

ROBERT P. MERGES

# JUSTIFYING INTELLECTUAL PROPERTY



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## Preface

Several years ago I told my esteemed and experienced Berkeley colleague Jesse Choper that I was beginning work on this book. After he heard a bit about my plans, his response was this: “Oh, I get it. Taking a Big Swing, are you?” Now as I look back on the whole project—prefaces having the invariably paradoxical quality of being written at the end, but appearing at the beginning—I can see that he was right. I had reached a point where I needed to disrupt the scholarly rhythm I had fallen into: a staccato series of law review articles, punctuated by casebook revisions, with the occasional “think piece” woven into the mix. I wanted to take on something bigger, more sustained; to go back to the dugout, pick up a bigger bat, and swing from the heels. This book is the result of that fateful, and very foolish, decision.

So up I strode, ready to take a big hack at some tough issues in my primary field of study, intellectual property (IP). I wanted to defend IP rights against a host of charges leveled in recent years: that IP was no longer necessary in the digital age; that the field is an incoherent tangle of made-up rationales and half-baked theories; that IP, whatever it is, is not really property at all. But I wanted to do more than simply defend the IP edifice as it stands. I wanted to suggest some ways that this area of law could be trimmed and tailored to better serve its main purpose, which for me has always been protecting creative works as a way of honoring and rewarding creative people. And so the title of this book has a double meaning. I want to justify IP rights, in the sense of defending them from various critiques;

but I also want to justify it in the sense of justifying a margin, or a line of type—to straighten it out, neaten it up, make it a bit more orderly.

Here is how I plan to go about it. I will talk mainly about three things: (1) ideas on property held by important philosophers, both old (Locke and Kant), and not-so-old (John Rawls, Robert Nozick, Jeremy Waldron); (2) close examination of these ideas with the specifics of IP chiefly in mind; and (3) ways these ideas might help in understanding the future of property rights in our increasingly digitized and networked world.

Carrying this out has taken longer than I planned and been harder than I thought. But it has also been something I can only describe as very close to fun. It is an odd idea of fun to get up several hours before the rest of the family, pour a cup of coffee, and anguish over just exactly what some complex text is trying to say to me, or what I really think about some gnarly tangle of a conundrum, or—worst of all!—how to set those thoughts into a series of words and a string of sentences that hang together in a semblance of sense and order. The challenge is something like crossing a wide, raging river that howls along at spring flood, with only a vague notion that there may be a few submerged stepping stones to hold you upright. If that sounds like an outing most sane people would gladly avoid, I am sure you are right. As for my own part, I found it irresistible.

On my rambles in IP law, I met with all sorts of notions and theories. As I grappled with them, three in particular stood out to me: (1) a Kantian conception of property, which lends itself to an even-handed theoretical approach to IP rights, balancing freedom of action for owners with the interests of others in the community (and which fits with the ideal of distributive justice expounded by John Rawls); (2) the importance of “mid-level principles” of IP theory, intermediate between deeply held foundational commitments and doctrinal and factual details; and (3) the idea of rewards proportioned to effort or value, which operates as a deep main-spring driving the wheels and mechanisms of many IP doctrines. I call this third idea the proportionality principle, which is itself exemplary of the midlevel principles just mentioned.

A word about these principles is in order. If we have learned anything in this world of ours it is that one person’s heartfelt conviction does not entitle him to inflict it on others just because it is intensely and sincerely felt. As explained in the Introduction and shown in Part I, I found the solid normative grounding for IP law that I had been looking for in philosophical writings on property. (The Introduction also explains why this grounding is perfectly consistent with most analytical work on IP, particularly in the law and economics tradition.) But although I see in these writings a firm footing for the field, you may not agree. This normative grounding

may leave you cold, or bored, or put you off entirely. What to do? How could I set out my best case for the philosophical foundations of the field as I had pieced them together, while leaving room for others to find or make foundations more conducive to their own closely held feelings and ideas? Once I put the issue this way, the answer was clear. I just needed to borrow from the deep literature on political pluralism, especially the work of John Rawls and, among contemporary legal philosophers, Jules Coleman. What is needed is a set of ideas, a vocabulary, that transcends and ties together multiple foundational conceptions. Discourse at this midlevel permits generalization from specific cases and discrete fact patterns, while avoiding head-on clashes over ultimate convictions. Midlevel principles cannot and should not prevent or displace all disagreement, but they do create a forum for disagreement that is more amenable to effective interchange and, ultimately I believe, resolution.

The reason it is important to preserve a safe space for argument and discourse in the IP field is that so much is at stake. For whatever foundation the field ultimately rests on, it is quite clear to me that it has a crucial role to play in contemporary economic life. IP rights allow people to make a living with their creative talents. This “proptertization of labor” allows composers, musicians, novelists, and inventors to leverage their creative work, turning their effort into saleable assets. This not only enhances their income, it buys freedom. A creative person can work when and where she wants, with whom she wants, making money by selling copies of what she produces. And ownership of the work product gives her control over how it reads or sounds or works, how it is packaged and marketed. These advantages of IP rights are the practical, workaday manifestation of the abstract-sounding value of “autonomy” that philosophers (especially Kant and Hegel) have long associated with property rights. The case study of Harry Potter author J. K. Rowling late in the book puts these benefits on display.

Stated simply, IP rights make creative work a more viable job for more people, and this basic fact explains why IP is still worth studying. Even though ownership is often mediated by large companies, IP allows more creative people to own what they make. The language surrounding IP rights rings with the message that ownership confers control and dignity. Workers receive wages, but IP owners are paid in *royalties*. This linguistic signal carries an important social message about the status of creative effort. It shows well the value that is attached to this type of work—value that is realized in concrete form only because of IP rights.

Writing can be a solitary business but, fortunately for me, scholars are a sociable lot. We have to be; without people to talk with, people to challenge

our pet ideas and push back against our opinions, we would seldom get very far in our thinking. I owe a huge debt to the many, many colleagues with whom I have discussed and developed my ideas over the years. I include here only a partial list, with the admonition that it is surely very far from comprehensive. (If I have left you out, I apologize for my hubris and/or incomplete memory.)

For help with orientation in the philosophical literature, my Berkeley colleague Chris Kutz was invaluable. I also want to thank Stephen Munzer of UCLA Law School and Justin Hughes of Cardozo Law School, who both oriented me in different ways to the philosophical literature I draw on. Finally, kudos to my former colleague Jeremy Waldron, whose contributions have left a very significant mark on my thinking, as this book will attest. And a nod as well to Kent Greenawalt of Columbia, Robert Ellickson of Yale, and Richard Epstein of Chicago, three experienced scholars whose guidance and support at different times and in different ways proved crucial to my thinking. I also want to thank Henry Smith of Harvard and Carol Rose of Yale / Arizona for being such close and supportive readers of my work over the years. Thanks also to Samuel Fleischaker for helpful information on philosophical issues related to Adam Smith.

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For general moral support, not to mention support of a more material nature, a shout-out to my cofounders, colleagues, and friends at the IP business and investment firm Ovidian Group, LLC., whose clients bring home the real-world value of IP rights every day: Alex Cohen; Steven Horowitz; Lisa McFall; Joe (“the CEO”) Siino; the newest Ovidian, Satya Patel; plus Sheri Siino and Emily Leavitt.

Everyone, especially scholars, needs to spend some time outside their heads once in a while. For help in this department, I thank all my friends at Davis Community Church, including the Rev. Marylynn Tobin; fellow DCC Worship Band musicians (especially our music director, David Deffner); plus John Hannan, the Saturday morning Starbucks crowd (Tom Newcombe and Tim Masterson, ringleaders), and Tim Mooney; and of



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And finally, my family: Jo, Robbie, James; Mom and Dad; and brothers Bruce, Paul, and Matt. “Acknowledgment” is a thin reed on which to hang what I owe them; it is like a pilot acknowledging the help of the air in doing what he does. Better to say they are the medium I move in, the reason I do what I do, the sustenance and support that make it possible to be who I am. I am profoundly grateful to them, in a way that no simple acknowledgment could capture. Especially my wife, Jo. Imagine being married to a guy who would write a book like this, full of abstruse terminology and obscure digressions. Well, she has to do more than imagine it, she has to live it. And for that I remain grateful and in no small part amazed.

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## CHAPTER ONE

# Introduction

## Main Themes

**I**NTELLECTUAL PROPERTY (IP) law today is like one of those sprawling, chaotic megacities of the developing world—Mexico City, maybe, or Shanghai. Construction cranes are everywhere. The old city center—the ancient core of the field—is today surrounded by new buildings, new neighborhoods, knots of urban growth, budding in every direction, far off into the distance. As a longtime resident, an old-timer who for a good number of years now has walked the streets and taken in the scenes, I find myself with decidedly mixed feelings about all this. I marvel at the bold, new energy unleashed in the old burgh, and I am not a little pleased at the prosperity it has brought. But I also feel a distinct sense of unease. The helter-skelter of new growth, proliferating at times with no regard for the classic lines and feel of the old city, brings a slight case of vertigo—a feeling of being lost amid the familiar. It's an exciting time, to be sure; but a confusing time too.

This book is a reconnaissance and renewal mission, undertaken in the precincts of my strangely familiar town. It is part archaeological dig, going back to the roots of the place to regain a sense of why it was founded, where it was centered, and what the city's original outline looked like. It is also part mapping expedition, an effort to put in place a high-altitude conceptual map of the cityscape—one of those marvels of modern graphic design, with stylized lines for the main roads, and a color key for main features—something akin to the New York City subway map. The idea is

to cut through the noise and new construction, to locate the trunk roads and main boulevards that give this place its distinctive form and shape. And this book is, finally, an exercise in city planning: it lays out principles and guidelines drawn from the deep well of history, to structure and channel all the new growth. My goal is not to stop the growth, or to dictate all its features at a fine level. It is instead to make sure that with each new extension of the old city, basic themes and motifs from the historical core are picked up, replicated, and carried forward. As the city grows, I want it to retain its essential character.

The archaeological part of my mission is a search for foundations. Although all legal institutions emerge out of social practices and become formalized over time, an inquiry into historical origins forms only a small part of this book. The major archaeology I undertake is *conceptual*: in extending property to intangible items, what are the best justifications, and how do they shape the contours and limits of the field? In other words, what are the conceptual patterns, the basic formative ideas, that have inspired and animated the “cityscape” I am surveying? It is these questions, and not the fascinating (but for my purposes tangential) linear march of historical events (first this act, then this case, and so on), that motivate Part I of this book.

Current convention has it that IP law seeks to maximize the net social benefit of the practices it regulates. The traditional utilitarian formulation—the greatest good for the greatest number—is expressed here in terms of rewards. Society offers above-market rewards to creators of certain works that would not be created, or not created as soon or as well, in the absence of reward. The gains from this scheme, in the form of new works created, are weighed against social losses, typically in the form of the consumer welfare lost when embodiments of these works are sold at prices above the marginal cost of their production. IP policy, according to this model, is a matter of weighing these things out, of striking the right balance. At the conceptual level at least, the process involved is not particularly complex. It is easy to picture the toting up of costs and benefits, and to think of a good policy as one that equilibrates the scale at just the right point—the point that maximizes the number and quality of new creative works without costing society an arm and a leg.

The process is simple but, practically speaking, not at all easy. Impossibly complex, in fact. Estimating costs and benefits, modeling them over time, projecting what would happen under counterfactuals (such as how many novels or pop songs really would be written in the absence of copyright protection, and who would benefit from such a situation)—these are all overwhelmingly complicated tasks. And this complexity poses a major

problem for utilitarian theory. The sheer practical difficulty of measuring or approximating all the variables involved means that the utilitarian program will always be at best aspirational. Like designing a perfect socialist economy, the computational complexities of this philosophical project cast grave doubt on its fitness as a workable foundation for the field.

In my research, I have become convinced that with our current tools we will never identify the “optimal number” of patented, copyrighted, and trademarked works. Every time I play the archaeologist and go looking for the utilitarian footings of the field, I come up empty. Try as I might, I simply cannot justify our current IP system on the basis of verifiable data showing that people are better off with IP law than they would be without it.<sup>1</sup> Maximizing utility, I have come to see, is not a serviceable first-order principle of the IP system. It is just not what IP is really all about at the deepest level.

This is a truth I avoided over the years, sometimes more subtly (for example, heavily weighing the inconclusive positive data, showing IP law is necessary and efficient, discounting inconclusive data on the other side), and sometimes less so (ignoring the data altogether, or pretending that more solid data were just around the corner). But try as I might, there was a truth I could never quite get around: the data are maddeningly inconclusive. In my opinion, they support a fairly solid case in favor of IP protection—but not a *lock-solid*, airtight case, a case we can confidently take to an unbiased jury of hardheaded social scientists.

And yet, through all the doubts over empirical proof, my faith in the necessity and importance of IP law has only grown. I seem to have a lot of company. Countless judges begin their IP decisions with one or another familiar “stage setter” about how IP protection exists to serve the public interest, often intoning one of a few stock passages penned in a spare moment by Thomas Jefferson. But these utilitarian platitudes quickly give way to doctrinal details, which often show the unmistakable imprint of something more fundamental, something beyond utility—revealing, at the end of the exercise, its real purpose and justification. That is, courts often wind up talking about IP rights *as* rights. Being courts, they are understandably too busy getting through their important work to notice the significance of this move. But in this book I make it my purpose to notice. And make no mistake, the shift from social utility to fundamental rights talk *is* an important one. For as we have learned from John Rawls, Jeremy Waldron, and others before them (particularly Immanuel Kant), the hallmark of a right is that social utility alone is not reason enough to override it. Waldron speaks to this when he distinguishes handily between “mere interests” and true *rights*. Despite the frequency of utilitarian rhetoric in the IP field, I have come to see that courts often understand IP rights (at

least implicitly) as rights in the full and true sense. Perhaps more surprisingly, at least to me, I have come to agree with them.

### Preliminaries: Is IP “Really” Property?

I will argue in this book that there is a basic logic to the law of property, and that it applies to intangibles as well as physical things. Because there is a lot of resistance to this from various quarters, I had better state my best case here at the outset.

To begin, I must concede that on one narrow view of what “property” is, I cannot succeed. There are those who claim that property the *concept* is and always will be a prisoner of its origins, that it is rooted in and can never grow out of its formative association with physical, tangible things, most notably (in the Anglo-American tradition) land. Anyone who sees things this way will always see intellectual property as an awkward transplant. For them, the idea of property contains certain historical-essentialist traits that cannot be altered to better adapt it to intangible things. As applied to intangibles, property will always have the feel of a northern fir in the tropics, or a damp fern in the high desert. It just does not fit. And any conceptual adaptation, any strenuous breeding program that produces a concept that *does* fit would result not simply in a small variant. It would create something fundamentally new and different, a new species entirely; and whatever it was called, it could not be called property. (One lexical clue to this argument is that only property in land is called “real” property.) For those who subscribe to this theory, intellectual property can best be described as a sort of protracted analogy, a standing metaphor. It borrows some of the basic outline of property but cannot be considered seriously as an actual and true branch of this fundamental legal category.

I disagree. I do not see property in this historical-essentialist way. For me, property is a broad and roomy concept. It has a distinct (and fascinating) history, to be sure. But its origins do not imply constraints or limits. The very wide range of things that property concepts have been applied to suggests to me an expansive and highly adaptable legal category. Land, tools, trees, minerals, water, fractional ownership claims, legal obligations to pay money—these and many, many other things are subject to property’s wide embrace. Over its long career, property has shown a restless capacity to jump from one arena into another, morphing and adapting as it goes. While some of its distinctive features were shaped by its early history, I believe this history supplied property not with a set of burdensome constraints, but largely with a highly adaptable and flexible conceptual vocabulary that renders it wonderfully adaptive to all sorts of new things

and situations. This vocabulary is singularly effective in structuring relations between legal actors and unique things of value to them. Property has proven robust because, like a spoken language that grows and spreads, it has shown itself quite capable of absorbing new dimensions and changing in significant ways, while retaining fidelity to certain core principles that provide its basic structure.

The most important core principle of the institution of private property is this: it assigns to individual people control over individual assets. It creates a one-to-one mapping between owners and assets.<sup>2</sup> I argue in this book that this one-to-one mapping is the best way to handle intangible assets, just as it is with most other assets. For me, it is this powerful logic of individual control that makes property appropriate and appealing; it has little to do with the nature of the assets in question. That is why I see IP as a perfectly plausible, and even desirable, system for administering intangible assets. The logic of decentralized control and coordination—that is, individual ownership—makes just as much sense to me for intangible assets as it does for physical assets and the other objects of traditional property law.

Another major objection to the property model in IP law centers on the high transaction costs of property rights. Critics with this orientation do not dwell on essentialist arguments. Their point is more about the consequences of assigning property rights to intangibles, and in particular, the transactional bottlenecks and costly nightmares that this entails. There are many variations on this basic objection, but most share this thought: while IP rights may make sense for some things, or may have at one time, in the context of a rapidly evolving, high-throughput information economy, IP represents a major frictional “drag.”

I address this objection—with which I have a limited degree of sympathy—at several places in this book. My basic point throughout is that high transaction costs point to *reforms* in IP law, rather than the need to scrap it altogether. Compared to critics who emphasize this point, I am both more confident in the ability of economic players to “work around” transactional chokepoints and more convinced that, notwithstanding these transactional challenges, the best starting point remains a commitment to individual ownership of assets. Ultimately, I seek to learn from “transactional pessimists” but not join their movement.

### Efficiency as One Midlevel Principle of IP Law

My earlier talk of IP as a “right” might sound like I am adopting a “natural law” perspective on IP, one that avoids completely any discussion of economic efficiency. Not so. Let me make clear right here that I am not

proposing that we banish questions of efficiency from IP law. Such a proposal would relegate a huge amount of helpful scholarship—some of it my own!—to the deleted file repository of history. The trick is to understand that efficiency is a second-order goal—a “midlevel principle.” Though I discuss foundational principles later in this introduction, I will take a moment now to explain the difference between a midlevel principle such as efficiency and a truly foundational concept.

Efficiency is an important goal of any area of law, and IP is no exception. The imprint of this important principle is all over IP law; indeed, many aspects of the social practice known as IP law cannot be effectively explained without reference to the principle of efficiency. As I mentioned earlier, however, despite its pervasive impact on the practices that make up IP law, efficiency is not an adequate foundational or normative principle. It cannot explain large features of the IP landscape (moral rights being one of many examples). And, try as we might, law and economics scholars have never established an efficiency-based (or utilitarian) justification for the field. There is no lock-solid proof that overall social welfare would decline if IP protection were suddenly removed. True, there are plenty of *indications*, plenty of data to support the notion that IP rights are overall a good thing for the economy. But there is no proof in the form that a scientist, or even a rigorous social scientist, would accept as unequivocal. The famous conclusion of the eminent economist Fritz Machlup in a study for the U.S. Senate was that it is not clear we would establish IP rights if starting from scratch today, but it would be unwise to get rid of them given that we already have them. The vast empirical literature in the field generated since then has done much to illuminate the wisdom of discrete practices and doctrines; but no one has produced evidence sufficient to dislodge Machlup’s basic conclusion. At a personal level, my interest (and belief) in efficiency led me to try to ground or justify the entire field on this idea. My failure to do so, and the path opened up by this failure, led me to write this book.

I also reject another principle that many have proposed (usually implicitly) as a possible foundation of the IP field: preserving and maximizing the public domain. Scholars have promoted this agenda under a number of rubrics. One centers on the idea that IP law serves the same function in the world of information that environmental law serves in the natural world: to guard as many things as possible from the rapacious grasp of privatization. In environmental law, this is the stewardship principle, the idea that our job is to protect nature’s wondrous but limited bounty from those who would appropriate it for personal gain. This concept lies behind environmental law’s preservationist agenda. In IP law, this concept is what I



call “the nonremoval principle,” which says that information and ideas in the public domain must not be taken away or privatized. This is the second midlevel principle that unites and helps organize the field.

Although I believe nonremoval is an important goal of the IP system, it is simply not robust enough to form a first-order principle. In this, it suffers from the same defect as utilitarianism. If you look carefully at various rules, doctrines, and institutional practices of the IP system, you will see much evidence of the nonremoval principle at work. And certainly for many practical purposes, promoting the agenda of nonremoval is a worthy aim. But just as with efficiency, nonremoval does not work as a normative foundation for the field. The reason is simple: it does not account for important practices and values evident throughout the field. For example, public domain concepts have nothing to tell us about the rules governing claims to priority (who was first, and deserves a right); the outcome of a priority contest in trademark and patent law is usually that one of the rival claimants will come away with a property right, so a policy favoring a maximal public domain has little place in such a contest. Likewise for the rules governing remedies and compensation when an IP right has been infringed. The core issue here is measuring harm to the rightholder, and nonremoval does not enter in. Even where nonremoval figures into a rule, it is often not the only principle at work. This is true with respect to rules about how much originality or creative spark is needed for a work to be worthy of copyright or patent protection. Nonremoval surely forms part of the rationale for these requirements. But another part comes from the idea that an IP right ought to be proportional to the contribution of a creative work. This idea, which I call “the proportionality principle,” is in my view central to IP law; it is perhaps *the* major midlevel principle and is covered in depth in Part II, Chapter 6, of this book. The fact that we need supplementary concepts such as proportionality is a dead giveaway that nonremoval is not by itself sufficiently robust to support the entire conceptual weight of the field.

It is plain to me now that although I thought I was starting at the bottom when I began exploring efficiency and nonremoval as foundations of the IP field, I was actually starting in the middle. In this I am not alone. The very accomplished legal philosopher Jules Coleman traces the same path in the introduction to his book *The Practice of Principle*.<sup>3</sup> I use Coleman’s terminology (in Part II) when I describe the four midlevel concepts at the heart of IP law. Like Coleman, I believe that these midlevel principles serve a vital function. They tie together a whole range of disparate rules, doctrines, and institutional practices in the IP system. It is not surprising in retrospect that I would commence my review of IP law by looking into