Preface

In his Foreword, Dr. Neuhauser explained the origin of the essays in this book along with the book's general structure. Nonetheless, a few prefatory remarks are in order. Despite the centrality of intellectual property issues in our networked society, ethicists and other scholars outside the legal community have not sufficiently given this topic the attention that it truly deserves. With that in mind, we have collected in this volume some recent essays that attempt to fill this void by offering some insights and perspectives on these controversial issues.

The tripartite division of the book is designed to make this material more accessible and intelligible to readers of diverse backgrounds. Section I consists of a single essay that provides a broad overview of the main themes in intellectual property scholarship, such as normative intellectual property theory and the legal infrastructure for property protection. This essay also includes a cursory review of the main legal disputes that have shaped the current debate about property in cyberspace. For the uninitiated, this chapter will be an indispensable guide for what is to follow.

Section II presents several essays that are intended to deepen the reader's understanding of intellectual property theory and show how it can help us to grapple with the proper allocation of property rights in cyberspace. Particular attention is paid to Locke's seminal theory of property, including the question of whether a property right can be construed as a natural right.

Section III further develops the themes in Section II but in greater detail and with a more practical orientation. For the most part, the essays in this section illustrate the costs and benefits of applying property rights to cyberspace. While intellectual property rights create dynamic incentive effects, they also entail social costs, and they are sometimes in tension with the development of a robust public domain. The reader may find some redundancy between the introductory section and the subsequent chapters on Locke,

copyright protection, or the information commons in Section II and Section III. Repetition of key arguments, however, will allow the reader to keep clearly in view some important and basic perspectives about intellectual property theory and law.

Each of these chapters presents critical issues that jurists and business people must face in the New Economy. While there is no uniformity among the viewpoints expressed, each essay contributes a complementary perspective on the intellectual property topics that have recently begun to dominate contemporary discussion of cyberethics and cyberlaw.

Chapter I, written by the book's two editors, comprises Section I of *Intellectual Property Rights in a Networked World*. It presents some foundational concepts and issues in intellectual property, and it reviews some of the normative justifications that have been advanced to defend the granting of property rights for intellectual objects. This sets the stage for some consideration of the philosophical case opposing intellectual property rights. That case is rejected in favor of a position for balanced property-rights frameworks that avoid the polar extremes of *over*- and *under*-protection. The chapter then reviews the four different kinds of protection schemes for intellectual property that have been provided by our legal system: copyright laws, patents, trademarks, and trade secrets. Finally, recent litigation, including the Napster, Grokster, Microsoft, and DeCSS cases, are critically examined. Many of the issues and controversies introduced in this chapter are explored and analyzed in greater detail in the subsequent chapters of this book.

The three chapters that comprise Section II of the book — Chapters II through IV — examine philosophical theories that undergird the rationale for many of our current intellectual property laws. Chapters II and III examine aspects of John Locke's theory of property as a backdrop for analyzing contemporary disputes involving ownership claims pertaining to intellectual objects. In Chapter II, Kai Kimppa shows how a "liberalist view" of intellectual property rights involving software can be justified using arguments found in Locke's *Second Treatise on Civil Government*. Kimppa notes that Chapter V of Locke's *Second Treatise*, titled "Of Property," has traditionally been seen as the starting point of the liberalist argument for property, in both its material or immaterial forms. Kimppa argues that even though Locke promotes the need for ownership of property, Locke does so from the viewpoint of necessity. (Because of the nature of material or tangible objects, Locke realized that one cannot have something that already is possessed by another.) But Kimppa claims that Locke's thinking about property in this respect should not be taken for granted as we move to the world of immaterial or intellectual objects. Kimppa believes that at this level, other values, such as cooperation,

should be promoted, and he seeks to demonstrate that Locke would agree with this position through a careful exegesis of key passages in Chapter V of the *Second Treatise*. Kimppa points out, for example, that Locke "wants for a world in which there would be as much justice and good as possible" for everyone. Thus, Kimppa sees some of the goals espoused in the classic writings of John Locke to be compatible with those advocated by Richard Stallman, founder of the Free Software Foundation and powerful advocate of open source software. Kimppa concludes that Locke's and Stallman's goals of greater cooperation regarding the development of intellectual objects (such as software) are goals worth pursuing.

In Chapter III, Michael Scanlan examines another aspect of Locke's theory of property. Like Kimppa, Scanlan focuses his attention on the provocative fifth chapter of Locke's *Second Treatise*, and is especially concerned with the question: How can a right of ownership arise in previously unowned goods? He notes that many take Locke's theory, introduced in the 17th Century, to be applicable today in situations involving the original acquisition and ownership of intellectual property. Scanlan explains how a "quasi-Lockean theory" could support a "very limited natural right to a species of intellectual property." He also notes, however, that this theory by itself would not be strong enough to support a *natural right* in an intellectual property of the sort given by current copyright law. Scanlan concludes that such property rights must be provided as a result of *positive law*.

In Chapter IV, Thomas Powers analyzes the notion of intellectual property in general, and software copyright law in particular, via the classic philosophical debate known as the "problem of universals." At the heart of this problem is the ontological question: Are there universals, or classes of particular objects, that exist in addition to the particular objects themselves? And if universals do exist, in what (ontological) sense can they be said to exist? Powers notes that a distinction in US copyright law, which is of particular importance to protecting software, is made between ideas (themselves) and their expressions. He also notes that the "idea vs. expression" distinction has been the focus of many copyright cases in the courts. This distinction has been especially apparent, Powers points out, in cases where there is an alleged infringement of non-literal parts of a computer program, such as "structure, sequence, organization, and look and feel." Powers argues that this legal distinction ultimately relies on the ontological distinction between universals and particulars. Because copyright law relies on this distinction — one that has proved to be problematic for philosophers for more than two millennia — Powers argues that the legal doctrine of copyright has inherited many of the conceptual confusions and "philosophical troubles" underlying the problem of

universals. He also argues that there are at least three plausible ways in which to construe the differences between universals and particulars, which in turn requires a closer examination of some arguments put forth on this topic by thinkers such as Plato, Aristotle, Locke, and (the later) Wittgenstein. Powers concludes that the unsettled nature of the philosophical debate about universals serves as a good explanation of the "meandering of case law" in the area of copyright law.

Section III of *Intellectual Property Rights in a Networked World* begins with Chapter V by Ann Bartow, who explains how the "likelihood of confusion" criterion is the basis of successful trademark infringement actions in the US. She argues that determinations of this "likelihood" are much too subjective, and that they are also too often premised on a very low estimation of the intelligence of the typical consumer. Nevertheless, in the US, "likelihood of confusion" jurisprudence has gained a strong foothold in cyberspace. Consequently, trademark holders win in most cases, and the result has sometimes been an especially broad set of property rights that prevail throughout the world.

Chapter VI, by Dan Burk, also focuses on cutting-edge legal issues. Professor Burk examines the relationship between hypermedia and feminist discourse. The essay takes a critical stance toward the role of copyright in suppressing such discourses. Given the salience of "non-hierarchical, associative webs to feminist discourse," digital media may be ideally suited to feminist modes of thinking. However, current copyright doctrine assumes that works should be more linear and more tightly controlled. According to Burk, copyright law is inimical to these nontraditional, collaborative works and to "relational user engagement." In the long run, this hostility will not further the promotion of creative discourse as the copyright law intends.

In Chapter VII, Herman Tavani critically examines current copyright protection schemes that apply to digital information. Beginning with a brief account of the way in which copyright law has evolved in the US, from its Anglo-American origins to the present, Tavani examines three traditional philosophical theories of property that have been used to justify the granting of copyright protection. Arguing that each property theory is, in itself, inadequate, he next considers and rejects the view that intellectual property should not be protected at all (and thus should be completely free). Tavani then critically analyzes the notion of *information*, arguing that it should not be viewed as a commodity that deserves exclusive protection but rather as something that should be communicated and shared. Building on this view, he argues for a new presumptive principle for approaching the copyright debate — namely, the principle that *information wants to be shared*. Finally, Tavani argues that

presuming in favor of this principle would enable us to formulate a copyright policy that can avoid the extremes found in the two main competing contemporary positions, both of which are morally unacceptable: (1) access to all digitized information should be totally free; and (2) overreaching, and arguably oppressive, copyright laws, such as the Digital Millennium Copyright Act and the Copyright Term Extension Act, are needed to protect digital information.

In Chapter VIII, Richard Spinello focuses on the theme of trespass in cyberspace. In order to prevent unauthorized use of their data, several US companies have hastily filed lawsuits alleging "trespass to chattels." eBay, for example, has accused metasites of trespass for sending "softbots" that roam the eBay website in order to aggregate auction data. In the author's view, legal scholars have rightly criticized this trend because it creates a novel property right in factual data, which is not eligible for copyright protection. Aside from reviewing the legal issues in this case, the author argues that Internet companies like eBay should be less preoccupied with property rights and more concerned with the Internet's common good. Both Eastern and Western philosophies enunciate the need to recognize and respect the common good of a community or common venture. This awareness should temper a company's narrow focus on proprietary property rights. Corporations like eBay should seek a prudent balance between their property entitlements and their duty to support the Internet's common good, which is manifest in the sharing and communication of information.

Chapter IX, by Elizabeth Buchanan and James Campbell, examines the growing threats to the "information commons" that result from strong property rights that have excessive longevity or too broad a scope. This discussion follows up on and expands upon critical issues that were introduced in Chapter I of this book. The authors discuss the importance of the commons or public domain for future creative efforts. They advocate looser protection schemes that will make for a more robust commons.

Chapter X, the final selection in this book, is by Melanie Mortensen. This chapter examines the ethical and legal issues that are triggered by shifts in communications technologies such as webcasting. Her presentation is an example of how traditional laws are misapplied to new technologies with "troubling" ethical results. She argues persuasively that in this new milieu, we must consider carefully what constitutes piracy, and she offers some ethical guidelines for doing so. Those guidelines are grounded in principles that are based upon "the essential nature of communications technologies."