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JUSTIFYING INTELLECTUAL PROPERTY, by Robert P. Merges.
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Robert Merges' scholarship has a continuing and significant influence on intellectual property law. As the saying goes, the author's reputation precedes him. THE COMPLEX ECONOMICS OF PATENT SCOPE, co-authored by Merges, is responsible for insight into patent law and the encouragement of invention.[1] His ongoing work in the field of intellectual property law has been widely influential.

In JUSTIFYING INTELLECTUAL PROPERTY, Merges considers concepts that are extraordinarily complex and controversial. As Merges' earlier writing recognizes, the current intellectual property system relies primarily on utilitarian justifications.[2] As another leading work authoritatively states, "[t]oday it is acknowledged that analysis and evaluation of intellectual property law are appropriately conducted within an economic framework that seeks to align that law with the dictates of economic efficiency."[3] In its broadest form, the intellectual property system has been supported by the incentive story—that is, legal protection provides incentives to invest in the creation of new works that ultimately inure to the benefit of the public.

In a departure from this framework, JUSTIFYING INTELLECTUAL PROPERTY omits nearly all discussion of utilitarianism.[4] Rather, Merges introduces the book with an unequivocal rejection of this basis as a sufficient foundational justification for IP law, explaining that "[t]he empty promises and ethical holes in the utilitarian theory of IP are just too glaring" (p.83). In its stead, Merges draws on legal philosophers John Locke, Immanuel Kant, and John Rawls to support the book's central proposition that "IP law deserves a place in a just and rational modern

state" (p.196). According to Merges, the principle justification for IP law is the individual creator (p.72).

JUSTIFYING INTELLECTUAL PROPERTY is a rich and thoughtful work that raises important questions. Merges considers the selected legal theorists with depth and clarity. Difficult concepts are handled with thoroughness and subtlety. A number of the propositions are undoubtedly provocative. By placing the primary emphasis on the creator, the book seeks to move the focus of the IP system to one that, at an operational level, inures to the benefit of a professional creative class. This work emphasizes that intellectual property is a property right that allows creators to control who may use the work, and—if used—to specify the terms (p.242).

In doing so, Merges neatly solves certain problems associated with the current IP system. Nevertheless, it is a rare case that one can attempt to move a system's foundations without creating disruption. By advocating strong property rights in IP, JUSTIFYING INTELLECTUAL PROPERTY asserts a number of challenging propositions about a system that some currently regard as too powerful.

In JUSTIFYING INTELLECTUAL PROPERTY, Merges expands on his prior work in Lockean theory[5] by advancing that the expenditure of labor justifies appropriation through the mechanism of intellectual property rights. Merges explains that Locke's TWO TREATISES OF GOVERNMENT demonstrates that the effort expended through the work of one's body allows one to legitimately claim ownership to creations assembled from the public domain (p.35). To place this claim in context, Merges explains that IP fits within Locke's overarching goal toward human flourishing (p.41). That is, Merges uses Locke's labor theory to support the book's central thesis that IP is justified as a property right. As Merges explains, "[c]rowning this labor with property serves two ends: it honors the effort involved and calls forth more of it" (p.38).

One controversial aspect of the book considers that Locke's property theory translates to intangibles. As Merges explains, "Locke's ideas work perfectly well in the context of creative work, so long as we picture removal not as something literal and physical, but as something arising from a necessary convention or shared understanding" (p.39). Among other support, Merges cites Locke's AN ESSAY CONCERNING HUMAN UNDERSTANDING ("ESSAY") that describes Locke's own work as that of "an Under-Labourer in clearing Ground a little, and removing some of the Rubbish, that lies in the way of Knowledge."[6]

Certainly Locke's justification for property, and ultimately government, is stated in terms of tangibles and the labor of the body. As Justin Hughes has recognized, "it is not always clear that the creation of an idea involves labor" as Locke used that term.[7] One plausible reading of Locke's description of himself as an Under-Labourer is that this image operates as a metaphor rather than a belief. That is, Locke's reference may have been a modest attempt to contrast his writing as the effort of an "Under-Labourer" with the work of "master-builders, whose mighty designs, in advancing the sciences, will leave lasting monuments to the admiration of posterity," citing the work of physicist Isaac Newton and mathematician Christiaan Huygens.[8]

One can identify from Locke's ESSAY that he perceived a clear distinction between mental and physical acts. As one example, Locke describes "invention" as the mental creation of a complex idea that is the "voluntary putting together of several simple ideas in our own minds; so he that first invented printing, or etching, had an idea of it in his mind, before it ever existed."[9] This quote suggests, and it is implicit throughout Locke's ESSAY, that man creates the intangible in the mind and appropriates or manipulates tangible objects with the body.[10] According to Locke's ESSAY, one's mind is one's soul and responsible for the exercise of liberty.[11] Given Locke's reverence for the mind, one might query whether Locke would have considered ideas as property without fuller discussion.

Regarding Kant, Merges explains that the legal concept of property is necessary for creators to have access and control over objects in order to exercise the full extent of their autonomy (p.72). According to the book, "[f]reedom to appropriate is so basic, so tied to matters of individual will and personal choice, that Kant finds it unthinkable to rule out large categories of things from the domain of the potential ownable" (p.72). Acknowledging that the application of this author-centric view will be "jarring" to some readers, Merges argues that a property label for IP is consistent with Kant's idea of a free rational will if one views creativity as a choice to carry out a work (pp.75, 79). Pushing against the trend in recent scholarship that recognizes the significant influence of social and cultural forces on creativity, Merges relies on Kant to shift the emphasis back onto the creator. In this vein, he explains that a creator's work inspires others: "Like a many-sided flint, sparks fly off a work of genius, igniting other minds, other individual creators, who are inspired to stretch themselves and thereby reach their potential" (p.92).

Next, Merges considers Rawls' A THEORY OF JUSTICE to conclude that those in the original position[12] would have categorized IP as a basic right despite the fact that its benefits fall disproportionally on creative professionals (p.110-11). JUSTIFYING INTELLECTUAL PROPERTY finds that those wishing to live in a society that fosters an autonomous and creative citizenry would have chosen IP as a basic right (p.112). Just as Rawls rejected a utilitarian conception, Merges similarly finds that those considering IP in the Rawlsian state are "not required to maximize social welfare with respect to their 'productive decisions'" (p.111). In essence, Merges considers creativity as an act of liberty due to its relation to the individual and one's autonomy (p.117).

Even if one does not accept that IP would be considered a basic right, JUSTIFYING INTELLECTUAL PROPERTY concludes that IP would not violate Locke's second principle of justice.[13] To demonstrate this point, Merges describes that the majority—a core—of every work derives from an individual's talent, vision, and will. This viewpoint holds that society's interest derives solely from inputs beyond the creator and sits at the periphery of the right. According to Merges, societal claims— such as those that seek costless redistribution—derive from this periphery (p.122-23). According to this account, this value is redistributed fairly in return for society's contribution in the form of, as some examples, access to the work after the right expires, benefits that derive from the existence of the work, and through taxation of IP-protected works. In contrast, the creative core of a work—the individual's contribution—supports what Merges describes as an "ineluctable property" claim, an "inviolate property right," and an "immovable substrate" (pp.122-23). Merges explains that this core derives from the Rawlsian concept of desert, which represents a legitimate claim to an entitlement.[14]

For Merges, reliance on Locke, Kant, and Rawls demonstrates that intellectual property derives from an act of human creativity that arises from an individual's "attention, effort, and personal vision" (p.114). Each philosopher brings individual support for Merges' claim that IP has a central role in a society (p.305). Through this lens, classic utilitarian concerns, such as the burdens that such rights place on society, can be expected to recede in importance.

Given that Merges accepts that agreement with IP's foundational principles is unlikely to coalesce, he writes that policy discourse should remain on the midlevel principles of the law (pp.144-45). These midlevel principles include nonremoval, proportionality, efficiency, and dignity, with the fullest treatment in the book given to proportionality and dignity.

Because midlevel principles derive from the study of the detailed rules applied in practice, Merges finds that such principles do not depend on any particular foundational theories for their validity (p.140). As Merges explains, at the midlevel "[t]he conversation is more productive—and a lot more civil!—than it would be if participants tried to conduct it at the ultimate normative level" (p.144). Merges likens these points of discussion to the "Midelevel Bar and Grille,"—a place where there may be ample disagreement but a common vocabulary (p.141).

Perhaps, as Merges suggests, the Midelevel Bar and Grille is an excellent starting point for policy discussion. Nonetheless, foundations have a way of impacting policy and, ultimately, the real world. As one example, Merges' foundational focus on creators reverberates through his later discussions preferencing the contributions of creative professionals at the midlevel. This suggests that the lines between these layers are quite permeable and that therefore discourse cannot be so easily confined. Engaged consideration of foundational principles might be civil, could be useful, and is likely to be inevitable.

Intellectual property is rife with pressure points. Are there limitations that can relieve them? JUSTIFYING INTELLECTUAL PROPERTY notes several—antitrust, misuse, the First Amendment, and other limitations built into current law. Perhaps one of most fascinating parts of the book is an eloquent application of the principles of proportionality to contextualize the U.S. Supreme Court's decision in *eBay v. MercExchange*.[15] Applying the principle that the right should be proportional to the value or significance of the work, JUSTIFYING INTELLECTUAL PROPERTY explains that *eBay* stands for the rule that injunctions should not confer excessive leverage to intellectual property rights holders (p.166-67).[16] In Merges' view, proportionality permits the limited government modification of a holder's property right and operates as a useful analytic tool for examining important questions that arise in IP. As he observes, "[i]t is hard to defend a legal system that permits grossly distorted transactions" (p.190).

How far can such exceptions go? According to Merges, not as far as others might have it. As he explains, "[t]his freedom to either waive one's rights entirely, or else hold onto them for purposes of economic exploitation or simple aesthetic preference, is what property is all about" (p. 228). As one example, JUSTIFYING INTELLECTUAL PROPERTY rejects the position that copyright in the digital realm should be subject to liability rules and a system of compulsory licensing.[17] Rather, Merges reiterates that digital copyright should be treated as a property right

subject to the waiver and consent of rights holders (pp.249-55). Further, Merges argues that re-mixers should not obtain significant leeway under fair use because doing so might prevent a market for the use of portions of musical works from ever developing (pp.251-54). Given the technological shift that has occurred for digital works, Merges predicts that, "IP rights may have to be strengthened for those rights to continue their traditional function of adequately rewarding hard-working creators" (p.250).

This review's description of the limits of IP explored in the book is not complete. Further, as Merges suggests, the problems that are presented to the IP system are difficult, complex and in a state of flux. The strength of IP rights, *eBay*, waiver, and limitations at the boundaries are critical issues. Moreover, how these doctrines interact appears to be as important as each one individually.

Certainly, the line between IP rights and allowable use cannot be drawn with precision. It is also an extremely significant point of contention. The need for access to informational inputs for new works is an issue that touches far more than remix culture. An alternative viewpoint might hold that the ecosystem that contributes to outcomes includes more than creators, and some of those inputs can be central to a work's existence. In other words, even if one accepts that creators are entirely necessary to a work, individuals are rarely sufficient. Moreover, even talented creative professionals can be stymied by other's strong property rights.[18] Although JUSTIFYING INTELLECTUAL PROPERTY makes a fascinating case, the principle that IP must be treated as a property right to accomplish a creator's goals is a challenging proposition.[19] As JUSTIFYING INTELLECTUAL PROPERTY recognizes, the contributions of earlier creators are inspirational to those who create later—that is, "genius awakens another genius" (p.92). That vibrant image can conform to IP law only if relatively firm lines can be identified and maintained as the creative process engages. It seems instructive that a number of high technology industries arose in the absence of IP enforcement, or in areas in which IP law created safe harbors.[20] This suggests that compartmentalization between inspiration and use of another's work is difficult to maintain, and not uniformly productive.

As for individual creators, the central message of JUSTIFYING INTELLECTUAL PROPERTY goes far toward dissolving the misconception that creative work is generated through the intervention of inspiration, genius, or otherwise inexplicable phenomena. Instead, Merges' archetypical creator is J.K. Rowling, who created the Harry Potter series based on "individual will and commitment" (p.134). Under

this view, one who undertakes the hard work to develop a piece earns the right to control it.

JUSTIFYING INTELLECTUAL PROPERTY does not claim that IP law must advance all creativity. Rather, the book favors particular *sources* of expression—that is, those that derive from a creative professional class. According to Merges, professional creators bring the world value in the form of "cultural icons and shared touchstones" (p.233). To Merges, the principle of autonomy and the pursuit of profit create no inconsistency. JUSTIFYING INTELLECTUAL PROPERTY examines large organizations, small entities, and individuals as potential sources of creative output. Of these, the work emphasizes individual professionals and small scale organizations as the primary sources of groundbreaking work. Against this background, the work claims that strong IP protection should operate to enable professionals to earn a living. As it states, "the care and feeding of this class is an essential—maybe *the* essential—function of the IP system" (p.247). In part, this argument pushes against the arguments made for less intrusive IP rights to facilitate the democratization of culture geared to enable amateurs to create second-order works (p.245). The reasons are two-fold: first, because "[p]rofessionals and the high-quality work they do are still crucial to the industries that rely on IP rights;" and second, "solid respect for IP rights is also the most flexible and accommodating policy, one capable of supporting a thriving bottom-up cultural movement as well" (p.196).

Certainly shared culture existed long before IP law and continues to exist outside of it. Further, as a universally present characteristic in everyone, creativity exists in many forms.[21] JUSTIFYING INTELLECTUAL PROPERTY'S prioritization of economically significant works leaves the student, amateur, and the average citizen out of the core creativity calculus.

Merges acknowledges that an approach favoring the creative professional "may be uncomfortable for some" (p.247). As the book finds that foundational principles derive from autonomy and effort, exceptional treatment of commercially significant works does give one pause. Perhaps privileging economically relevant works represents an effort toward carving out areas in which IP can be implemented more moderately. If so, preferences for the determination of ownership, validity, and enforcement would most strongly inure to those that Merges argues represent the central purposes of IP. Presumably, this would allow a vibrant community of information sharing among non-professionals. On the other hand, counter-cultural and amateur works may share many of the humanly

expressive elements of the type described by Locke, Kant, and Rawls. In some cases, perhaps more so.

In AN ESSAY CONCERNING HUMAN UNDERSTANDING, Locke asserts that "[i]deas thus made up of several simple ones put together, I call Complex; such as are Beauty, Gratitude, a Man, an Army, the Universe."[22] Intellectual property theory, although made of smaller components, is similarly rife with complex (and frequently moving) parts. Certainly, this brief overview cannot hope to capture all of the complexity of Merges' JUSTIFYING INTELLECTUAL PROPERTY. Merges adds to his influential body of scholarship by adopting foundational principles that focus on the author, the creator, and the designer to support the legal institution of intellectual property. Virtually every page includes rich and cross-referenced dialogue. The work examines layers of theory, which are then applied to specific problems.

The work can be expected to trigger debate and discussion. As it describes (and a review of the scholarly literature confirms), there are propositions in the book that are not part of any universal consensus. Perhaps, as Rawls suggests, judgments are best made after consideration of all possibilities and examination of their support from relevant philosophical argument.[23] For its part, JUSTIFYING INTELLECTUAL PROPERTY makes a clear, thorough and interesting case for its theories.

ENDNOTES

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[1] Robert P. Merges and Richard R. Nelson, On the Complex Economics of Patent Scope, 90 Colum. L. Rev. 839 (1990).

[2] See Robert P. Merges, Rent Control in the Patent District: Observations on The Grady-Alexander Thesis, 78 Va. L. Rev. 359 (1992) ("Intellectual property–especially patents–is a largely utilitarian discipline.").

[3] William M. Landes and Richard A. Posner, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW, 4 (The Belknap Press of Harvard University Press, 2003).

[4] There are roughly two pages that stand as the exceptions. Robert P. Merges, JUSTIFYING INTELLECTUAL PROPERTY, 46-47 (2011).

[5] Robert P. Merges, Locke Remixed ;-), 40 U.C. Davis L. Rev. 1259 (2007).

[6] John Locke, AN ESSAY CONCERNING HUMAN UNDERSTANDING, Epistle to the Reader, 11 (Penguin Classics, 2004).

[7] Justin Hughes, The Philosophy of Intellectual Property, 77 Geo. L.J. 287, 311 (1988).

[8] Locke, supra note 6, at 11.

[9] Id., at 265

[10] Id. at 266 (distinguishing modes of the mind from those of the body, and describing "mixed modes" that include both).

[11] Id. at 223 ("the idea of liberty, is the idea of a power in any agent. . . according to the determination or thought of the mind"); id. at 231-32 ("To the question, what is it determines the will? The true and proper answer is, the mind."); id at 278 ("our idea of our soul, as an immaterial spirit, is of a substance that thinks"). Locke acknowledges that the exercise of liberty involves physical capability. Id. at 230 ("a man falling down a precipice, though in motion, is not at liberty because he cannot stop that motion, if he would.").

[12] The original position is a hypothetical construct created by Rawls, which represents an initial status quo. In this position, decision makers must articulate principles for society as a whole. These principles include the manner in which fundamental rights will be determined, as well as the economic opportunities and social conditions for that society. Members in the original position operate as equal, but under a "veil of ignorance"—that is, these decision makers do not have any advance knowledge of their future place in society. John Rawls, A THEORY OF JUSTICE 11-19 (Revised Edition, The Belknap Press of Harvard University, 2003).

[13] Rawls' second principle of justice holds that "Social and economic inequalities are to be arranged so that:

a. they are to be of the greatest benefit to the least-advantaged members of society (the difference principle).

b. offices and positions must be open to everyone under conditions of fair equality of opportunity.

[14] Id. at 88 (explaining that those who "have done what the system announces it will reward are entitled to have their expectations met").

[15] eBay v. MercExchange, 547 U.S. 388 (2006).

[16] For a description of patent holdup, see Mark A. Lemley and Carl Shapiro, Patent Holdup and Royalty Stacking, 85 Tex. L. Rev. 1991 (2007).

[17] Merges refers in general terms to the work of Lawrence Lessig, William Fisher and others as representative of this view (p. 228).

[18] See Marjorie Heins and Tricia Beckles, Will Fair Use Survive? Free Expression in the Age of Copyright Control (Brennan Center for Justice, 2005).

[19] See James Bessen and Michael J. Meuer, PATENT FAILURE: HOW JUDGES, BUREAUCRATS AND LAWYERS PUT INNOVATION AT RISK, 93 (Princeton University Press, 2008) ("'Property' is not a ritual incantation that blesses the anointed with the fruits of innovation….").

[20] See Mark A. Lemley, Patenting Nanotechnology, 58 Stan. L. Rev. 601, 606-14 (2005) (observing that computer hardware, software, the Internet, biotechnology and other industries developed in the absence of significant patent enforcement); Thomas Rogers, et al., FAIR USE IN THE U.S. ECONOMY: ECONOMIC CONTRIBUTION OF INDUSTRIES RELYING ON FAIR USE (Computer and Communications Industry Association, 2007) (detailing the economic contribution of industries that rely on fair use and safe harbors).

[21] James C. Kaufman & Ronald A. Beghetto, Beyond Big and Little: The Four C Model of Creativity, 13 Rev. of Gen. Psych. 1-12 (2009).

[22] Locke, supra note 6 at 159.

[23] Rawls, supra note 12 at 42-43.

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