

# FOREWORD: OWNING IDEAS

DALE A. NANCE\*

## UNDERSTANDING INTELLECTUAL PROPERTY

“Intellectual property” is a peculiar notion. It includes diverse lines of doctrine and practice. Patents, copyrights, and trademarks all come within the ordinary usage of the term, and at least some of these can be subdivided into functionally different but related legal categories.<sup>1</sup> Roughly speaking, patents are federal statutory rights over novel inventions or designs.<sup>2</sup> Copyrights are federal statutory rights over original literary or artistic expressions.<sup>3</sup> Trademarks are identifications of commercial origin, protected under common law with a substantial overlay of federal statutory rights.<sup>4</sup> In addition, various peripheral rights arise out of state tort law doctrines that have some similarity to the three central categories and, consequently, some exposure to findings of federal preemption.<sup>5</sup> An outsider or neophyte, even an experienced practitioner or scholar, may well wonder whether intellectual property is a meaningfully discrete field of law at all.

One can, of course, isolate certain common denominators in these doctrines, features that make it possible to speak of affinities among them. Thus, intellectual property may be defined as embracing rights to novel ideas as contained in tangible products of cognitive effort.<sup>6</sup> More narrowly, these rights are such that their violation does not necessarily entail physical misappropriation or fraudulent misuse of such products, or any

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\* Associate Professor of Law, Illinois Institute of Technology, Chicago-Kent College of Law. The author would like to thank Randy Barnett, Linda Hirshman, Lloyd Cohen, and David Mayer for helpful comments. Research assistance was ably provided by Jerri Ryan, class of 1991.

1. See generally P. GOLDSTEIN, *COPYRIGHT, PATENT, TRADEMARK, AND RELATED STATE DOCTRINES* (2d ed. 1981).

2. See 35 U.S.C. §§ 1-376 (1988).

3. See 17 U.S.C. §§ 101-914 (1988).

4. See 15 U.S.C. §§ 1051-1127 (1988).

5. See, e.g., *Sears Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964) (state prohibition of copying another's unpatented commercial design preempted by federal law, though other aspects of state unfair competition law remain valid); *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974) (right against disclosure of unpatented trade secrets not preempted); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) (right of publicity in entertainer's uncopyrighted performance not preempted).

6. See, e.g., Hughes, *The Philosophy of Intellectual Property*, 77 *Geo. L.J.* 287, 294-96 (1988).

breach of contract or fiduciary duty.<sup>7</sup> Consequently, the special term "infringement" is used to refer to such violations.<sup>8</sup> Whether this synthetically derived category of property has moral coherence is another matter. Insofar as its moral force is attributable to the conviction that, for whatever reason, the creator ought to control the use of published ideas, it is seriously underinclusive. Numerous products of cognitive effort go unprotected under intellectual property doctrines.<sup>9</sup> Indeed, one of the striking features of intellectual property law is its heterogeneity and its seemingly arbitrary doctrinal delineations.

More technical perplexities are readily identified. Consider, for example, the matter of duration of ownership. Most patents on functional processes last for seventeen years from the date of the federal grant; patents on designs last for fourteen years.<sup>10</sup> Most copyrights on works created before 1978 last for twenty-eight years, with option to renew for an additional forty-seven; copyrights on works produced during or after 1978 last either for the author's lifetime plus fifty years or, in the case of work produced for hire, for seventy-five years from publication or 100 years from creation, whichever is shorter.<sup>11</sup> Trademark registration is effective for twenty-year renewable terms, although common-law rights over trademarks last for as long as

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7. This characterization fits patents and copyrights better than trademarks. The latter rights are closely but ambiguously related to the idea of preventing deception of the consumer. The ambiguity arises from the fact that neither deception nor consequent damages suffered by consumers need be shown in a trademark infringement action. See, e.g., A. MILLER & M. DAVIS, *INTELLECTUAL PROPERTY: PATENTS, TRADEMARKS, AND COPYRIGHT* § 17.1 (1983). Moreover, insofar as premised upon protection of the consumer from fraudulent misrepresentation, such actions present the rather anomalous situation of one private person or corporation recovering from another for the latter's wrongdoing against a third. Thus, in practice trademarks are as much a protection of its holder's goodwill as a protection of consumers from deception. See *id.* §§ 11.1, 11.2, 13.1, 13.2.

8. As one commentator has noted, these characteristics tend to account for public and professional distrust of intellectual property rights. See Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 *STAN. L. REV.* 1343, 1345-47 (1989).

9. Thus:

Everyday ideas, like thinking to walk the dog on a shorter leash or to go to the top of the Eiffel Tower on a first date, are not the subject of intellectual property rights. At the opposite extreme, the most extraordinary ideas or discoveries are also beyond the ken of legal protection: the calculus, the Pythagorean theorem, the idea of a fictional two-person romance, the cylindrical architectural column, or a simple algorithm.

Hughes, *supra* note 6, at 295-96.

10. See 35 U.S.C. § 154 (functional patents); *id.* § 173 (design patents).

11. See 17 U.S.C. §§ 301-305.

the mark is properly used.<sup>12</sup> This seeming arbitrariness suggests something distinctly “unnatural” about such rights.<sup>13</sup> One can hardly imagine a court announcing a common-law rule of property limiting an entitlement to a set number of years, much less a body of rules in which each of the periods above is used.<sup>14</sup> Similarly, the availability of actual damages, multiple actual damages, punitive damages, “statutory” damages, impounding, and criminal sanctions for violations of these rights varies considerably, depending upon which type of intellectual property is involved.<sup>15</sup>

Perhaps one can attribute such seeming arbitrariness to the unavoidable need to draw a line on a relevant continuum, like the need to choose an age of majority for certain legal purposes. One may be convinced that toddlers and adults must be treated differently under the law, at least in many respects. A cut-off point may be chosen for the sake of convenience, to avoid the complexities of continuously variable rights or judgmental standards for discontinuous rights. Thus, the age of eighteen years may be chosen, even when one knows that there are sixteen-year-olds who are more mature than some twenty-five-year-olds. Similarly, it may be morally unacceptable to give no protection to the creator of ideas and yet be equally unacceptable to give, for example, protection in perpetuity. If the appropriateness of protection decreases as time from creation increases, some intermediate line may need to be drawn to reach a justified resolution of competing moral claims in a workable rule, a *practical compromise*, so to speak.<sup>16</sup>

Alternative explanations draw upon the possibility that only

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12. See 15 U.S.C. §§ 1058-1059.

13. These generalizations actually understate the variety and *ad hoc* specificity of the federal statutory provisions. For example, under the Semiconductor Chip Protection Act of 1984, there are intellectual property rights for “mask work in a semiconductor chip product” that last for ten years. 17 U.S.C. § 904.

14. The closest example that comes to mind is the common-law rule against perpetuities. Notwithstanding the notorious complexities in the rule’s application, voiding interests that can vest later than the death of all lives in being plus twenty-one years (plus a possible period of gestation) has an obvious naturalness when compared with the durations of statutory intellectual property rights. See T. BERGIN & P. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 178-80, 227-29 (2d ed. 1984).

15. The basic parameters can be found summarized in most standard reference works. See, e.g., E. KINTNER & J. LAHR, AN INTELLECTUAL PROPERTY LAW PRIMER (2d ed. 1982); M. EPSTEIN, MODERN INTELLECTUAL PROPERTY (2d ed. 1989).

16. For example, “we may assume that in the absence of the original invention, sometime later someone else would have come up with it. This suggests placing a time limit on patents, as a rough rule of thumb to approximate how long it would have taken, in the absence of knowledge of the invention, for independent discovery.” R.

one of a finite number of options is justifiable, such as no protection or protection in perpetuity. If this is acknowledged to be so, the choice of some other term, such as the life of the creator or a fixed number of years, would be a different kind of compromise. Thus, a purely *epistemic* compromise would reflect doubt about which of the discrete "natural" options is the correct solution. Here, the will to do right encounters the problem of uncertainty. By contrast, a purely *political* compromise would reflect the resolution of conflicting political power. Here, the will to do right, if present at all, gives way to the need for consensus.<sup>17</sup> In these contexts, as distinguished from the kind of practical compromise described above, compromise guarantees that the resolution will *not* arrive at the just rule, except insofar as justice is defined in terms of the result of the process of compromise itself.<sup>18</sup>

As in most areas of the law, such explanations must be historically well-informed if they are to be fully satisfying. In particular, the inertia of tradition is often a powerful explanatory tool. Thus, for example, the early practice of granting monopoly rights over industrial processes for multiples of seven years appears to have been based on the institution of seven-year apprenticeships. Royal grants were generally made to persons importing new arts from abroad, without regard to originality of invention, and no doubt with considerable regard to political favoritism. The practice is historically connected to the development of patent law in its modern form.<sup>19</sup> An even less savory story, about the suppression of religious and political dissent, can be told about the origins of copyright law in grants of monopolies over printing.<sup>20</sup> These points cast a significant cloud upon the justifiability of these institutions, while at the same

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NOZICK, ANARCHY, STATE, AND UTOPIA, 182 (1974). See generally Barnett, *Foreword: Can Justice and the Rule of Law Be Reconciled?*, 11 HARV. J.L. & PUB. POL'Y 597 (1988).

17. Consensus can take many forms, only some of which satisfy the natural desire to see the law as coherent. See R. DWORKIN, *LAW'S EMPIRE* 176-86 (1986).

18. Of course, epistemic and political compromise can be features of resolutions dealing with a moral continuum, where the parties to law-making recognize a range of plausibly just solutions. It will be difficult in many cases to classify unambiguously a given resolution in the manner indicated in the text.

19. See generally B. BUGBEE, *GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW* (1967).

20. See generally L. PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* (1968). The story is summarized in B. KAPLAN, *AN UNHURRIED VIEW OF COPYRIGHT* 2-9 (1967). See also Abrams, *The Historic Foundations of American Copyright Law: Exploding the Myth of Common Law Copyright*, 29 WAYNE L. REV. 1119 (1983).

time providing clues to the concrete forms of their development.<sup>21</sup> This is not to say that morally dubious origins necessarily make modern intellectual property unjustifiable. Scholars both within and without the field have noted the capacity of law to "work itself pure."<sup>22</sup> Still, a healthy skepticism is in order.

In the end, we probably need a hybrid explanation. Straightforwardly normative considerations may provide a first-order explanation of the widespread existence of intellectual property in a form different from that which attends property in land or chattels or even other intangible forms of property. Still, this explanation is likely to be incomplete. Supplementary second-order explanations, invoking epistemic or political compromise, as well as mechanisms generating unintended social order, are needed to gain a clear picture of the system of intellectual property we have today.<sup>23</sup> Nevertheless, when dealing with social institutions, especially normative institutions like the law, one is well advised to test the explanatory power of justificatory arguments.<sup>24</sup> The problem of the justification of intellectual property rights thus has a dual importance: both in its own right as the basis of critique and as a critical component in the descriptive understanding of our legal institutions.

#### JUSTIFYING INTELLECTUAL PROPERTY

Ownership of the ideas expressed in the products of cognitive effort seems to run directly into conflict with the value of freedom of thought. Not surprisingly, such ownership has never been without its critics. Thomas Jefferson, who spent several years on the Patent Board, expressed this hostility in the following terms:

If nature has made any one thing less susceptible than all

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21. For example, they suggest socio-economic processes, such as the international flow of ideas and technologies, that continue to have significant impact upon national systems of intellectual property. See, e.g., *Symposium: Trade-Related Aspects of Intellectual Property* (pts. I and II), 22 *VAND. J. TRANSNAT'L LAW* 221, 689 (1989), reprinted as *TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY* (L. Brown & E. Szweda eds. 1990).

22. Lon Fuller, for example, made much of the general jurisprudential claim that morally iniquitous institutions can be driven in a more positive direction by the internal dynamics of law. See, e.g., L. FULLER, *THE MORALITY OF LAW* 33-91 (1964).

23. As just one example, the current seventeen-year term for functional patents developed out of a political compromise between those who wanted the original fourteen-year term to be renewable and those who did not. See P. GOLDSTEIN, *supra* note 1, at 590.

24. See Fried, *The Laws of Change: The Cunning of Reason in Moral and Legal History*, 9 *J. LEGAL STUD.* 335 (1980).

others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of every one, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me . . . .

It is a fact, as far as I am informed, that England was, until we copied her, the only country on earth which ever, by a general law, gave a legal right to the exclusive use of an idea. In some other countries it is sometimes done, in a great case, and by a special and personal act, but, generally speaking, other nations have thought that these monopolies produce more embarrassment than advantage to society; and it may be observed that the nations which refuse monopolies of invention, are as fruitful as England in new and useful devices.<sup>25</sup>

Jefferson's comments reflect a rich diversity of arguments, containing at least the following ingredients: (1) ideas are, in some way, insusceptible of ownership; (2) the voluntary spread of one person's idea represents no loss to that person; and (3) the use of monopoly grants by government have not been so effective in encouraging inventiveness as to outweigh the disadvantages entailed by the constraint of others' liberties. These points mirror the diversity of normative arguments that are used affirmatively to justify intellectual property.<sup>26</sup>

Indeed, there are as many modes of justificatory argument with respect to intellectual property as there are with respect to

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25. Jefferson, *Letter to Isaac McPherson, Monticello, August 13, 1813*, in XIII THE WRITINGS OF THOMAS JEFFERSON 326-38 (A. Lipscomb ed. 1904).

26. One sense of "justification" not addressed overtly in this passage concerns the issue of constitutional authority. Jefferson was not silent on this matter; indeed, he had earlier proposed an amendment that could have nullified the constitutional grant of authority to the federal government to issue patents and copyrights. Jefferson, *Letter to James Madison, Paris, July 31, 1788*, in VII THE WRITINGS OF THOMAS JEFFERSON 93-99 (A. Lipscomb ed. 1904). Although Jefferson failed in his efforts to include an explicit and general prohibition of government granted monopolies in the Bill of Rights, there remains the issue of the extent to which the guarantees of the various constitutional amendments override or constrain the explicit grant of federal power. These matters are not addressed in this Symposium. See generally Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970); Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 U.C.L.A. L. REV. 1180 (1970); Dencicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 CALIF. L. REV. 283 (1979); Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1 (1987).

property in general.<sup>27</sup> Although I will not here attempt to address all such theories, we can say that they generally fall into two broad categories, deontological and consequentialist. The latter category embraces all theories that purport to justify property rights on the basis of the *good consequences* of their legal recognition, as distinct from their *moral rightness*. This seems to be the point of the constitutional authority for federal patent and copyright protections:

The Congress shall have power . . . To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.<sup>28</sup>

The power is clearly granted as instrumental to the “progress of science and useful arts.” However, it can be argued that the reference to “securing” (rather than, say, “granting”) the “right” to authors and inventors suggests a deontological element as well.<sup>29</sup> This should come as no great surprise, because few people, then or now, sharply distinguish the two kinds of arguments, or rely solely upon one or the other.<sup>30</sup> Thomas Jefferson’s arguments, for example, include assertions about the absence of loss for the creator of a published idea in allowing others to use it, an argument blending the deontological and consequentialist voice, as well as a rejection of the explicitly

27. On the general justification of property, see L. BECKER, *PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS* (1977); J. WALDRON, *THE RIGHT TO PRIVATE PROPERTY* (1988); S. MUNZER, *A THEORY OF PROPERTY* (1990).

28. U.S. CONST., art. 1, § 8, cl. 8.

29. Both the dominance of consequentialist thought and the remaining deontological bite are exemplified in this oft-quoted passage from a leading Supreme Court opinion:

The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in “Science and useful Arts.” Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.

*Mazer v. Stein*, 347 U.S. 201, 219 (1954).

30. Probably the purest consequentialist was the English utilitarian reformer, Jeremy Bentham, who took all claims of *right* to be derivative of the *good*, and took the measure of good as the balance of pleasure over pain. See generally J. BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* (J. Burns & H.L.A. Hart eds. 1970)(1st ed. 1789). Probably the purest deontologist was the German philosopher, Immanuel Kant, who derived normative claims from a “categorical imperative,” grounded in respect for persons, to act in accordance with universalizable maxims. See generally I. KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* (H. Paton trans. 1948)(1st ed. Riga 1785).

consequentialist argument that the benefits generated by legal protection for creators outweigh the costs.

There are several deontological arguments for intellectual property rights, most of which fall into one of two sub-categories. First, they can be based upon the creator's deserving to own the fruits of her labors. This "labor theory" of property is generally associated with John Locke, whose influence on American thought is undeniable.<sup>31</sup> An alternative theory, less familiar to Anglo-American thought, is that such rights are based upon respecting the creator's extension or reification of personality by the occupation of tangible or intangible things. The "personality theory" of property is most commonly attributed to the German philosopher Hegel and is better established in continental law.<sup>32</sup> Each of these theories has obvious, yet complex, applicability to the problem of rights in the products of one's cognitive efforts.<sup>33</sup> They reflect what we may call the "moral rights" tradition.

As already suggested, however, American intellectual property law is imbued with a consequentialist tone reflected in our constitutional language. This tradition of thought can also be divided into two major branches, utilitarianism and teleology. In the context of intellectual property, arguments falling into these branches share the goal of promoting, by law, the good of invention and creative art, and therefore focus on the *incentives* that laws create. They differ in that utilitarian theories, including the modern offshoot known as "law and economics," generally measure the good in terms of the satisfaction of human preferences, without imposing a judgment about whether those preferences are, in some objective sense, appropriate or correct.<sup>34</sup> This measurement is done, by and large, by

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31. See generally J. LOCKE, TWO TREATISES OF GOVERNMENT (P. Laslett ed. 1970)(3d ed. 1698). Locke's version of that theory contained consequentialist elements centering around the importance of private property as protection against despotism. These consequentialist components come to the fore in some variants of Locke's argument. See, e.g., Epstein, *Possession As the Root of Title*, 13 GA. L. REV. 1221 (1979).

32. See generally G. HEGEL, PHILOSOPHY OF RIGHT (T. Knox trans. 1952)(1st ed. 1821). Unlike Locke, Hegel expressly disavowed even a modestly consequentialist vision of property as *instrumental* in the development of the person, but variants have developed this theme. See, e.g., Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

33. For an extensive argument that intellectual property is better justified by these theories than is much ordinary property in tangibles, see Hughes, *supra* note 6. For an argument to the contrary, see Hettinger, *Justifying Intellectual Property*, 18 PHIL. & PUB. AFF. 31 (1989).

34. On the points of similarity and differentiation between utility maximization and

allowing aggregate preferences to be registered by the operation of the market, in this context by the demand that is revealed for the ideas in question. In contrast, teleological theories are prepared to make the judgment about what is good, for individuals and communities, notwithstanding contrary "consumer" preferences.<sup>35</sup> In the context of intellectual property, this would translate into an argument based on the intrinsic values of knowledge and aesthetic experience, values deserving governmental support despite, indeed because of, the insufficiency of consumer demand, even in a well-functioning market.<sup>36</sup>

The utilitarian school of thought differs, of course, from the moral rights tradition in that the former is overtly consequentialist, but these approaches nevertheless share a feature that distinguishes each from teleological theories. Both moral rights theories and utilitarian theories, in justifying intellectual property rights, focus upon the "free-rider" problem. Thus, if a creator has a moral right to own the created idea, it is because it is wrong for another to use it without the creator's consent, to "free-ride" on the creator's efforts. The utilitarian will see the problem as one in which novel ideas will be underproduced because of the system's failure to register the utility of the idea to others by their paying for its use.<sup>37</sup> In each case the injustice is eliminated precisely by the elimination of free-riding. Each of these two kinds of arguments, moral rights and utilitarianism, is plausibly reflected in the constitutional language quoted above.

The teleological approach, however, does not mesh as well with that language, because there is no reason to think that the optimal commitment to creative effort, whatever that may be

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the "wealth maximization" explicitly or implicitly employed in the most widely known form of law and economics, see Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979). The latter approach is applied to intellectual property in Landes & Posner, *An Economic Analysis of Copyright Law*, 17 J. LEGAL STUD. 325 (1989).

35. This general school of thought is called "teleological" because it entails judgments about the proper ends of human life. It is especially associated with classical "natural law" thought, like that of Aristotle or Thomas Aquinas. The best modern restatement is J. FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980).

36. In the trademark context, insofar as trademark rights are not based upon concerns about consumer deception, the teleological argument would have to turn on a non-instrumental value of commercial goodwill. See *supra* note 7.

37. This is one class of examples of a more general phenomenon often called "market failure." See generally *THE THEORY OF MARKET FAILURE: A CRITICAL EXAMINATION* (T. Cowen ed. 1988).

according to such a theory, will be determined by the fortuitous equilibrium of supply and demand in a market the parameters of which include exclusive rights in creators. In other words, the elimination of free riding, which is the consequence of securing exclusive rights to authors and inventors as constitutionally envisioned, would only accidentally produce the objectively correct amount of knowledge and aesthetic experience. Government subsidies or prizes would make more sense from an objectivist perspective, as they would allow encouragement of creative effort to a governmentally determined degree. On the other hand, the teleological view may be needed to justify the recognition of rights *only* in the ideas of "science and useful arts," and not in other products of cognitive effort that could command a price in the market if exclusivity were legally prescribed. Moreover, the limited duration of rights in ideas could be seen as varied in such a way as to attain the objectively optimal degree of incentives to effort, *provided* that the optimal degree is less than that which would result from perpetual rights.

Fundamental analysis from such deep-level theories is a very tricky business.<sup>38</sup> It is often wise, therefore, to consider a partial and comparative form of justification that asks instead: Can the institution in question be justified in a way that harmonizes with identifiable fixed points, with other institutions that we can take as given for this purpose? In the intellectual property context, certain relatively fixed points are easy to identify. Thomas Jefferson's remark about the "insusceptibility" of ideas to "ownership" suggest two such points. One can ask whether intellectual property is more like the generally justifiable and paradigmatic institution of private property in tangible things, or more like the generally unjustifiable institution of governmentally created or protected private monopolies in trade. Posing the issue in this or similar fashion has a long history dating from at least the famous English Statute of Monopolies of 1624, which made most royally granted monopolies illegal, subject to various exceptions relating to patents and copy-

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38. For one thing, there is a substantial body of thought, going back at least to the work of John Stuart Mill, explicitly attempting to merge the two major kinds of argument, deontological and consequentialist, into one by showing, for example, that a respect for individual rights is compatible with, if not required by, the goal of social utility. See J.S. MILL, *UTILITARIANISM* 52-79 (O. Priest ed. 1957) (London 1861). See generally *UTILITY AND RIGHTS* (R.G. Frey ed. 1984).

rights.<sup>39</sup> Answering this question requires us to rethink the distinction between property and monopoly.

As argued in a previous foreword in this *Journal*, moral rights theories and consequentialist theories are different modes of analysis that should be applied concurrently, so that each constitutes a check on the other; convergence should then reinforce our confidence in the result reached.<sup>40</sup> Given an historically warranted skepticism toward intellectual property, our confidence in the justifiability of its institutions should depend upon the existence and convergence of coherent deontological and consequentialist theories that support the rights in question and cohere with our respective views toward tangible private property and government supported private monopolies. The present issue of the *Journal* is aimed at probing, from several different directions, the question of whether this condition is satisfied.

#### THE SYMPOSIUM PAPERS

The articles in this issue were initially presented as papers at a symposium on "Intellectual Property Rights and the Market System," held in August of 1989 in Aix-en-Provence, France. Recognition is due the Liberty Fund for sponsoring the symposium and the research leading to the papers. The symposium was organized through generous efforts of the Institute for Humane Studies, at George Mason University, and publication of the papers was supported by the Veritas Fund, Inc. The papers are summarized here in a way intended to assist the reader in placing these contributions in the wider picture developed above.

Boudewijn Bouckaert, in his article *What is Property?*, elaborates the Continental development of property rights as rights against all the world as to things, and uses this historical background as a vehicle for the critique of intellectual property. He finds the key to legitimate property rights, as revealed by this tradition, in the twin features of natural scarcity and the possi-

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39. See Machlup & Penrose, *The Patent Controversy in the Nineteenth Century*, 10 J. ECON. HIST. 1 (1950). For more recent examples of this approach, see Kitch, *The Nature and Function of the Patent System*, 20 J.L. & ECON. 265 (1977); Kitch, *Patents: Monopolies or Property Rights?*, 8 RES. L. & ECON. 31 (1986); Gordon *supra* note 8; Easterbrook, *Intellectual Property Is Still Property*, 13 HARV. J.L. & PUB. POL'Y 108 (1990).

40. See Barnett, *Foreword: Of Chickens and Eggs—The Compatibility of Moral Rights and Consequentialist Analyses*, 12 HARV. J.L. & PUB. POL'Y 611 (1989).

bility of physical possession. He argues that these features justify property rights in oneself and in tangible things as components of a closed system of rules that provide consistent and knowable limits of human action in the pursuit of the good life. Intellectual property rights, he concludes, are incompatible with such a system because they fail the indicated twin tests, are incompatible with otherwise legitimate property rights of other persons, are not justifiable under principles of tort or quasi-contract law, and thus should ultimately be classified as unjustifiable special privileges granted by government.

Tom Palmer pursues a similar theme from a radically different direction in his contribution, *Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects*. He addresses primarily the deontological theories of property and finds them wanting. His argument is that personality-based theories are either founded upon a misconception about the extension of human personality or reducible to labor-based justifications. In turn, labor-based justifications are either founded upon an unworkably subjective standard of moral desert or reducible to liberty-based theories. Thus, Palmer arrives at a justification of property in the priority of self-ownership and liberty. From this he concludes that intellectual property, at least in the forms of patents and copyrights, is incompatible with that priority, as it necessitates interference with other persons' use of their intellect, bodies, and otherwise lawful property.

The arguments of both Bouckaert and Palmer rest ultimately upon the claimed incompatibility of intellectual property rights with otherwise legitimate rights of other persons. What exactly does this mean? If A is granted a patent over a novel invention, the X-process, is such legal recognition compatible with B's otherwise legitimate rights? Here I note the obvious distinction between B's independent invention of the X-process and B's copying of the X-process upon its revelation by A. (Assume B's copying involves no trespass, fraud, breach of contract, or breach of fiduciary duty to A; otherwise, A would not need the peculiar assistance of intellectual property rights.) Few would quarrel, I suspect, with the proposition that B's right to use her independent inventions cannot be denied by a legitimate prop-

erty scheme, at least at first blush.<sup>41</sup> But what about B's copying from A? Does this instantiate an otherwise legitimate right of B, the right to free-ride on information published by others? It is relevant, but not conclusive, to note the vast number of ways in which such free-riding is done on a daily basis. When it has generated litigation, the common law has generally answered that free-riding *simpliciter*, in the absence of fraud, trespass, consumer deception, and the like, is not an actionable wrong.<sup>42</sup> Bouckaert's and Palmer's similar conclusions seem to rest on the view that such free-riding is either not wrongful or not sufficiently wrongful to justify legal redress because it does not pose a serious risk of violent social conflict, the published information being equally available to the publisher and any observer of the publication.

By contrast, Roger Meiners and Robert Staaf take a more narrowly instrumentalist approach in their *Patents, Copyrights, and Trademarks: Property or Monopoly?* They address the issue of intellectual property by comparing its economic features with those of ordinary tangible property rights, on the one hand, and invidious governmentally imposed monopolies, on the other. They conclude that modern intellectual property rights function much more like the former, and add that the elimination of such rights would invite forms of governmental regulation with all the defects of the latter. Having placed patents, copyrights, and trademarks on the property side of the property/monopoly contrast, they locate the justification for such rights in the dynamic character of the efficiency problem posed by the production of goods subject to free-riding. Although this is a different kind of efficiency problem than that posed by

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41. This claim rests upon the proposition that the presence of free-riding is *necessary* to support intellectual property law protection, but it does not assume that such free-riding is *sufficient* to justify protection. If B is to be denied the right to use her independent invention of the X-process, as current patent law does, it must be for second-order reasons, like the inherent unlikelihood of independent invention of the same process, if it is to be justifiable at all. See *supra* note 16.

42. See generally Chafee, *Unfair Competition*, 53 HARV. L. REV. 1289 (1940). However, in some contexts, and with recognizable hesitancy, the common law has given the opposite answer. See, e.g., *International News Service v. Associated Press*, 248 U.S. 215 (1918) (competitor's free-riding on information gathered and published is actionable as unfair competition); *id.* at 246 (Holmes, J., concurring on limited basis); *id.* at 248 (Brandeis, J., dissenting). See generally Callman, *He Who Reaps Where He Has Not Sown: Unjust Enrichment in the Law of Unfair Competition*, 55 HARV. L. REV. 595 (1942); Sell, *The Doctrine of Misappropriation in Unfair Competition*, 11 VAND. L. REV. 483 (1958); Baird, *Common Law Intellectual Property and the Legacy of International News Service v. Associated Press*, 50 U. CHI. L. REV. 411 (1983).

the absence of exclusive rights in tangible property, it is nonetheless a problem for the proper allocation of scarce resources. Moreover, they argue, it is not one that we can always expect to be adequately handled by substitute market arrangements.

Ejan Mackaay does not go quite as far toward endorsing efficiency as the central issue. In his *Economic Incentives in Markets for Information and Innovation*, he argues that monopoly is a matter of degree, based on the availability of substitutes for the good in question. Indeed, monopoly exists to varying degrees in ordinary property rights to tangible goods. Because these rights are nonetheless justifiable, the existence of monopoly cannot be normatively decisive in the consideration of intellectual property. On the other hand, neither can the existence of inefficiency associated with public goods. Although Mackaay professes agnosticism about the ultimate justifiability of intellectual property rights, he does see them as representing a compromise that appears relatively warranted because they do not have the kind of features associated with the worst kinds of governmental meddling in the economy, and because their functional equivalents could, to a considerable extent but perhaps at greater cost, be achieved by carefully protected trade secrets combined with contractually imposed restrictions on copying by buyers or licensees of the information in question. In other words, he sees patents and copyrights as little more troublesome than state-provided form contracts.

The contrast between the papers by Bouckaert and Palmer, generally disapproving of intellectual property, and that by Meiners and Staaf, tending in the opposite direction, rests ultimately upon a different conception of the proper goals of property rights in general. The former reflect the view that private property is an institution for the achievement of individual liberty within a social order; the latter apparently reflects the view that private property is an institution for the achievement of efficient utilization of resources. Mackaay's paper bridges this gap by emphasizing the way law evolves to recognize the efficiency-promoting efforts that individuals make within an ordered system of liberty.

#### CONCLUDING THOUGHTS

What, then, of the question framed earlier? Do we have such a strong convergence of deontological and consequentialist ar-

guments in favor of intellectual property rights so as to overcome the skepticism rightly derived from their shady origins? Although the question is a close one, I think the answer is "No." In the brief space remaining, I will tentatively suggest why.

Teleological arguments are incomplete as justifications unless they can bridge the gap between recognizing creative effort as an objective good and using the law to compel the citizenry to support such efforts more strongly than would be the case under voluntary arrangements.<sup>43</sup> The rate of innovative activity is a rather poor candidate for governmental overriding of people's revealed preferences in the production of goods and services, at least when compared to more basic issues in production related to health, safety, and even education. This is not to deny the good consequences flowing from innovative thought, but only to suggest that the existence of such consequences is not by itself enough to justify governmental support that inevitably imposes burdens on others, particularly when those burdens take the form not of general taxation but of more direct constraints on the liberty that persons would otherwise have. Largely freed from the discipline of the market and its automatic registration of opportunity costs, it is difficult to see how a meaningful criterion of optimality in government subsidy can be articulated and applied.

In utilitarian terms, the recognition of exclusive rights over ideas has complex effects noted by the authors in this Symposium. But there is nothing here to contradict the opinion among experts that such recognition has not demonstrably achieved a more nearly optimal rate of social investment in innovation and creativity than would have existed without it.<sup>44</sup> It is a slim reed of support for the curtailment of individual liberty merely to conclude that the modern institution of intellectual property does no harm, or does less harm than the usual result of special interest legislation. The argument is only slightly better if all one can claim is marginal improvements in

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43. The coercive element of legal action must be kept ever in mind, notwithstanding modern tendencies to downplay it. See Nance, *Legal Theory and the Pivotal Role of the Concept of Coercion*, 57 U. COLO. L. REV. 1 (1985).

44. See, e.g., F. MACHLUP, AN ECONOMIC REVIEW OF THE PATENT SYSTEM 21, SUB-COMM. ON PATENTS, TRADEMARKS AND COPYRIGHTS, OF THE SENATE COMM. ON THE JUDICIARY, 85TH CONG., 2D SESS. (Comm. Print 1958)(Study No. 15); J. JEWKES, D. SAWERS & R. STILLERMAN, THE SOURCES OF INVENTION 25-54 (1959).

efficiency as compared with what could be achieved in the market anyway. And even this modest claim seems dependent upon an extremely problematic operationalization of social utility as social wealth.<sup>45</sup>

That leaves the fundamental question of fairness and its relation to the respective rights of creators and free-riders. As Jefferson noted, there is something very *public* about releasing one's ideas from the confines of secrecy; hence the term "publication." Creators who publish do so for the many advantages that come from participation in the public forum. To say, "Look, but don't copy!" is to ask for the advantages of publication without accepting the consequences. Of course, the law to some extent defines the advantages and disadvantages of publication, and there is certainly a viable argument that the creator deserves something for the effort. The question, however, is not whether he or she deserves *something*, but rather how far legally mandated deserts are to extend.

My own moral intuitions coincide with the general nonactionability of free-riding *simpliciter*. The power of the state should be sparingly employed, and *nonrivalrous* use hardly seems a morally compelling context for general coercion. Moreover, one must seriously question the integrity of a system that protects from free-riding significant classes of creative effort, cognitive or otherwise, in much more extensive ways than it does many others. If it is impractical (or otherwise undesirable) to give legal redress for all substantial forms of such free-riding, perhaps the entire category should be left, as the common law has generally left it, to the creator's capacity to make appropriate contractual arrangements or, if this kind of protection should prove inadequate, to utilize the always underestimated, informal mechanisms of social sanction.

I am thus skeptical of a justification of intellectual property in its present forms under any of the theories that present themselves as obvious candidates, and more skeptical of a convergence of those theories in support of intellectual property. On the other hand, supporting theories coalesce sufficiently to offer, if not a justification, at least the core of an explanation of the continued employment of intellectual property rights. They are grounded in plausible beliefs about the objective

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45. See Dworkin, *Is Wealth A Value?*, 9 J. LEGAL STUD. 191 (1980); Dworkin, *Why Efficiency?*, 8 HOFSTRA L. REV. 563 (1980).

good of innovation and creativity of certain types, supported by the plausible moral entitlements of innovators and creators, and constrained from absurd consequences by a form of legal encouragement that invokes the automatic self-correction of the market mechanism.

Much more needs to be said, but this is not the place to do so. I will be satisfied if these comments provoke useful ways of thinking about the contributions of this Symposium as well as other work on the fundamental issues underlying the law of intellectual property.

