# Jahrbuch für Recht und Ethik

# Annual Review of Law and Ethics

Band 26 (2018)

Herausgegeben von

Jan C. Joerden

Duncker & Humblot · Berlin

Jahrbuch für Recht und Ethik

Annual Review of Law and Ethics

Band 26

# Jahrbuch für Recht und Ethik

# Annual Review of Law and Ethics

Im Jahre 1993 begründet von B. Sharon Byrd †,
Joachim Hruschka † und Jan C. Joerden

Herausgegeben von
Jan C. Joerden

Band 26


Duncker & Humblot · Berlin

# Jahrbuch für Recht und Ethik

# Annual Review of Law and Ethics

Band 26 (2018)

Herausgegeben von

Jan C. Joerden

Themenschwerpunkt:

## Recht und Ethik des Kopierens – Law and Ethics of Copying

Mitherausgegeben von
Reinold Schmücker
Eberhard Ortland

Duncker & Humblot · Berlin

Bibliografische Information der Deutschen Nationalbibliothek

Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über http://dnb.d-nb.de abrufbar.

Empfohlene Abkürzung: JRE
Recommended Abbreviation: JRE


Druck: Das Druckteam Berlin
Printed in Germany

ISSN 0944–4610
ISBN 978-3-428-15544-6 (Print)
ISBN 978-3-428-55544-4 (E-Book)
ISBN 978-3-428-85544-5 (Print & E-Book)

Gedruckt auf alterungsbeständigem (säurefreiem) Papier
entsprechend ISO 9706 ♾

Internet: http://www.duncker-humblot.de

# Vorwort

Am 10. Dezember 2017 ist mein akademischer Lehrer, *Joachim Hruschka*, Ordinarius für Strafrecht, Strafprozessrecht und Rechtsphilosophie an der Friedrich-Alexander-Universität Erlangen-Nürnberg im Alter von 82 Jahren verstorben. An seinen Lebenslauf und sein Werk erinnert ein zu Beginn dieses Jahres in der JuristenZeitung erschienener Nachruf.[1] *Joachim Hruschka* war einer der Mitbegründer des *Jahrbuchs für Recht und Ethik* und bis zu seinem Tode auch dessen Mitherausgeber. Herausgeber und Mitarbeiter/innen werden ihm ein ehrendes Angedenken bewahren.

—

Der Themenschwerpunkt dieses *Jahrbuch*-Bandes ist dem Thema „Recht und Ethik des Kopierens – Law and Ethics of Copying" gewidmet. Der Initiator dieses Projekts, *Reinold Schmücker*, Professor für Philosophie am Philosophischen Seminar der Westfälischen Wilhelms-Universität Münster, führt gemeinsam mit seinem Mitarbeiter *Eberhard Ortland* in diesen neuen Forschungsbereich und die einzelnen Beiträge dazu am Beginn von Teil A. des *Jahrbuchs* ein. Erarbeitet wurden diese Beiträge im Rahmen einer von *Schmücker* in den Jahren 2015/16 geleiteten Forschungsgruppe am Zentrum für interdisziplinäre Forschung (ZiF) der Universität Bielefeld.

Im Teil B. des *Jahrbuchs* werden Fragen aus durchaus heterogenen Themenbereichen erörtert, die aber alle das Spannungsverhältnis zwischen Recht und Ethik beleuchten, und zwar im Hinblick auf das *ius puniendi* im Völkerstrafrecht; die Problematik des Flüchtlingsschutzes; den Factumbegriff in Kants praktischer Philosophie; das Recht des Whistleblowing; die Schwierigkeiten neuer Verfahren der Pränataldiagnostik; und schließlich den moralischen Status genetisch veränderter Pflanzen. Abgeschlossen wird das *Jahrbuch* mit der Rezension einer Arbeit zur Begründung von Recht und Staat und zum Widerstandsproblem bei Kant.

Für ihre Mitwirkung bei der Herstellung der Druckvorlagen für diesen Band und bei der sorgfältigen Anfertigung der Register danke ich herzlich den Mitarbeiterinnen und Mitarbeitern des Lehrstuhls für Strafrecht und Rechtsphilosophie an der Europa-Universität Viadrina Frankfurt (Oder), insbesondere *Florina M. Polutta*, *Carola Uhlig*, *Susen Pönitzsch*, *Monique Vollbrecht*, *Monika Molencka* und *Dr. Johannes Bochmann*. Für die stets zuverlässige technische Betreuung der Drucklegung im Verlag Duncker & Humblot danke ich einmal mehr Frau *Susanne Werner*.

---

[1] *Joerden*, Nachruf – Joachim Hruschka (1935–2017), JuristenZeitung 73 (2018), 201 f.

Die Internet-Seiten des *Jahrbuchs für Recht und Ethik* finden Sie wie üblich unter folgender Adresse:

**http://www.rewi.europa-uni.de/de/lehrstuhl/sr/intstrafrecht/_projekte/jre/index.html**

Dort sind auch weitere Informationen zum *Jahrbuch* erhältlich – insbesondere die englische bzw. deutsche Zusammenfassung der Artikel und Bestellinformationen.

*Jan C. Joerden*

# Inhaltsverzeichnis – Table of Contents

## A. Recht und Ethik des Kopierens – Law and Ethics of Copying



## B. Weitere Beiträge zu Recht und Ethik – Further Contributions on Law and Ethics

**Rezension – Recension**

# A. Recht und Ethik des Kopierens – Law and Ethics of Copying

# Law and Ethics of Copying

## Introduction

Reinold Schmücker and Eberhard Ortland

The special theme of this issue of the *Annual Review of Law and Ethics* is the law and ethics of copying. Long before the invention of the Xerox machine and way beyond it, copying has always been a widespread human practice. It is crucial in many ways for the cultural development of any society as well as for administrative purposes, for scientific progress or economic success. Furthermore, copying can support democratization by providing access to important cultural resources and information, and to chances to make one's voice heard. In which cases and to what degree it might or might not be legitimate to copy an artefact is, however, a question that is more controversial today than ever. This is not merely due to the obvious moral wrong of deceit with fake artefacts, forgeries or plagiarism.[1] Copying *per se*, even if it does not involve any intention to deceive, raises several ethical questions: Who should be entitled to copy a particular artefact? And who should have a right to deny or grant others the right to copy certain artefacts? What kind of relationship between a person or social entity and an artefact should be required and sufficient to claim an exclusive right to copy the respective object?

In modern societies, the most important and also the most successful means used for normatively assigning and restricting rights to copy certain artefacts is the law, in particular copyright law,[2] patent and trademark law and further laws regulating unfair competition, libel or hate speech. These branches of law have evolved rather recently in modern times, since the 18th, 19th or 20th centuries, and have been substantially expanded in recent decades. However, the limits of regulating copying processes by mere legal means have become obvious. Restricting copying by largely controlling the use of digital media is hardly compatible with a conception of a free, democratic society, in which the freedom of communication is of central importance. In addition, effective technical copy protection and prevention measures tend to infringe the owners' property rights of disposal over their property to

---

[1] Cf. *Dennis Dutton*, Forgery and Plagiarism, in: Encyclopedia of Applied Ethics, ed. by Ruth Chadwick, vol. 3, San Diego, CA 1998, pp. 503–510; *Thomas Dreier/Ansgar Ohly*, (eds.), Plagiate. Wissenschaftsethik und Recht, Tübingen 2013.

[2] "Copyright" is used here to denote indiscriminately both Anglo-American copyright and continental European *droit d'auteur* legislations.

a degree that is legally problematic. Moreover, many legal restrictions on copying are neither nationally nor globally accepted. The same is true of the legal distinction between private copies and commercially relevant copying activities.

On the one hand, many creators of artefacts think that copyright restrictions do not go far enough. On the other hand, many people worldwide use the technical means of copying without thinking that there is anything wrong in what they are doing, even if they violate existing laws (e.g. by illegally downloading music or movies from the internet). Some of them demand a liberalisation or even the abolition of copyright law and intellectual property rights. Some of them contribute to the emergence of new ethical frameworks. Recent survey-based research on new media ethics has shown how and to what degree such new ethical frameworks "have arisen in the absence of a robust and adaptive legal regulatory apparatus, and often in contradistinction to the letter of copyright law itself".[3]

The discrepancy between the legal assessment of many copying processes and the widespread lack of a sense of guilt about copying in everyday life points to a normative deficit: major parts of the existing copyright law – and of intellectual property law in general – are not regarded as normatively appropriate by a growing number of people. This discrepancy tends to become even greater given the current shift from owning and copying physical things to merely having access to electronic data.[4]

One factor adding to this growing discrepancy between the norms of copyright law and widespread normative intuitions certainly is the availability of copying equipment and the effortlessness of producing copies with digital technologies. Another factor might be that the law is often perceived as the result of lobby pressure (from various parties, ranging from Hollywood to Google). But this alone does not explain the remarkable discrepancy between the existing legal situation and common morality, which is also not limited to particular societies – notwithstanding differences concerning the normative treatment of copying based on cultural differences or particular historical circumstances.

If the law is supposed to shape reality in a way that can be normatively justified, one should seek to avoid a divergence between positive law and common morality. This, however, requires a profound debate about the rationality and justifia-

---

[3] *Mark Latonero/Aram Sinnreich*, The Hidden Demography of New Media Ethics, in: Information, Communication & Society 2013, doi: 10.1080/1369118X.2013.808364, p. 19. See also *Aram Sinnreich*, Ethics, Evolved: An International Perspective on Copying in the Networked Age, in: Darren Hudson Hick/Reinold Schmücker (eds.), The Aesthetics and Ethics of Copying, New York/London 2016, pp. 315–334; *Jakub Macek/Pavel Zahrádka*, Online Piracy and the Transformation of the Audiences' Practices: The Case of the Czech Republic, ibid., pp. 335–358.

[4] *Jeremy Rifkin*, The Age of Access: How the Shift from Ownership to Access is Transforming Modern Life, New York 2000; *Stephanie J. Lawson/Mark R. Gleim/Rebeca Perren/Jiyoung Hwang*, Freedom from Ownership: An Exploration of Access-based Consumption, Journal of Business Research 69 (2016), pp. 2615–2623.

bility of normative attitudes that contradict the law, but are nonetheless manifest in common practices and, in particular, in ongoing developments in the arts (e.g. sampling, remixing, digital art and appropriation art) or in social expectations and habits concerning the access to and use of information (cf. the use of computer programs, information contained in databases or internet-based social networks). The law could benefit from an ethics of copying to the degree that the latter can expose the implicit normative premises of the law and, at the same time, question those premises. For instance, the universalistic foundation of copyright law in natural law (going back to Locke's justification of intellectual property[5]) has facilitated restrictions of copying processes across borders and states. However, the limits of this paradigm become visible. It prioritizes the interests and claims of copyright owners over the justified claims for access and use made by third parties. This prioritization might no longer be generally acceptable.

The study of the normative foundations of (all kinds of) legal restrictions of copying ought to make explicit and critically review the assumptions about the right or wrong of copying they are based on. Pursued in an impartial and rigorous way, such a systematic reflection of the law's implicit ethics of copying can become the starting point of an explicit ethics of copying that may be conceived as a field of applied ethics, or rather, as a domain-specific branch of normative ethics. Thus, an ethics of copying can expose the implicit normative premises of the existing copyright law. It can question the alleged universal validity of copyright laws, it can provide standards for reviewing and evaluating existing copyright law and other relevant laws, and it can develop suggestions for legal reform that might eventually contribute to reducing the divergences between law and common morality. This approach was developed by an inter-disciplinary research group that brought together scholars coming from eight countries and representing various disciplines

[5] *Locke* did, in fact, not produce a justification of intellectual property (see *Ronald V. Bettig*, Critical Perspectives on the History and Philosophy of Copyright, in: id. [ed.], Copyrighting Culture: The Political Economy of Intellectual Property, Boulder, CO 1996, pp. 9–32: p. 19 et seq.). The concept of intellectual property was unknown to him. The first known use of the term in English dates to 1769 (cf. Oxford English Dictionary, s.v. "intellectual property", citing an article in the Monthly Review 41 [1769], p. 290), and the first example of something like the modern usage seems to have appeared in 1808 (cf. OED, ibid., citing an article in the Medical Repository of Original Essays and Intelligence 11 [1808], p. 303). In fact, the concept was established on an international scale only with the foundation of the World Intellectual Property Organization (WIPO) in 1967 and did not enter the language of American law before the U.S. Patents and Trademark Act of 1980 (see *Mark A. Lemley*, Property, Intellectual Property, and Free Riding, Texas Law Review 83 [2005], pp. 1031–1075: p. 1033 et seq.). – *Locke* did, however, develop a justification of real property in his Second Treatise of Government (1689), and this classical 'labor-desert theory' of property has been often cited as a justification for intellectual property in the modern understanding, too; see *Adam D. Moore*, Toward a Lockean Theory of Intellectual Property, in: id. (ed.), Intellectual Property: Moral, Legal, and International Dilemmas, Lanham, MD 1997, pp. 81–103; *Daniel Attas*, Lockean Justifications of Intellectual Property, in: Axel Gosseries/Alain Marciano/Alain Strowel (eds.), Intellectual Property and Theories of Justice, London 2008, pp. 29–56.