PREFACE TO THE PAPERBACK EDITION: INTELLECTUAL PROPERTY, PRIVILEGE, AND NATURAL RIGHTS

I believe the future of intellectual property is in peril. Since the initial publication of this work there have been numerous important legal and cultural developments related to intellectual property. A recent and alarming trend is that intellectual property rights are starting to be viewed as state created entities used by the privileged and economically advantaged to control information access and consumption.

A few years ago peer-to-peer file sharing across computer networks was threatening to radically change the intellectual property landscape. Yet in early 2001, Napster – the first widespread file sharing service – began blocking the transmission of copyrighted songs after an extended legal battle with the Recording Industry Association of America (RIAA). While other less centralized file sharing programs stepped in to fill the void, the RIAA began suing individuals, citing a 31% decline in CD sales. The RIAA sued over 200 hundred individuals in 2003 and continued with similar litigation in 2004 leading to a chilling effect on file sharing. Also in 2004, a bill was introduced in the U.S. Senate and supported by RIAA entitled, "Protecting Intellectual Property Rights Against Theft and Expropriation (Pirate) Act." If passed, the bill will allow the Justice Department to pursue civil cases against those who share copyrighted files across computer networks. It appears that copyright holders have taken the first round of the peer-to-peer file sharing war and are digging in for a protracted struggle.

Content providers also won a second battle by securing an extension on the life of copyrights in *Eldred vs. Ashcroft* (2003). The Supreme Court of the United States rejected a challenge to the *Sonny Bono Act* (1998) which provided a twenty year extension on copyright protection. The extension has allowed numerous movies such as "Casablanca," "Gone with the Wind," and "The Wizard of Oz" along with cartoon characters such as Mickey Mouse to remain protected.

Furthermore, in order to control the distribution and use of copyrighted material content providers are embedding intellectual works behind technological walls that restrict access. Once breached,

U.S. copyright holders then bring suit under Digital Millennium Copyright Act (DCMA) which includes an anti-circumvention provision. With few exceptions, circumvention of technologically based access mechanisms is illegal. The DMCA also prohibits the distribution of programs that can be used to break through copy and access control technologies.

In the area of biotechnology there has been an alarming rush to patent everything from genes or parts of genes to plant and animal varieties and new medicines. By 2002 the U.S. Patent and Trademark Office (PTO) had already granted nearly 20,000 patents involving genes or other organic material. New biotech drug and vaccine approvals rose from two per year in 1982 to thirty-five in 2002. The "land-grab" ended in 2002, however, when the PTO clamped down on biotech patent applications by raising the standards applicants had to meet to obtain a patent on genes or gene-related discoveries. While this ended the mass patent filings that were common prior to 2002, it is still possible to patent organic materials of all sorts whether innovative or not.

In terms of personal information control, government and corporate data mining activities have produced massive information files on most U.S. citizens. In the name of security or better profits, sensitive personal information is held, sold, and traded as intangible property. In addition, individuals have little control over these activities. In the area of personal information control, it seems as if we are moving into an age of transparency dominated by market forces.

What has been surprising over the last few years is the absence of a cost/benefit analysis in support of new intellectual property legislation or legal decisions. This worry and the problems mentioned above are discussed at length in Lawrence Lessig's *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (2004), Jessica Litman's *Digital Copyright: Protecting Intellectual Property on the Internet* (2001), and Richard Spinello's article "The Future of Intellectual Property" (*Ethics and Information Technology* vol. 5, 2003). As noted in the chapters to follow, Anglo-American institutions of intellectual property are justified because they are said to promote overall social progress through innovation. Generally, rights are granted in return for public disclosure. Furthermore, these rights have a built-in sunset – they lapse after a period of time and the content, that was once protected, falls into the public domain.

In the Napster case, the RIAA claimed $300 million in lost sales, but this is only one side of the equation. Balanced against this overly bloated figure – bloated because RIAA assumed that those who received free copies would have purchased a legitimate copy – is the benefit obtained by more than 70 million people accessing and enjoying music. Moreover, part of the purpose of copyright related to music was to afford producers and distributors control so that production and distribution costs could be recouped. The World Wide Web, however, is an extremely efficient distributor of music and virtually costless as well. Additionally, digital-based production of music has led to a radical reduction in production costs. In the end, had a cost/benefit argument been an overriding factor in the litigation surrounding file sharing, it seems that Napster would have won.

In *Eldred V. Ashcroft* the Supreme Court of the United States seemingly failed to conduct a social progress analysis and the result was a cash windfall for Disney and numerous other companies. Arguably no further incentives to innovate were offered by the twenty-year extension of copyright. Additionally, access to a host of works that were due to fall into the public domain was curtailed. Again it is hard to see how any in depth cost/benefit analysis would have led to this result.

Prior to the enactment of formal systems of intellectual property, many early patents and copyrights had little to do with innovation – economic pragmatism and privilege were the dominate forces. For example, one of the earliest cited patents (1469) granted John of Speyer a monopoly over printing within Venetian territory – even though printing and the production of books was already a practiced craft. Such monopolies had more to do with lining the pockets of those in power and a privileged few than innovation.

The Statute of Monopolies (1624) and the Statute of Anne (1709) pushed intellectual property institutions away from mere economic privilege and toward a justifying theory – limited rights were offered as incentive for production and the overall result was social progress. For 300 years it seemed as if theory – albeit the wrong theory, or so I argue in this volume – dominated the formation and implementation of Anglo-American systems of intellectual property. But what can be said of the ascendancy of theory in the wake of Napster, *Eldred*, the Digital Millennium Copyright Act, and numerous other cases? Such developments point toward an ever-marginalized role for theory in favor of economic pragmatism and privilege.

One problem with this trend is that such arrangements appear to be unjustified while at the same time protecting wealth, status, and privilege. For example, part of what gives the sometimes violent protests related to World Trade Organization meetings impetus is that the globalization of trade appears to protect, strengthen, and maintain the positions of those economically well off at the expense of the poor and disenfranchised.

To deserve our moral and political allegiance, institutions of intellectual property and legal systems in general, must be grounded in and constrained by our best theories. Institutions of intellectual property ruled by economic privilege and group pragmatism cannot be embraced with conviction or command our reflective loyalties. While privilege and group economic pragmatism have shaped systems of copyright, patent, and trade secret in recent times, this need not be so and we can revise our institutions of intellectual property to eliminate or weaken such influences.

A dominant theme of this work is that intellectual property rights are not state created entities – like life rights, and physical property rights, they exist prior to and independent of governments and social progress arguments. They are what some theorists call "natural rights." Consider the simplest of cases. After weeks of effort and numerous failures, suppose I come up with an excellent recipe for spicy Chinese noodles – a recipe that I keep in my mind and do not write down. Would anyone argue that I do not have at least some minimal moral claim to control the recipe? Suppose that you sample some of my noodles and desire to purchase the recipe. Is there anything morally suspicious with an agreement between us that grants you a limited right to use my recipe provided that you do not disclose the process? Alas, you didn't have to agree to my terms and, no matter how tasty the noodles, you could eat something else.

Here at the micro-level we get the genesis of moral claims to intellectual works independent of social progress arguments. Like other rights and moral claims, effective enforcement or protection may be a matter left to governments. But protection of rights is one thing, while the existence of rights is another.

This simple idea – that intellectual property rights are not state creations – if adopted would cause radical changes in Anglo-American institutions of intellectual property. Here, as already noted, I believe the future of intellectual property is at stake. If we continue down the road of economic privilege, then we risk undermining both the institutions and the very idea of intellectual property. We end up

with the view that intellectual property rights and systems of intellectual property protection are state created entities controlled by the privileged and economically advantaged. These institutions represent the mafia family on a global scale.

To be justified, to warrant worldwide coercion, systems of intellectual property should be grounded in theory. But not just any theory – our institutions of intellectual property need to acknowledge and uphold the natural rights of authors and inventors.

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