FOUNDATIONS OF
Intellectual Property

Robert P. Merges and Jane C. Ginsburg

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By

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PREFACE

This book is meant to provide a comprehensive yet concise collection of commentaries on the topic of intellectual property. Our goal has been to bring together the most influential writings on patent, copyright, trademark and design protection, beginning with early material from the seventeenth century and continuing into the contemporary law review literature. Because this literature continues to grow quickly, we decided on a "cutoff date" of the year 2000, however, so some very recent contributions of note will not be found among the excerpts. At the same time, each excerpt or group of excerpts is supplemented by extensive notes and questions, which typically include citations and extended discussions of more recent literature (up until our publication deadline of June, 2004).

The excerpts have been very heavily edited. Given our desire to provide a comprehensive overview, and because many of the articles we draw on are quite long, the excerpts set forth here are in many cases little more than a précis of the original. While we have tried very hard to capture the essential animating ideas of each excerpt, many of the nuances, elaborations, and qualifications (not to mention, footnotes) that often surround careful scholarly work are either barely discernable or else entirely missing from the excerpts in this book. For a full and detailed understanding of an author's argument, there is simply no substitute for consulting the original text.

Scholarship, though in many ways a solitary enterprise, takes place within a community. A book like this one brings this fact home with extra force. First, it reminds us that today's work builds on many labors from the past—that we are part of a scholarly enterprise stretching over time and space, connected by our interest, concern, and even passion for this branch of the law. Second, at a more prosaic level, a book like this requires the permission and consent of many authors and many publishers of legal scholarship. Without procedures and norms for granting permission, and in some cases arranging compensation, a book like this would be impossible. We take this opportunity to thank the many authors, law review staff members, and other publishers, who took time to answer our inquiries and grant us permission to works over which they hold copyrights.

Finally, and in some ways most importantly, each of the editors has a support system that makes it possible to work on projects such as this book. Here we record our debt to the people who support us.

Rob Merges would like to thank Roberta Romano of the Yale Law School for originally proposing this project, and patiently waiting several years for it to come to fruition, and also Steve Errick of Foundation Press for encouragement, enthusiasm, and editorial support. Merges also thanks Chris Swain, Kathleen Vanden Heuvel, and Susan Russell at Boalt Hall School of Law, U.C. Berkeley, for help in tracking down and digitizing various excerpts; and especially Carrie Armstrong-Ruport of

the U.C. Davis Law School, for her cheerful, energetic help in formatting, editing, and typing many excerpts, all of which was absolutely indispensable to the completion of this project. And as always the Merges family, Jo, Robbie and James, was there to support, divert, indulge, and love in just the right proportions to see the project through.

Jane Ginsburg thanks Rob Merges for inviting her to participate in this project: the reacquaintance that a task of this kind requires with so many leading historical and contemporary commentaries has proved enriching and in some cases even surprising. Thanks also to Steve Errick for consistent and cheerful editorial support, and to Gabriel Soto of Columbia Law School for valued administrative assistance. Ginsburg is especially grateful to Hannah Shay Chanoine, Columbia Law School class of 2004, whose perseverance, intellectual generosity, and patient fulfillment of ever-evolving (not to say, occasionally contradictory) requests made editing the Copyright and Trademarks chapters of this book both possible and fun.

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A. Basic Concepts

We begin our exploration of patent law with an excerpt from the writings of John Locke, whose seventeenth century treatises form one of the cornerstones of property rights theory. Historians and legal scholars have long recognized Locke's "labor theory" of property—set out in the following excerpt—as one of the foundations of intellectual property law. See, e.g., Adam Mossoff, "Rethinking the Development of Patents: An Intellectual History," 1550–1800, 52 *Hastings L.J.* 1255 (2001) (emphasizing influence of Locke's writing on various aspects of patent law).

Second Treatise on Government (1690)

JOHN LOCKE

Chapter V

Of Property

24. Whether we consider natural reason, which tells us that men, being once born, have a right to their preservation, and consequently to meat and drink and such other things as Nature affords for their subsistence, or "revelation," which gives us an account of those grants God made of the world to Adam, and to Noah and his sons, it is very clear that God, as King David says (Psalm 115. 16), *"has given the earth to the children of men,"* given it to mankind in common. But, this being supposed, it seems to some a very great difficulty how any one should ever come to have a property in anything . . .

25. God, who hath given the world to men in common, hath also given them reason to make use of it to the best advantage of life and convenience. The earth and all that is therein is given to men for the support and comfort of their being. And though all the fruits it naturally produces, and beasts it feeds, belong to mankind in common, as they are produced by the spontaneous hand of Nature, and nobody has originally a private dominion exclusive of the rest of mankind in any of them, as they are thus in their natural state, yet being given for the use of men, there must of necessity be a means to appropriate them some way or other before they can be of any use, or at all beneficial, to any particular

men. The fruit or venison which nourishes the wild Indian, who knows no enclosure, and is still a tenant in common, must be his, and so his—i.e., a part of him, that another can no longer have any right to it before it can do him any good for the support of his life.

26. Though the earth and all inferior creatures be common to all men, yet every man has a "property" in his own "person." This nobody has any right to but himself. The "labour" of his body and the "work" of his hands, we may say, are properly his. Whatsoever, then, he removes out of the state that Nature hath provided and left it in, he hath mixed his labour with it, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state Nature placed it in, it hath by this labour something annexed to it that excludes the common right of other men. For this "labour" being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good left in common for others.

27. He that is nourished by the acorns he picked up under an oak, or the apples he gathered from the trees in the wood, has certainly appropriated them to himself. Nobody can deny but the nourishment is his. I ask, then, when did they begin to be his? when he digested? or when he ate? or when he boiled? or when he brought them home? or when he picked them up? And it is plain, if the first gathering made them not his, nothing else could. That labour put a distinction between them and common. That added something to them more than Nature, the common mother of all, had done, and so they became his private right. And will any one say he had no right to those acorns or apples he thus appropriated because he had not the consent of all mankind to make them his? Was it a robbery thus to assume to himself what belonged to all in common? If such a consent as that was necessary, man had starved, notwithstanding the plenty God had given him. We see in commons, which remain so by compact, that it is the taking any part of what is common, and removing it out of the state Nature leaves it in, which begins the property, without which the common is of no use. And the taking of this or that part does not depend on the express consent of all the commoners.... The labour that was mine, removing them out of that common state they were in, hath fixed my property in them.

28. ... Though the water running in the fountain be every one's, yet who can doubt but that in the pitcher is his only who drew it out? His labour hath taken it out of the hands of Nature where it was common, and belonged equally to all her children, and hath thereby appropriated it to himself.

29. Thus this law of reason makes the deer that Indian's who hath killed it; it is allowed to be his goods who hath bestowed his labour upon it, though, before, it was the common right of every one.... And even amongst us, the hare that any one is hunting is thought his who pursues her during the chase. For being a beast that is still looked upon as common, and no man's private possession, whoever has employed so much labour about any of that kind as to find and pursue her has

thereby removed her from the state of Nature wherein she was common, and hath begun a property.

30. It will, perhaps, be objected to this, that if gathering the acorns or other fruits of the earth, etc., makes a right to them, then any one may engross as much as he will. To which I answer, Not so. The same law of Nature that does by this means give us property, does also bound that property too. *"God has given us all things richly."* Is the voice of reason confirmed by inspiration? But how far has He given it us—"to enjoy"? As much as any one can make use of to any advantage of life before it spoils, so much he may by his labour fix a property in. Whatever is beyond this is more than his share, and belongs to others. Nothing was made by God for man to spoil or destroy . . .

31. . . . As much land as a man tills, plants, improves, cultivates, and can use the product of, so much is his property. He by his labour does, as it were, enclose it from the common. Nor will it invalidate his right to say everybody else has an equal title to it, and therefore he cannot appropriate, he cannot enclose, without the consent of all his fellow-commoners, all mankind. God, when He gave the world in common to all mankind, commanded man also to labour, and the penury of his condition required it of him. God and his reason commanded him to subdue the earth—i.e., improve it for the benefit of life and therein lay out something upon it that was his own, his labour. He that, in obedience to this command of God, subdued, tilled, and sowed any part of it, thereby annexed to it something that was his property, which another had no title to, nor could without injury take from him.

32. Nor was this appropriation of any parcel of land, by improving it, any prejudice to any other man, since there was still enough and as good left, and more than the yet unprovided could use. So that, in effect, there was never the less left for others because of his enclosure for himself. For he that leaves as much as another can make use of does as good as take nothing at all. Nobody could think himself injured by the drinking of another man, though he took a good draught, who had a whole river of the same water left him to quench his thirst. And the case of land and water, where there is enough of both, is perfectly the same.

33. God gave the world to men in common, but since He gave it them for their benefit and the greatest conveniencies of life they were capable to draw from it, it cannot be supposed He meant it should always remain common and uncultivated. He gave it to the use of the industrious and rational (and labour was to be his title to it); not to the fancy or covetousness of the quarrelsome and contentious. He that had as good left for his improvement as was already taken up needed not complain, ought not to meddle with what was already improved by another's labour; if he did it is plain he desired the benefit of another's pains, which he had no right to, and not the ground which God had given him, in common with others, to labour on, and whereof there was as good left as that already possessed, and more than he knew what to do with, or his industry could reach to.

Notes and Questions

1. John Locke was born in Bristol, England on August 29, 1632. He attended Oxford University. In the early 1680s, his views on freedom of religion and the rights of citizens brought him into conflict with the British monarchy, and he took refuge in Holland. He returned in 1689, the year of Britain's "Glorious Revolution," and then began publishing his views more widely. Both his first and second Treatises on Government were published in 1690. He died in 1704.

2. In Paragraph 25, Locke lays the foundation for property as a means of *appropriating* what nature provides: "[Y]et being given for the use of men, there must of necessity be a means to appropriate [nature's products] some way or other before they can be of any use, or at all beneficial, to any particular men." For Locke, the need to appropriate follows strictly from the fact that the fruits of nature are given to man for his survival. How are the *physical* appropriations Locke discusses—picking up acorns or apples, for example—different from appropriating an idea, principle, concept or new technology? In what ways are they the same?

Scholars disagree about whether Locke's "natural law" approach to property works well, or even at all, in the realm of intellectual property. Compare James V. DeLong, "Defending Intellectual Property," *in Copy Fights: The Future of Intellectual Property in the Information Age* 17 (Adam Thierer & Clyde Wayne Crews Jr. ed., 2002) with Tom W. Bell, "Indelicate Imbalancing in Copyright and Patent Law," in *Copy Fights*, supra, at 4. For an argument that Locke's theory has little relevance to intellectual property and other intangible goods, see Jacqueline Lipton, "Information Property: Rights and Responsibilities," 56 *Fla. L. Rev.* 135, 179 (2004). For a nuanced view of these issues, ultimately concluding that copyright law in particular squares reasonably well with Lockean labor theory, see Richard Epstein, "Liberty Versus Property? Cracks in the Foundation of Copyright Law," 1 IPCentral Rev. No. 1 (April 8, 2004), available at www.ipcentral.info/review.

3. In Paragraph 26, Locke describes the first of several limits he sees as necessary to any system that allows humans to claim things as property:

> Whatsoever, then, he removes out of the state that Nature hath provided and left it in, he hath mixed his labour with it, and joined to it something that is his own, and thereby makes it his property.... [N]o man but he can have a right to what that is once joined to, ***at least where there is enough, and as good left in common for others***.

The idea reappears in Paragraph 33. The highlighted phrase has been referred to as the "sufficiency proviso," see Jeremy Waldron, "Enough and As Good Left for Others," 29 *Phil. Q.* 319–28 (1979), or simply "the Lockean proviso," see Wendy Gordon, "A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property," 102 *Yale L.J.* 1533, 1538 (1993).

What does it mean to leave "enough, and as good ... for others" in the realm of intellectual property? One view would be that so long as an

appropriator claims only what is original to him or her, leaving all the ideas and information that existed before, this criterion would be satisfied. See, e.g., Jeremy Bentham, *Manual of Political Economy*, in 3 *The Works of Jeremy Bentham* 31, 71 (John Bowring ed., Edinburgh, William Tait 1843). Some have argued, however, that certain works are so important and foundational that others coming after their creation must have access to them for them to have "enough and as good." See, e.g., Wendy Gordon, 102 *Yale L. J.*, supra.

4. An additional limitation on the scope of property claims appears in Paragraph 30:

> As much as any one can make use of ***to any advantage of life before it spoils, so much he may by his labour fix a property in***. Whatever is beyond this is more than his share, and belongs to others. Nothing was made by God for man to spoil or destroy.

This has been referred to as the "spoilation limitation." See C.B. MacPherson, *The Political Theory of Possessive Individualism: Hobbes to Locke*, 233 (Oxford: Oxford University Press 1962). One scholar has also identified a third limitation on property in the writings of Locke, "the doctrine of charity." Jeremy Waldron, *God, Locke and Equality: Christian Foundations in Locke's Political Thought* 177 (Cambridge: Cambridge University Press, 2002). So Locke wrote, for example, that "Charity gives every man a title to so much out of another's plenty, as will keep him from extreme want, when he has no means to subsist otherwise." John Locke, *First Treatise on Government,* Chapter 4, Paragraph 42, reprinted in 5 *The Works of John Locke* (London: Thomas Tegg, 1823), avail. http://socserv.mcmaster.ca/econ/ugcm/3ll3/locke/government.pdf.

5. There are numerous challenges in translating Locke's basic concepts into practice. For example, under contemporary patent law, there are many cases where an independent inventor can be barred from using his or her own invention because another inventor patented the invention first. Why should the inventive labor of the second inventor be ignored in favor of another person whose effort happened to be expended earlier—sometimes just barely earlier? For a criticism of "natural rights" defenses of exclusive intellectual property rights along these lines, see R.A. Macfie, *The Patent Question under Free Trade* (2d ed.; London, 1864), p.8. Note that limited "prior user rights" are in place in the U.S. for inventions relating to "business methods." See 35 U.S.C. § 273; Robert P. Merges and John F. Duffy, *Patent Law and Policy* (3rd ed.) 172–173 (New York: Matthew Bender, 2002). For some recent arguments that patent law ought to incorporate a general prior user right—in the form of an "independent invention defense"—see Stephen M. Maurer & Suzanne Scotchmer, "The Independent Invention Defense in Intellectual Property," 69 *Economica* 535–547 (2002); John S. Liebovitz, "Note, Inventing a Nonexclusive Patent System," 111 *Yale L.J.* 2251 (2002).