse off than if the pre-existing work had never come to his notice. Excluding malicious users from the laborer's product still leaves them with 'enough, and as good' as the laborer herself possessed. Denying them use of a work or making them pay for it simply restores them to their status quo ante, which is the classic function of corrective justice. As to malicious users, then, the proviso is necessarily satisfied.

Beyond malicious users, there is a second group, defined by having a connection with the work itself. In the second group belongs the copying by any artist/user who has been affected by the prior work in some way other than a simple stimulated desire to better himself at the other's expense. Because they do not merely seek the 'benefit of another's Pains', the proviso might not be satisfied when suit is brought against members of this second group. From a Lockean perspective, such persons may be entitled to some freedom to borrow even when their use harms the original author.[77] To such a 'content-oriented user', the text is not just a commodity, an instrument, or a tool that can be exchanged with other tools. Such a user has an emotional reaction to the text that is nonfungible. The need to react to the text may involve use of the text; suppressing the need may violate Locke's proviso.[78]

[75] The analogy with Nagel's example is not perfect. The extent of the laborer's 'pains' will have only an inexact correlation with the value of the work produced. More importantly, the child's arm belongs to him more surely than the laborer's effort belongs to the laborer. The thesis I raise here is, therefore, overbroad unless one accepts with Locke some notion that the laborer's effort remains 'his' even after the labor is expended – or, alternatively, unless one accepts that the laborer's beneficial acts deserve some reward that the nonlaborer is morally obliged to honor.

[76] This and the following few paragraphs borrow language from my article (Gordon 2004), and at other points, the chapter borrows some language from another of my articles (Gordon 1993).

[77] I am speaking here of a Lockean approach. Liberties that might be justifiable under a Lockean approach might not be justified under other, for example, some consequentialist approaches.

[78] I do not contend that enforcing copyright will always suppress or distort the nonmalicious borrower's creative impulse. Some of the nonmalicious may be proper objects of Lockean

Do the copyright statutes of any nations limit the imposition of liability solely to cases where the proviso is satisfied? I know of no such provision. Do the copyright statutes of most nations limit liability to those copyists who are malicious? Again, the answer is 'no'.

Under the American rules that govern direct infringement, liability is imposed on virtually anyone who copies, regardless of motive. Even having a reasonable and good faith belief that one is copying lawfully will ordinarily give no defense to a civil suit. (Such a lack of intent to infringe might help in a prosecution for criminal copyright infringement,[79] but *Grokster* was a civil suit.) Therefore, copyright and the Lockean approach again seem to diverge.

But do copyright and the Lockean approach instead converge in the rare types of copyright liability (here, a form of secondary liability) that courts do premise on intent? *Grokster* after all is one such rare case.[80] The answer lies in comparing the kinds of intent the Court required in *Grokster* with the kind of intent that matters under the Lockean approach. For the Lockean approach, the question was whether the copyist was motivated by the desire to use another's labor as a substitute for his own, a desire to subordinate that other person to himself, to use the other merely as a means. For *Grokster*, the question was whether the defendant has 'distribute[d] a device with the object of promoting its use to infringe copyright'.[81] Are these intents necessarily equivalent?

LIABILITY FOR TECHNOLOGY

As discussed earlier, the U.S. Supreme Court in *Grokster* seems to have shifted ground from copyright's usual consequentialism to issues of intent. The Court seems to have switched from a consideration of agent-neutral principles, to an agent-relative emphasis. Presumably it is the defendant's intent to induce copyright infringement – a bad act – that makes the Court not care about the technology's potential for good consequences.[82]

Let us assume arguendo that a deontological constraint (of the kind that says, for example, 'do not murder') gives rise to a prima facie duty that can relieve us of any otherwise-applicable obligation to achieve the highest net

liability – namely, those who copy despite the fact that 'enough and as good' was left for them.

[79] United States v. Moran. 757 F. Supp. 1046, 1049 (D. Neb. 1991).

[80] Although copyright imposes 'strict liability' on copyists as part of the doctrine of 'direct' infringement, 'secondary' liability such as that which is at issue in *Grokster* is based on different rules.

[81] *Grokster*, 125 S. Ct. at 2780.

[82] Alternatively, the emphasis on 'intent' may really be an inquiry into defendant's 'lineage' (Wu 2005, p. 243), or may result from an assumption that 'inducement' 'suggests mass infringement' (Wu 2005, p. 250).

balance of good consequences over bad.[83] But what is an intent to induce copyright infringement? Is it an intent to commit an act that in itself violates a deontological constraint? If acting with an intent to induce infringement necessarily amounts to a deontological wrong, then, under our assumption, the Court was free (at least as a prima facie matter) to disregard consequences. However, if the act of inducement does not necessarily amount to a deontologic wrong, then the Court needs some other explanation (not yet supplied)[84] for employing an inquiry into 'intent' in lieu of undertaking a full consequentialist inquiry.

Let us look first at the intent involved in the underlying direct infringements, that is, the acts by file-traders from which the technology's secondary liability would be derived. Direct copyright infringement (unlike some forms of secondary liability) is premised on grounds independent of intent. Further, copyright infringement can be found even when the Lockean proviso is violated.[85] Thus, a file-trader may be legally liable despite the fact he lacks the kind of intent that in the Lockean approach would subject him to a duty, and despite the proviso being otherwise unsatisfied. Therefore, even if one could utilize some kind of doctrine of 'transferred intent' to attribute the direct infringers' motivations to the secondary party, it is not necessarily true that one or more of the direct infringers had the improper motivation. Some or even most file-traders *may* have had the kind of intent that the Lockean approach would condemn,[86] but this is neither something that the Court sought to demonstrate nor is it something that is logically entailed by the test for secondary liability that the Court used.

What about the intent of the secondary infringer himself? On the one hand, he is using others' 'property' for purposes of his own. On the other hand, as we have seen, what the positive law considers to be copyright 'property' is not always 'property' from a Lockean perspective. Therefore, again, it is difficult to be sure that, in a Lockean world, someone commits a deontological wrong when he facilitates copying.

[83] As mentioned earlier, this chapter does not need to reach the ultimate question of whether a deontological duty always carries the day despite consequences. Nevertheless, it is worth mentioning the classic literary example posing that question. In Dostoyevsky's *The Brothers Karamazov*, one brother poses roughly the following problem to another brother: 'Assume an evil deity credibly promises you that he will end all suffering experienced by all children. No more hungry children, or diseased children, or beaten children. But the evil deity specifies that he will grant this boon to the millions of future children only if you kill one innocent child. Would you do it?'

[84] I do not deny that precedent provided some support for the Court's rule, as did (by analogy) a provision in patent law. But existing precedent could also have supported alternative rules. The question is how the Court justified the path it took.

[85] See Gordon (1993).

[86] Although file-sharers have a personal connection to the work, having a personal connection does not always give rise to a liberty based on the proviso. See note 21, supra.

To sum up: when the proviso is violated, copying may be *rightful*. If so, then having the intent to induce such copying is not necessarily wrongful.

One might argue that the U.S. Supreme Court was acting not against the purportedly wrongful act of encouraging copying, but against the purportedly wrongful act of helping people to disobey the law. It is certainly possible to argue that we all have at least a prima facie moral obligation to obey the law. If so, might one defend the U.S. Supreme Court's *Grokster* decision on the ground that anyone who 'intentionally induces' lawbreaking is committing a deontological wrong? Conceivably. But to make such an argument would require explanations not ventured in the Court's opinion.[87]

In its prior decision, *Sony*, the Court had decided that, when a technology presented a mix of lawful and unlawful consequences, the 'capacity for substantial noninfringing uses' was sufficient to validate the technology's survival. In other words, the lawful consequences trumped the unlawful. In *Grokster*, the Court was asked to say more about what counted as this trump: how to define 'capacity' and 'substantiality', or to determine what balance between good and bad effects was necessary before copyright law should impose liability on a technology.[88] Instead of facing those questions, the Court reached for a trope.[89]

The Court essentially announced that, if a certain kind of intentional inducement is present, the trumping effect would switch to the unlawful effects: if 'intentional inducement' is present, then it is the lawful and beneficial effects that become irrelevant. That position would be controversial even if the Court's test for liability required proof that a defendant had committed a deontological wrong. But the Court's test seems to have no such component. So in the end, I agree with Tim Wu's criticism. One cannot escape the impression, reading the *Grokster* decision, that the language of intent was being used primarily to enable the Court to evade a difficult choice about what consequences should matter (Wu 2005).

CONCLUSION

Blocking an inquiry into consequences is a serious matter. Yet, in the *Grokster* case, the Court ducked difficult questions about consequences[90] and instead imposed liability on the ground that the defendant, Grokster, had 'intended' to facilitate copyright infringement.

[87] The Court does briefly exhibit some concern with the issue of lawbreaking: '[I]ndications are that the ease of copying songs or movies using software like Grokster's and Napster's is fostering disdain for copyright protection' (*Grokster*, 125 S. Ct. 2764 at p. 2775).

[88] See, generally, Wu (2005)

[89] Cf. Wu (2005).

[90] For example: What kind of effects should suffice for imposing secondary liability? How much good or bad did the Grokster technology facilitate? Of how much good or bad was it capable?

The Court implicitly ruled that consequences didn't matter. Perhaps the Court believed that a concern with societal effects was trumped by a deontological concern with avoiding wrongful behavior.[91] Yet, the Court never really discussed why it thought the 'intentional' act of facilitating infringement was sufficiently evil to render the technology's potential benefits irrelevant. This chapter attempted to fill that gap, drawing on Lockean theory to identify a potentially applicable deontological wrong. The chapter concluded, however, that the Court's test for secondary liability does not depend on a defendant committing such a wrong.

The *Grokster* opinion is thus caught between two stools. It lurches from consequentialist considerations (e.g., where the Court says that making Grokster liable is the only 'practical' thing to do) to what sounds like nonconsequentialist reasoning ('intent'), without at any point either pinning down the consequences at issue, or pinning down a deontological duty that would be violated by a defendant who induced copyright infringement. The opinion does justice to neither concern.

That the makers of a technology intentionally help someone else violate copyright law hardly seems like such an evil act that a lawmaking court should disregard the beneficial byproducts of the technology. Moreover, the Court's apparently deontological inquiry into 'intent' is engrafted onto a statute that was enacted pursuant to a consequentialist clause of the U.S. Constitution. After all, Congress is given power over copyright and patent 'To Promote the Progress of Science and the useful Arts'. By neither admitting or explaining why it was abandoning consequentialism, nor doing a full consequentialist analysis, the Court comes to a result whose basis is opaque. This chapter intends to help show how acknowledging the consequentialist/nonconsequentialist divide can help us reason more clearly.

References

Alice Randall 'Speaking freely' transcript. Recorded April 2, 2002, in Nashville, TN. http://www.firstamendmentcenter.org/about.aspx?id=12787

Becker, L. 1977. *Property rights: Philosophic foundations.* London: Routledge and Kegan Paul.

Becker, L. 1993. Deserving to own intellectual property. *Chicago-Kent Law Review, 68,* 609–629.

Broome, J. 1995. *Weighing Goods: Equality, Uncertainty and Time.* Oxford: Blackwell.

Bell, T. W. 1998. Fair use vs. fared use: The impact of automated rights management on copyright's fair use doctrine. *North Carolina Law Review, 76,* 557–619.

Calabresi, G. 1970. *The cost of accidents: A legal and economic analysis.* New Haven, CT: Yale University Press.

[91] We need not reach the question of whether deontological duties really should have such a trumping effect. The chapter addresses an issue that arises prior to that question, namely, the issue of whether people who 'induce copyright infringement' necessarily violate a deontological duty.

Cheung, S. N. S. 1986. Property rights and invention, in J. Palmer and R. O. Zerbe (Eds.), *Research in law and economics: The economics of patents and copyrights* (Vol. 8), Greenwich NJ: JAI Press, pp. 5–18.

Cohen, J., Loren, L. P., Okediji, R. G., and O'Rourke, M. A. 2002. *Copyright in a global information economy.* New York: Aspen Publishers.

Cohen, J. 2005. The place of the user in copyright law. *Fordham Law Review, 74,* 347–74.

Drahos, P. 1996. *A philosophy of intellectual property.* Dartmouth: Ashgate.

Fisher, W. 2001. Theories of intellectual property, in S. Munzer (Ed.), *New essays in the legal and political theory of property.* Cambridge, UK: Cambridge University Press.

Frankena, W. 1988. *Ethics* (2nd ed.). Englewood Cliffs, NJ: Prentice Hall.

Gordon, W. J. 1989. An inquiry into the merits of copyright: The challenges of consistency, consent and encouragement theory. *Stanford Law Review, 41,* 1343–1469.

Gordon, W. J. 1993. A property right in self-expression. *Yale Law Journal, 102,* 1533–1609.

Gordon, W. J. 2004. Render copyright unto Caesar: On taking incentives seriously. *University of Chicago Law Review, 71,* 75–92.

Hardy, T. 1996. *Property (and copyright) in Cyberspace,* University of Chicago Legal Forum, pp. 217–260.

Hettinger, E. C. 1989. Justifying intellectual property. *Philosophy and Public Affairs, 18,* 1, 31–52.

Kramer, M. H. 2004. *John Locke and the Origins of Private Property: Philosophical Explorations of Individualism, Community, and Equality.* Cambridge: Cambridge University Press.

Lange, D. 2003. Reimagining the public domain. *Law and Contemporary Problems, 66,* 463–483.

Lessig, L. 1999. *Code and other laws of cyberspace.* New York: Basic Books.

Litman, J. 1994. The exclusive right to read. *Cardozo Arts and Entertainment Law Journal, 29,* 13–54.

Litman, J. 2001. *Digital copyright.* Amherst, NY: Prometheus Books.

Litman, J. 2004. Sharing and stealing. *Hastings Communications and Entertainment Law Journal, 27,* 1–50.

Locke, J. 1988. *Two treatises of government.* Edited by Peter Laslett. Cambridge, UK: Cambridge University Press.

Lunney, G. 1996. Reexamining copyright's incentives-access paradigm. *Vanderbilt Law Review, 49,* 483–571.

Lunney, G. 2001. The death of copyright: digital technology, private copying, and the Digital Millennium Copyright Act. *Virginia Law Review, 87,* 813–920.

Michelman, F. 1967. Property, utility, and fairness: Comments on the ethical foundations of 'just compensation' law. *Harvard Law Review, 80,* 1165–1258.

Mill, J. S. 1872. *Principles of political economy.* Boston: Lee & Shepard.

Moor, J. 1985. What is computer ethics? in T. W. Bynum (Ed.), *Computers and ethics.* Oxford: Blackwell, pp. 266–275.

Nagel, T. 1986. *The view from nowhere.* New York: Oxford University Press.

Nozick, R. 1974. *Anarchy, state and utopia.* New York: Basic Books.

Otsuka, M. 2003. *Libertarianism without inequality.* Oxford: Oxford University Press.

Palmer, T. G. 2002. Are patents and copyrights morally justified? The philosophy of property rights and ideal objects, in A. Thierer and W. Crews (Eds.), *Copy fights: The future of intellectual property in the information age.* Washington DC: Cato Institute, pp. 43–93.

Portmore, D. W. 2001. can an act consequentialist theory be agent relative? *American Philosophical Quarterly, 38,* 363–377.

Quinn, W. S. 1992. Actions, intention, and consequences: the doctrine of double effect, in J. M. Fischer, and M. Ravizza, *Ethics: Problems and principles.* Fort Worth: Harcourt Brace Jovanovich, p. 179ff.

Shiffrin, S. V. 2001. Lockean arguments for private intellectual property, in S. R. Munzer, *New essays in the legal and political theory of property.* Cambridge, UK: Cambridge University Press.

Simmons, A. J. 1992. *The Lockean theory of rights.* Princeton: Princeton University Press.

Simons, K. 1992. Rethinking mental states. *Boston University Law Review, 72,* 463–554.

Stallman, R. 2002. *Free software, free society.* Boston: GNU Press

Thomson, J. J. 1976. Property acquisition. *Journal of Philosophy, 73,* 664–666.

Waldron, J. 1988. *The right to private property.* New York: Clarendon Press, Oxford University Press.

Wu, T. 2005. The copyright paradox. *Supreme Court Review, 2005,* 229–255.