

JUSTIFYING
INTELLECTUAL
PROPERTY

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Conclusion

The Future of Property

PROPERTY DOES HAVE A FUTURE. Especially if it reflects a proper respect both for individual owners and the needs of the community—that is, if it is based on what a philosopher would call a liberal theory of property—it can continue to serve a vital function in a well-designed sociopolitical system. As more and more of society’s valuable assets come to be incorporeal and intangible, this function will more and more come to be served by the species of property we call IP. So in constructing a viable theory of property, it makes sense to start with IP, or at the very least to include it.

In this spirit, I want to set out as clearly as I can the basic elements of a workable theory of IP. They will all be familiar; they are the same ones I have been talking about since the first page of this book. In this final chapter, I just want to gather them together, restate them simply, and show some relationships between them.

The elements as I see them are these:

1. *Propertize creative labor.* Recognize and reward creative work with true legal rights, thereby converting that work from hourly wage labor into a freestanding *economic asset* wherever possible. Allow individuals to control the works they create, via the one-to-one mapping between owners and assets that is the essence of property. Replace the discredited “heroic author” with a more realistic construct: the “prosaic author,” a creative professional trying to

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make a decent living from his or her talent. Acknowledge that rewarding the prosaic creator means encouraging not only individual and small team ownership, but also large corporate entities, which form an important part of the ecosystem that nurtures and supports individual creative professionals.

2. *Grant real rights, but not absolute rights.* Recognize each creator's unique contribution by granting IP rights that are truly rights, but also recognize society's contribution to creative work. Envision a *deserving core* anchoring each property right, surrounded by a *social periphery*. Honor the former with a solid entitlement, a real desert claim, and the latter by permitting taxation of creative products. Conceptualize these taxes as compensation to society for the myriad social contributions to every creative work.
3. *Accommodate the needs of consumers and users by (a) facilitating and encouraging cheap and easy IP permission and licensing mechanisms, together with (b) simple waiver techniques that permit binding dedication of rights to the public.* In the long-standing debate over incentives versus access, creators/owners versus consumers/users, recognize that *there is a solution*. Rightholders can continue to receive rights, while consumers and users can gain access to the works they want to use, if resources are directed to creating efficient transactional mechanisms that allow IP rights to flow through commercial channels as smoothly, or almost as smoothly, as do the works covered by those rights. Recognize that, in a world with numerous IP rights, the market for creative *works* necessitates also a (separate, but related) market for the *rights covering those works*. Encourage market making in this secondary market! Encourage collective action and competition in this market. This will ensure the smallest dislocation from the desirable policy of awarding real IP rights, and thus the largest net reward. At the same time, create a simple and binding mechanism for *waiver*—allowing a rightholder to make a binding dedication of his works to the public, and thus implementing a *right to include* that is coextensive with the traditional right to exclude at the heart of IP and property generally.

In my discussion of these elements, I will touch on a number of themes that have permeated this book. These are not, strictly speaking, required components of a workable IP theory. They are more like intellectual motifs that, for me at least, tie together and animate the elements I just listed; they help me make a coherent whole out of the myriad details and countercurrents of IP law. These themes are as follows:

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1. *There is room at the bottom.* IP law has many possible and plausible normative foundations. Acceptance of this basic fact can help usher in a constructive policy discussion (based I hope on the midlevel principles; see Chapter 5) without the need to argue about ultimate foundations.
2. *Locke and company have much to say about IP.* The basic insight that property makes sense at a deep ethical level is for me central to my understanding of IP—why we need this form of legal protection, why it has the shape it does (exclusive rights, and so on), and why it is worth defending from critiques that would render it irrelevant or ancillary under contemporary conditions. Because of the midlevel principles, you do not have to agree with me on this, or on the underlying premise that the utilitarian case for IP is as yet inadequate; but I hope you will.
3. *IP, properly conceived and constructed, makes sense on distributive justice grounds.* IP rights surely have an effect on distributive justice, but these rights are defensible nonetheless. Put simply, *IP is fair*. A just society awards exclusive property rights to creators, and also limits and structures those rights in a way consistent with overall distributive justice concerns. Time-limited rights, public-facing exceptions to rights, and permissible taxation of works covered by rights are examples of how IP rights fit into an overall scheme of distributive justice.

Finally, there is one conceptual thread that runs through the book that merits separate attention, and while it does not really qualify as an element of basic theory or an intellectual theme (it is more like a metatheme, though that is a term I use with some distaste), I thought I would list it here:

The contemporary literature on IP rights has many gems of wisdom but is wrong to advocate the shrinking or withering away of IP rights. I have learned much from IP academics, including (a) the limits of the heroic author idea (see Element 1 above); (b) the need to integrate IP into comprehensive theories of distributive justice (Element 2); and (c) the benefits of voluntary dedication to the public schemes (such as Creative Commons licensing), and thus the need for a robust “right to include.” Notwithstanding all these positive contributions, I disagree with the general thesis that property rights over information are a bad idea or that IP has mutated into a gargantuan, monstrous parody of its traditional moderate form. In an economy where intangible assets are more valuable than ever, IP is more important than ever.

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I will now consider each of the three elements listed above, working the three themes, as well as the one “metatheme,” into the discussion when relevant.

Propertizing Labor

Property is a unique legal construct. Even the language we use—what scholars sometimes call “property talk”—is distinctive. We speak of the creation of property as a “grant,” a word derived from the Latin term for “entrust.” The state bestows property on an owner, who then carries a small piece, a tiny spark, of the state’s power. It is this power that makes a property right “good against the world,” which means two things at once: first, that the owner can invoke the power of the state to enforce the right; and second, that there need be no preexisting relationship between an owner and another person for the owner to bring that person to account for violating the property right. The only connection, in such a case, is that both the owner and the other person are subject to the law of the same state.

The state’s delegation of power to an owner signifies something important. The owner is carrying out a function vital to the state. For Locke, mutual recognition of preexisting property claims and mutual commitment to the institution of ownership is the first cause, the big bang that sets in motion the forces of state formation. Kant said something similar. Without the state, there are no strong ownership claims extending over time and space and reaching beyond an individual’s ability to physically grasp and work on an object.

To put these grand ideas into practice, an actual state, a recognized government, must grant property rights to individual owners. One classic rationale for private ownership appeals to efficiency: ownership concentrates incentives to develop, deploy, monitor, and maintain an asset in ways that a centralized bureaucracy can rarely match. Some think this same rationale is sufficient to explain the need for IP rights, and there is surely truth in this. It is obvious, though, that many contributions to culture, and much of the technology in a modern society, is not individually owned or controlled. Classical music, ancient texts, the design of the internal combustion engine, the Internet, and many more of our everyday artifacts are not individually owned. And if this is true of these products of human creativity, why have property over anything of the sort? Given the stark fact that property rights for person A restrict the freedom of action of everyone else in A’s society, and that the ideas embodied in creative works can often be copied and borrowed by others, why have IP at all?

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The reason is that creative labor is valuable and important. It is noble work, work that is worthy of recognition and reward. It is work that should be dignified with the grant of a small dollop of state power—a property right. This is right in itself, something a good society would and should do. And it is good policy: the behavior called forth when property is awarded in this way benefits and ennobles the rest of society. High-quality creative work is recognized and rewarded (through the market), and people with talent and the drive to put it to work have a chance to make for themselves a viable career doing what they are good at. IP rights make it possible for people to develop their talents and make a living practicing their skill and artistry—to become true *creative professionals*. We dignify this sort of labor when the state grants IP rights in recognition of it. The power to restrict the freedom of others, when that power is earned and appropriate, is the flip side of our token of respect, our societal reward. Not all labor results in works that qualify for state recognition via property rights. But in a system of IP law, some work may be “propertized,” may be backed by a claim “good against the world,” enforceable by invoking the power of the state against anyone who would violate it. A claim like this is potent recognition of the valuable work that underlies it. Not lightly does society permit a measure of effort to be converted into a long-standing, publicly enforceable legal claim, which may become a valuable economic asset.

Why IP Rights?

Why must IP be a right? There are other ways to recognize and reward activities useful to the state and society. We could give cash payments, award medals, or bestow recognition some other way. Assuming reward or recognition is merited, why must it be in the form of a right, a strong legal claim?

Because rights are associated with individuals, are held by individuals. And an individual reward-claim is precisely the right way to recognize the creation of IP-worthy items. Creativity is still, in most cases, an individual affair (or a small-team affair; see Chapter 7). An individual state-backed claim is the appropriate and fitting way to reward individual creative labor. Cash awards, public or professional recognition—these and other rewards have their place. But a creative professional ought also be able to obtain a state-backed grant that confers the right to individually shape and control the deployment of a creative work. The nature of the thing created justifies the award of a property right.

Speaking of IP *rights* also makes sense because of an implicit distinction suggested by this way of speaking. Users and consumers of creative works do have some rights, but for the most part when it comes to a work cre-

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ated by someone else they have what legal theorists would call *interests*: their activities and concerns touch on or bear on creative works, and creative works affect them and their activities. Readers have an interest in books and book publishing; users and adapters of technology have an interest in relevant technologies; and so on. But authors and inventors should have *rights*: strong, deep claims that take precedence over mere interests. I emphasize repeatedly in this book that these strong claims must be balanced in a number of ways: by limits on appropriation, as described by Locke, Kant, and Rawls, and as given expression by the midlevel non-removal and proportionality principles; by the society's right to tax the proceeds of creative work; and by users' rights, in some cases. Nevertheless, I believe the position of creative persons should be a privileged one when it comes to the works they create. The most appropriate and most sensible way to embody this is to grant those persons a true legal right.

*Individual Control over Individual Assets:
The Once and Future Essence of Property*

Especially in areas covered by IP, there seems to be a persistent resistance to the idea of individual control of assets. It looks to some like an excuse for “political” decisions, such as the allocation of power in a society. The “rights as a cover for politics” school sees collective contributions as the true essence of most valuable works, and argues that individual ownership is a fairly recent overlay on the “natural” situation of group effort and group control. The more recent manifestation of this school of thought centers mostly on digital works. It holds that individual contributions are being overshadowed by the power of dispersed, collective creativity. The future, it is understood, belongs to the amateurs, the wiki contributors, the open source software contributors. Discrete works, originating and belonging to an individual or a small creative team, are decidedly yesterday's news. These works, and the property rights associated with them, will for the most part just wither away in the future.

As I argued in Chapter 8, there is a lot to be said about the value of dispersed creativity. Wikipedia and fan websites, together with some open source projects, have indeed shown the value of dispersed teams of people each working on a bite-sized piece of a much larger whole, with no one person or company claiming ownership or exercising traditional incidents of control over the resulting work. And yet: there are still many works that are better shaped and controlled by a single individual. Those so made will often be superior to the decentralized, uncoordinated productions of far-flung amateur teams. For the very reasons that Locke first identified as the

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core case for property, people need a reason to work hard, to carry out a singular vision by dint of sometimes repetitive editing, shaping, and crafting. The persistent right to maintain control while such a vision is manifested and worked out—the central argument for property in Kant’s view—is still necessary in many cases. Property still matters.

THE FLEXIBILITY OF EXCLUSIVITY

One reason people often take offense at the notion of property is that, since at least Blackstone’s time, the definition of its essence invokes a concept that seems repugnant. Conventional wisdom, repeated ad nauseum, emphasizes that the essence of property is *the right to exclude*. To exclude means to shut out, to prevent access to—to slam the door in everyone’s face, so to speak.¹ With this as its essence, it is not hard to see why property has a bad name among those who care about others.

In truth, though, it is not nearly so hard to defend property. The trick is to avoid getting hung up on the legal definition, the apparent power and effect that follows from the ominous-sounding “right to exclude.” The moment of the initial grant, and the formal definition of the right being granted, draws attention away from what comes afterward. If we attend instead to what typically happens after property rights are assigned, a completely different picture comes into view. Attending to the crucial *postgrant* stage in the life of a typical property right (including especially most IP rights) reveals all sorts of ways that the supposedly exclusive right of property is actually bound up with various forms of *inclusion*.

The most obvious example is nonenforcement. As I have emphasized repeatedly, rights that are theoretically exclusive can be voluntarily left idle for all sorts of reasons—rendering them not very exclusive at all. Sometimes this is a simple matter of pragmatics: IP rights are not self-enforcing. The owner of an IP right is permitted to invoke the power of the state to exclude others, but of course he does not *have* to do so. The potential gain is often not worth the cost of engaging the expensive and slow-moving machinery of judicial enforcement. When it is not, rights that are putatively exclusive will in fact not wind up excluding anyone at all.

So too with waiver—a more voluntary, intentional form of nonenforcement. Often for strategic reasons, rightholders will take action that in effect says, yes, I have an exclusive right, but I hereby relinquish it. For my own ends, I choose not to assert it; I hereby allow it to lapse as against some or all of those I might otherwise exclude. These decisions, in my view, are an important part of the autonomy that property allows, and indeed promotes. Waiver reveals one of the great advantages of property

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as an institution: it is not an immovable obstacle—in fact, it’s often easy to get around. All an owner need do is announce or otherwise signify the message “I have these rights but choose not to enforce them.”

Waiver puts on display the flexibility of property. It can be instructive to compare this feature with the situation that would prevail under a regime where property is forbidden or strictly limited. It is very difficult for private actors operating under a regime of no-property to voluntarily opt out of that policy. Creating property by private initiative is very difficult. It requires a cumbersome series of contracts, or a shared understanding. The whole structure must be made to work without the support of a universal set of rights “good against the world.” For this reason we might say the door into the regime of no-property is a one-way door; once through, there is no going back. A state that makes it difficult to acquire property rights also makes it difficult for private actors to work around that rule. Contrast that with the state that grants property rights. If enforcement costs something, or there are strategic gains to be had from waiver, there is a strong likelihood that at least some of the rights that are granted will not be enforced. Private actors who want to opt out of a property regime will be able to do so in at least some circumstances. True, the fear that others may assert their rights could keep people from waiving theirs; in this sense, it may not always be possible to act unilaterally. But sometimes it will. And sometimes people can join together, formally or informally, to create a shared zone of nonenforcement, and in so doing effectively opt out of the property regime at least in part, and at least with respect to others in the group. Property is in this sense a two-way door: we can enter the world of property, but private actors can choose to leave it if and when they wish. This is an enormous advantage over the world of no-property, it seems to me. And it is completely at odds with the superficial emphasis on property as a right to exclude. The ability to easily *include* is an important flip side to the grant of property rights—one that is obscured by an overemphasis on the muscular rights that accompany a grant of property.

The key in all this is to watch how rights are *deployed*—to pay attention to the postgrant environment in which property rights operate. When we do this, we are much less likely to get caught up in excessive claims about the power of property. We should pay at least as much attention to enforcement rates and the real-world impact of property rights as we do to the formal specification of rights. If we do we will get a much more realistic picture of the ground-level effect of property, including IP rights. And nine times out of ten, I will wager, the scary stories we tell ourselves about the potentially devastating scope of property will fade away in the cold light of day.

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FLEXIBILITY IN ACTION: TWO EXAMPLES

So IP, as I conceive of it, is highly flexible. By way of example, consider two topics discussed in various parts of the book: online digital content and technological platforms. An understanding of the various business strategies enabled by IP rights, the experimentation this engenders, and the surrounding context of economic competition will go a long way toward illustrating how the flexible nature of IP rights operates in practice.

Musicians, authors, photographers, and artists have been struggling for some years, trying to hit on the right formula for making money in the era of digital copyright and transmission—the Internet era. Many observers of the digital scene have been advocating a brave new world free of IP rights, where content is given away or shared in the hope of voluntary payments. And in some cases the observers have been right: giving things away, it turns out, can sometimes help spread the word and thus seed a market. The Internet has made it possible to experiment with all sorts of free digital samples of creative work.

At the same time, the “just give it away” school of thought, standing alone, has not so far brought a decent living to too many people. As any businessperson will attest, the free sample idea pays off only if it leads to an actual sale somewhere down the road. Digital seeding will only work where the seedlings grow up into cash-producing crops of one sort or another.

This is where IP rights reenter the story. At some point, a creative person who has generated some interest in her work needs to be able to charge for it. IP rights make this possible. If and when the market for a creative person has matured to the point where at least some consumers are willing to pay, IP enables a successful business model to take shape. So the musician may draw an audience by giving her music away, then later graduate to the sale of IP-protected music in a real market transaction.

But what is the ideal mix of free sample and for-pay, or premium, content? No one can say at this point. All sorts of combinations have been tried, and more are being tried every day. The point I want to emphasize is that the flexible structure of property, and IP law in particular, is what makes all this experimentation possible. The optimal mix of free and for-pay music is something that every musician can explore and experiment with on her own. There is no one-size-fits-all policy that dictates a uniform approach. Musicians can give away snippets of songs, whole songs, whole albums, or any combination of these. Likewise—and here is where IP really contributes—they can just as easily choose *not* to give away any or all of the above. They can make individual decisions based on their interests and values; property enables them all.

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The experimentation spawned by property's flexibility gives consumers choices. Autonomy for creators means competition, which benefits consumers and users of IP-protected works. In the end, it is often the pressure of competing models of IP exploitation that protects consumers best from the potentially harmful effects of exclusivity. Put another way, IP guarantees exclusivity over *works*, but works compete in *markets*. An IP owner may have what Blackstone called "despotic dominion" over his works, but this very rarely translates into domination of a market. And market competition usually prevents IP owners from drastically overreaching. An IP owner who is seen as too restrictive, or who charges too much for protected works, will be disciplined. Not, in the usual case in our system, by a government agency, but by a better consumer watchdog: competition.

I have mentioned the powerful policing effect of competition at several points in this book. In Chapter 8 I talked about academics and observers of the IP scene who advocate a strong right for digital aficionados who want to remix the original content of others. I resisted this idea, on the ground that creators of original content should be privileged vis-à-vis remixers, that their work deserves a substantial legal right that is difficult to invade or override. But there are many people who enjoy remixing, and who therefore value public material, because they can remix it as much as they want with no legal repercussions. So, lo and behold, mechanisms have arisen to enable remixers to do their thing. Some private companies voluntarily waive their rights, wagering that the support of remixers will offset whatever is lost by not strictly enforcing their rights. (Fan websites of all sorts fit this description.) Other companies sell content specifically free of IP protection, which can be reproduced or reused in any way the purchaser desires. Other groups are composed of fellow amateurs and remixing fans who release their own original works into the cybersphere with no restrictions on remixing or reuse, via open-access licensing of one sort or another. Remixers can then contribute to and draw from large pools of such open-access material with no fear of IP-based legal liability.

Amongst all the blooming, buzzing diversity of digital content, one point stands out: competition among distribution models gives consumers many choices. The inherent flexibility of IP rights means that some content owners will protect them vigorously; others will give away some rights over some uses, while closely guarding some of their rights; and some people will generously donate pretty much everything they do for the use and pleasure of like-minded others.

This diversity of choice helps even those consumers who are willing to pay for premium content. Partially free and totally free content will naturally and inevitably put at least some downward pressure on the price that

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can be charged for the premium stuff. In this way, those who distribute content in copy- and remix-friendly forms do more than strike a blow for the freedom of their content. They also reduce the price of other content as well. From the perspective of creative professionals this may not always be a good thing. But for the consumer and user of digital material, it is a very good thing indeed.

The beneficial effects of competition are also on display in the matter of IP protection and technological platforms. Platforms such as Apple's iTunes/iPod system, various video game systems, and e-book readers such as Amazon's Kindle are often subject to controlled access regimes. Owners of these platforms use various measures—including IP protection—to prevent all comers from gaining free and open access to the platforms they control. Some academics, industry players, and regulators (particularly in Europe) fear that controlled access like this is a bad deal for consumers. Why shouldn't anyone who wants to sell or distribute compatible content be able to hook into these proprietary systems? Wouldn't it be great if legal and economic policy were designed so as to consistently favor interoperability?

The proconsumer consequences of robust interoperability would be a great boon, there is no doubt. But my point is that many of these consequences will follow even if the regulators use a much lighter touch on the interoperability issue. The reason is the same as we saw with respect to digital content: competition. It does not (always) take a government regulator to observe that consumers prefer a wide array of choices when it comes to content that can be played on a technological platform. Private companies can see that too. Which is why they will often be driven to line up a very wide assortment of content that works with a proprietary platform. And—more important—they will respond to consumers who are displeased with excessive restrictions on how content can be used. A platform seller who tightly restricts the number of copies that can be made, or the length of time a copy can be used, or any of a number of things consumers want to do, can expect competition from a rival platform owner. Maybe not right away (such is the power of short-term lock-in effects, as described in Chapter 8). But eventually; before too long, usually.

What we have seen in the marketplace is that, once consumers understand that restrictions on content are one of the dimensions or parameters that are relevant in platform markets, rival platform sellers start to emphasize the advantages they offer with respect to use restrictions. A digital music subscription service that cuts off access to its library when the consumer stops paying may be met with advertising from another platform where consumers pay once and can use the music any way they want. A

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system that allows a limited number of copies of content will be met by competition from a platform with a higher limit. And so on. Over time, consumers begin to catch on: when they buy content for a platform, they are actually buying a product that has two distinct attributes, the content itself and a *set of rights* that goes along with it. Consumers begin to disaggregate the bundle they buy into its component parts. Competition heats up over the number and scope of rights that are sold along with the content. All of this competition depends on the fact that the content owners have a set of rights to begin with, and that they are free to carve up and sell these rights in any way they see fit. Flexibility, experimentation, competition—again, these are the features of the IP system that best protect consumers. Regulatory intervention may be necessary in extreme cases of persistent market power and very high switching costs; but overall, the basic structure of the IP system and the economic competition that surrounds it are the best protectors of consumer interests.

WHY RIGHTS “GOOD AGAINST THE WORLD”?

One variant on the ideas about IP reviewed in Chapter 8 holds that, in the online world, contracts will eventually displace property. Because it is easy to require people to agree to a contract to access content, there will no longer be a need for property rights. As I argued in Chapter 8, there is reason to doubt the accuracy of the property-displacement theory, because of the logistical problems of attaching an unbroken chain of contracts to every piece of digital content. To this largely descriptive point I add here a more normative one. Property does more than bind unknown individuals to one another. It also unites all individuals in a larger set of relations. Because of this, it can serve as more than a floor upon which individuals base bilateral relations, such as by a contract that builds on a preexisting property right. It can also act as a ceiling or limit on permissible bilateral deals. So, for example, through various doctrines the law can prohibit private parties from contracting away certain core rights, such as moral rights (in the case of creatives) or fair use rights (in the case of users or consumers). In this way, property can be seen not only to precede contract, but also to transcend or in some cases supersede contract. It is a right not only good against the world, but a set of duties that is good for the world as well.

Recognizing Dynamics and Rejecting the Environmental Analogy

The traditional justification for IP rights is that they create incentives. They hold out rewards designed to elicit desirable behavior from people,

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in the form of extra effort and creativity which, it is believed, will redound to the benefit of society. I have mixed this traditional idea into my treatment of IP while rarely featuring it. Partly this is because the theorists I admire build their theories primarily on illustrations of older types of assets, usually land and other tangible items. Partly it is because the language of incentives is closely tied to utilitarian modes of thought, which I have sought to avoid for the most part. And partly it is because the “incentive story” of IP protection, while it surely has more than a grain of truth, is notoriously difficult to prove persuasively.

Nevertheless, before I leave the topic of why IP rights make basic sense, I do want to say a few words about the incentive story. Or, to be more accurate, I want to say something about why the *dynamic perspective* out of which this story comes is so right when it comes to IP.

As Jeremy Waldron points out, from one point of view Locke’s emphasis on original appropriation makes the Lockean theory singularly irrelevant in the modern world, where many of the important assets (land, buildings, natural resources, and so forth) were long ago appropriated and where we are dealing in many instances now with the subsequent or downstream transfer of things that have been owned for a long time.² But as I noted in Chapter 2, when describing why Locke in some ways works better for IP than for traditional assets, this is not at all true in the world of IP. While the existing stock of creative works is no doubt very large, new works come into existence all the time. In this world, initial appropriation is not a historical curiosity; it happens every minute of every day.

My complaint about “the environmental analogy” in IP law is that it omits this crucial point. The world of created works is not a fixed corpus, like the natural world. While conservation is important, it is not and should not be the only focal point for the setting of IP policy. The stock of works relevant to IP grows every day, all the time. Conserving what is publicly available is important—that is why the nonremoval principle is included in Chapter 5. But preserving open access to the maximum number of created works is not and should not be the single goal of IP law. In a world where new material is constantly being created, there is less need to concentrate exclusively on preserving what came before. This is important, but not paramount, in a dynamic field such as IP. Conservation alone loses sight of a simple fact. Creative works do not come to us out of nowhere; the landscape is created, piece by piece, work by work, with great care, skill, and effort on the part of individual people. In a dynamic context where new material is constantly being added, maintaining access to the largest possible set of works (via an expansive legal public domain) is only one aspect of policy. Encouraging the next round of new additions is even more important.

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Balanced Rights: PreGrant and Postgrant Considerations

It is easy to advocate “balanced” property rights. Hardly anyone opposes it. Many judicial opinions and academic articles argue that the results they contend for will produce a more balanced IP system. Usually, however, the call for balance is just so much ballast thrown into an argument to recognize that (1) it should not be taken too far, or (2) it should be seen as but one part of a complex whole, offset and softened in some way by other results and doctrines in IP law.

I have tried my best in this book to go beyond this conventional appeal to the often vacuous notion of balance. I have tried not to even talk about balance, but instead to *show what it looks like*, in detail.

The normative theories of appropriation I examined in Part I are all aimed explicitly at constructing a balanced understanding of property rights. Locke’s labor-based justification for original appropriation is expansive, to be sure; but this aspect of his thought is offset with the equally expansive provisos, sufficiency, spoliation, and charity. The same with Kant: the fundamental need for individual property finds a counterweight in the Universal Principle, which bounds and restricts property at just as fundamental a level. And for Rawls, property plays only a small part in a comprehensive institutional setup whose primary purpose is to achieve distributive justice. For each of these theorists, property is an inherently balanced institution. And for good measure, I have tried in this book to integrate the three theories into a cohesive whole whose overall structure is even more balanced than each of them standing alone.

Granting Balanced Rights

Balance begins when rights do. In IP law, this means that limitations on rights, and counterbalancing rights for users and consumers, are built in from the outset. Locke’s provisos, the Kantian Principle, and of course Rawls’s whole approach to property ensure as much. In addition, much of the operational punch of the midlevel principles is aimed at maintaining balance. Nonremoval means that the public domain must never be depleted to provide a source of rights for creators. Efficiency compares the benefits of rights against their costs, and thus often points toward restrictions on rights that would be too costly for society. And most important, the proportionality principle has balance as its single-minded purpose. Granting rights that are commensurate with the achievement of valuable ends, but extend no further, is a shining exemplar of the idea of balance in action. Of the four

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midlevel principles described in Chapter 5, only the dignity principle can be said to favor one side of the IP equation, that of the creator. Yet even this one-sidedness is rooted in the benefits that creative people bestow on society, and so can be justified in a sense as a way to balance the debt society owes to those who labor to create things.

Postgrant Balancing

Compared to the initial grant of rights, where questions of balance are often extensively investigated, the postgrant stage is examined relatively little. But because of the many variables that affect how rights are actually deployed, many of the most important occasions for bringing balance occur after rights are granted. The dynamic nature of IP in practice makes the postgrant stage the crucial time for bringing balance to the IP system. Also, because it is difficult to assess the true impact of IP rights before they are granted and deployed, there are significant advantages to deferring questions of balance until this postgrant stage. Doing so prevents the pruning of IP rights based on speculative worries at the pregrant stage, and defers consideration until more information about the real impact of the rights has come to light.

What do I mean by postgrant balancing? Examples abound. Doctrines of estoppel, implied license, IP misuse, and infringement remedies are all applied in the postgrant phase of the life of an IP right. They are all capable, in one way or another, of achieving or restoring a measure of balance since they are all *responsive* to the way IP rights are being deployed in practice.

Take two specific instances as illustrations. In copyright law, it has become the rule that people who post copyrighted content on the Web are assumed to permit that content to be found, cataloged, indexed, and searched by systematic web-crawling and searching software. There are software settings a person may use to prevent crawling and indexing; but the burden is on the individual copyright holder to make these settings before posting his works. Neither copyright notice nor any other indirect objection to crawling and searching is enough to offset the default assumption that posted material can be crawled and indexed for search. This is a major adjustment in traditional notions of IP law, which presume that explicit legal permission is required prior to any copying or other infringing use of a work. But the new default makes sense in this setting. Courts have consistently held that the owner of a copyrighted work gives an implied license to the crawlers and indexers when he posts his work without indicating in software settings that he does not want it crawled. This might

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be described as an “opt-out” system, in which an owner of copyrighted works must now indicate explicit nonassent to what have become conventional online practices that technically implicate traditional copyright (that is, the right to prevent a copy from being made). But two things may be said briefly in defense of the new default. First, it makes sense given the enormous benefit derived from online crawling and indexing activities. Second, it is a far better alternative than trying to specify a new limitation in the initial grant of copyrights. The implied license concept emerged after the Internet had time to develop and crawling and indexing activities became established. It might well have been much more difficult to legislate an *ex ante* restriction or limitation in rights. Letting the practice emerge, then recognizing a reasonable and sensible scope for it via the implied license doctrine, seems to me a far superior approach to copyright policy in this and many other cases.

We can also consider another instance, this one from patent law. A high degree of anxiety has attended the issue of patents that cover all or part of a widely shared technological standard. Patented formats, interfaces, and other standardized technological components raise difficult questions about the need to balance incentives to innovate against the benefits of shared access or interoperability. The exclusive force inherent in patents makes some observers nervous; they worry that patents on standards may give their owners excessive leverage over those needing or wanting access to a widely used standard technology. One solution, as always, is to restrict patents with special potential to disrupt interoperability. But a superior solution, I think, is to put in place doctrines that prevent strategic misuse of standards-related patents. The advantage, as with the implied copyright licenses described above, is that this solution does not overreach. It saves the cost and controversy of defining at the outset which patents might influence interoperability. Instead, by its terms it applies only when patents are actually being used to thwart reasonable consumers’ expectations—such as when a patent holder reneges on an earlier pledge not to enforce her patents, or when patents are hidden from sight during group standard-setting exercises, and later sprung like a trap on the unwary adopters of a standard.

My Favorite Normative Theories, and Why They Matter

In the Introduction I explained how I moved from a conventional utilitarian understanding of IP rights to something else, something based on the

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nonutilitarian philosophical ideas of Locke, Kant, and Rawls. Though, as I said in the Introduction and tried to illustrate in Chapter 5, you need not share my views about the correct ultimate normative foundations of IP law, I have tried to show why I came to reject the conventional view in favor of the foundational ideas of the three philosophers just mentioned. I hope that in the process I may have convinced you that there is something valuable in these alternative views as well.

What do I find so appealing in the theories of Locke, Kant, and Rawls? Let me take each in turn. Locke has a simple but convincing story about initial appropriation, the conditions under which property rights originally arise. Kant understands ownership to be crucial to the development of a person's full potential, which involves both extensive interaction with objects in the environment and also persistent rights over those objects, so that the individual can place his unique stamp on them. And for Rawls, property fits into the overall scheme of a fair and just society, taking its place alongside other institutions and rights that guarantee an equal chance at self-fulfillment to all citizens.

Property for Locke and Kant shares a critical feature that for me makes these theorists refreshing and indispensable when thinking about IP rights. They both connect property rights with the formation of government, the founding of civil society. This is about as far from much contemporary IP theory as it gets. For many today, IP retains at best a precarious toehold in the edifice of government policies. It is thought to be archaic, partly to mostly irrelevant, perhaps even a retrograde institution. What a difference in perspective to start instead from a theory that property—including, naturally, IP—is at the very center of state formation, and thus of the state itself. Locke emphasizes the priority and fundamental nature of initial claims, and the voluntary formation of governments to protect and enforce them. Kant says that the need for rights over objects that extend in time and space is the basic, primitive impetus behind state formation. I argued at length in Chapters 2 and 3 that these ideas, formed in an era when property applied mostly to tangible items, lose nothing in transit when applied to modern economic conditions, where IP rights are of paramount importance. The same need for equilibrium between individual autonomy and the rights of others that prevailed when Locke and Kant were writing still prevails today. Property is still a large piece of the puzzle. Theories that understand the centrality of property, and the ways it can be structured so as to advance and maintain a social equipoise, are therefore just as useful today.

Despite the basic similarities, however, there are of course also major differences between the eighteenth- and nineteenth-century scene and present

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conditions. One of the most important is the far bigger role that large private corporations play now as compared to earlier times. All the talk of individual autonomy in the works of Locke and Kant, and how the rights and duties of others counterbalance restrain autonomy, might appear tangential or even hollow in light of the rise of large corporate power. As I argued in Chapter 7, there is surely something to this; where, as is often the case today, large corporate entities acquire, hold, and deploy many of the works covered by IP rights, property surely has a different impact and a different set of meanings than it did historically. The tight connection between robust property rights and wide-ranging individual autonomy is obviously moderated, to at least some degree, when large corporations mediate between individuals and the direct ownership of property rights over their works. Yet as I explained in Chapter 7, the fact that there is no longer quite a short, tight line between creative professionals and the unfettered right to control their works does not mean that IP is irrelevant to the professional prospects or career discretion of the creative professional. Not at all. Large corporate entities now loom large in the industrial ecosystem surrounding many people who create things for a living. But these entities do not always work at cross-purposes with individual creators and small creative teams. In fact, large companies not only employ many creatives, they also constitute a vital outlet for the work product of many individuals and small teams. Corporate ownership, and the presence of large corporate entities generally, does not always replace opportunities for individual ownership and autonomy; it often supports or creates those opportunities as well. Thus the pro-autonomy effect of granting property rights may at times be more muted in tone than if all rights were held directly by individuals and small entities. But large entities are a long way from completely extinguishing the light of individual creativity and professional freedom. They also contribute to it as well.

Autonomy in Action

The foundational normative theories of Chapters 2 and 3 can be of great help in sorting through complex issues of contemporary IP law. For example, as I emphasized in Chapter 8, it is right to privilege original creators at the expense of those who would reuse or remix original creative works. The point is not that remixers are not original and creative; many surely are. It is just that IP law is designed to honor and reward individual creators. Remixers, at least sometimes, take as their starting point original works first created by someone else. This, and not a lack of creativity, is what earns them the second-tier status I have assigned to them. As I men-

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tioned in Chapter 2, a primitive understanding of Locke's theory of appropriation might seem to imply that the labor of remixers earns them a property right. But this is not so. Locke says that a worker can contract away the right to own his work product, for example, when the worker agrees to labor on materials or assets already claimed and owned by someone else. In this way Locke signals his understanding that preexisting property claims sometimes take precedence over the labor-based claim of another. His rationale is quite clear: he says that allowing appropriation by the later laborer in this case would in effect work an injustice on the original property holder. And this his theory does not permit. Again, the point is not that the later laborer works less hard, or that his labor is necessarily less valuable in and of itself. It is just that labor cannot be used as a lever to pry away the rights of an owner. To allow it to do so would be to blur the line between appropriation and misappropriation, and this Locke says we must not do.

Kant's theory is in accord. For Kant, property is all about respect for autonomy. So he would almost surely reject the argument of the remixer that interference with the autonomy interest of the original creator is warranted by the rights of the remixer. Though he would no doubt credit the argument that the remixer wants to work his will on a found object, he would likely reject a property claim. To recognize such a strong claim by a remixer requires utter vitiation of the claims of the original content creator, and this Kant would surely disfavor.

In this case, as with other case studies in this book, I have tried to convince you that even though normative theory à la Locke, Kant, and Rawls is not essential to making policy and resolving controversies in IP law, it is very useful, and indeed superior to the alternatives. For my money, until utilitarian foundations become much more solid, these theorists provide the best account we have of why we have IP and what its basic structure ought to look like.

IP Is a Fair Institution

Like Locke and Kant, John Rawls believed that pure utilitarianism makes a poor theoretical foundation for a state. I wholeheartedly agree. The empty promise and ethical holes in the utilitarian theory of IP are just too glaring for my taste. Not that I did not give it a good try. I just came to see that as applied to IP law, utilitarian theory could not bear the load that has been assigned to it. At some point it became for me "the god that failed."

Rawls is brilliant at plucking the ideas of thinkers like Kant and placing them in a sweeping, society-wide panorama. Rawls thinks systematically,

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at the broad societal level, just as the utilitarians do; but he avoids the conceptual snares and ethical vacuum of utilitarian thinking. Rawls gives us a philosophy that systematically and broadly shows how to value each individual.

Despite its brilliance, undiluted Rawlsian theory has its problems too. Rawls is too skeptical of property, of strong private claims, to give it pride of place at the foundation of a fair state as he envisions it. In this, he is at odds with Locke, Kant, and others, who see property as a central rather than secondary institution. For my part, I sought to combine this traditional emphasis on the importance of property with Rawls's solicitude for social justice, particularly the plight of the most destitute.

The result, as I described in Chapter 4, is to reject both the "property first" and "property last" approaches. Instead I advocate something closer to "property, but." Yes, property: place strong individual claims over valuable assets at the center of the socioeconomic system. However: build in limits on these claims, and allow society its own claim to some of the proceeds from property, in the form of taxation. In IP as elsewhere, take the best of Locke and Kant and add in Rawls's concern with fairness. The result: a property-centric state that is also fair.

This may sound fine, as far as it goes. But clashes between people, want against want and need against need, are difficult to resolve at such a high level of abstraction. Put another way, Locke and Kant may be terrific, but how do they help us decide who should win a lawsuit under statute X brought by person A against person B? The answer of course is that theory at this level can only point us to general considerations, can only help restructure the issues in a way that gives us some insight into the deeper principles at stake in a specific dispute. At the end of the day, the ideas of Locke and Kant, tempered by Rawls's emphasis on social fairness, lead only to a high-level prescription: IP, and property in general, should be granted so as to promote autonomy, except where doing so would trample heavily on matters affecting other individuals or society as a whole.

It is wrong to say that application of this prescription is self-evident. A number of more granular principles (such as the midlevel principles of Chapter 5), and ultimately detailed statutes and doctrines, are required to carry it out. But it is also wrong to say that a general prescription for strong but fair IP rights is worthless. It can help organize and structure the more detailed, operational principles. And it can also remind us, amidst the clutter and welter of nits and specifics that make up the IP field, of the overall purpose and sustaining value of the IP system as a whole.

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The Transactional Burden of IP Rights:
There Is a Solution

The best way to encourage and reward creative activity is to permit individuals to control the assets they create. And the best way to do that is to grant property rights. With so much decentralized control, however, come problems of coordination and interaction. Many activities require that disparate assets be identified and brought together. If each asset—or worse, each of many components of each asset—is owned by a separate entity, the cost of assembling the needed components and assets may become exorbitant. All those private rights, all that individual autonomy, comes at a steep cost.

How do we bring harmony amidst so much autonomy? That is a central question in IP policy, and in the law of property generally. Is there a solution to the high transaction costs imposed when individual IP rights wind up in widely dispersed hands?

I contend there are multiple solutions to the problems created by IP rights. There are all sorts of ways to square the grant of individual property rights and the need to buy and assemble numerous assets and rights. Many were discussed in Chapter 7: integration, rights pooling, clearinghouses, pre-assignment norms and agreements. Diverse and very different operational features characterize these many forms. But beneath the diversity of form there is a consistency in design. They are all designed to ameliorate the transaction burden that follows from the granting of many discrete IP rights.

*Transactions: Flow and Movement across the
IP Landscape*

In the Introduction to this book I compared the sprawl and chaos of the modern IP landscape to the configuration of a rapidly growing city. We can extend the metaphor to embrace the transactional burden of multiple, dispersed IP rights, by analogizing the transactional mechanisms of Chapter 7 to the transportation and communication grid of a city. Just as a city's infrastructure ties together and makes coherent the city's various neighborhoods and locales, so too transaction-facilitating mechanisms speed the movement of IP rights from those who hold them to those who need them. The more conduits there are to channel transactions, and the lower the cost of navigating and engaging them, the greater will be the volume of transactions and the smaller the burden of many and widespread rights.

Of course, in a city, too much sprawl is considered a bad thing. Rational planning requires that some building locations be ruled out, and that policies such as “in-fill” will produce the desired level of population and structural

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density. So too with IP: requirements for awarding rights must be enforced, and it does not make sense to push out on every frontier just because there is a clamor for expansion.

Reducing the Transactional Burden

Nevertheless, the case for IP rights is a strong one. So we will often find ourselves in a situation where the transactional burden of awarding IP rights is worth it. The trick here, as I emphasized in Chapter 7, is to reduce this burden as far as possible. Creativity should be honored; property rights are the best way to do so. But the effect of implementing these rights, the cost to others of awarding and enforcing them—these we should strive to minimize, and even eliminate if possible. Indeed, the more a creator receives from the total cost burden of an IP right, the closer that right is to serving its basic social purpose. Wringing transaction costs out of the IP system is something that everyone—creators and consumers alike—can agree on completely.

The sprawling city of IP makes the best sense when IP rights are numerous, widely dispersed, and easily moved around. A healthy IP landscape will feature large, high-volume transactional mechanisms well populated by the flow of rights from owners to users. These IP aqueducts will ensure that the autonomy and independence of IP owners does not interfere unnecessarily with the needs of consumers and users. As explained in Chapter 7, the legal system ought to encourage private investment in these aqueducts as much as possible, and even kick in public resources when that will help. The result will be a well-functioning and well-balanced IP system, one that recognizes both the rights of creators and the needs of users.

If I had to reduce all this to a simple formula, it would look like this:

$$\text{Rights} + \text{Transactions} = \text{The Solution}$$

If we keep this basic guiding principle in mind, we can have a balanced and effective set of IP policies.

Some Final Thoughts

It takes courage to try to create something new, and even more courage to send it out into the world in hopes of a good reception. Any author, musician, songwriter, inventor, or designer can vouch for that. To me, IP rights represent an important token of respect and recognition for those souls

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brave enough to launch their creations out into the roiling sea in search of an audience or a market. These rights have a practical side too, of course; without them, these acts of bravery would often not add up financially. The prospect, or more often hope, of maybe making a living helps keep the creative class going. IP gives them a reason to believe that some day, for some of them anyway, a real career could be made by doing what they are best at.

There is no question that awarding IP rights costs something. Thomas Macauley's quote, no less accurate for being worn thin from overuse, says it all: copyright is a tax on readers for the benefit of writers. A commitment to IP reminds us to remember what we get in exchange for this tax. To paraphrase another quote, this one from Oliver Wendell Holmes, IP taxes are the price we pay for a creative civilization. To me, the cost is very much worth it.

In paying the IP tax, we recognize our interdependence. Creative people need to make a decent living. Consumers and users of creative works need dedicated professionals to keep doing what they do. Big anonymous companies may take in our money, but it does not stay there, at least not all of it. Some of it—enough to make a difference, we hope—finds its way into the hands of those whose works we use and enjoy. This all happens because IP rights are awarded by the government. The state mediates between creators and consumers. State-backed IP rights link creative people with those who enjoy their works. In this way, private ownership—which appears at times the opposite of a public-spirited institution, and seems even in some ways selfish—turns out to be just one part of a larger, interdependent structure. IP rights do not cut us off from one another; they are an instrument by which we meet each others' needs. It is this ability to unify, to knit together, that ultimately pushes to the forefront when we set ourselves the difficult but rewarding task of justifying intellectual property.

brand companies in not enforcing pharmaceutical patent protection in Africa”; “strategic philanthropy”; “burnish their image.”).

27. Doha Development Agenda, “Decision Removes Final Patent Obstacle to Cheap Drug Imports,” (August 30, 2003), avail. at http://www.wto.org/english/news_e/preso3_e/pr350_e.htm (applauding administrative decision “allowing poorer countries to make full use of the flexibilities in the WTO’s intellectual property rules in order to deal with the diseases that ravage their people.”).
28. \$2.5 billion was invested in neglected diseases in 2008, led by NIH and the Gates Foundation; private pharmaceutical firms were the third-leading source of funding. Center for the Study of Drug Development, Tufts University, “Neglected Diseases in the Developing World: Progress, Current Challenges, and Promising Approaches,” Summary Proceedings (October 16, 2009), at 1, avail. at <http://csdd.tufts.edu/files/uploads/ndfinproceed.pdf>.

Chapter 10. Conclusion: The Future of Property

1. The *Oxford English Dictionary* defines one sense of the word “exclude”—that pertaining to a “monopoly or grant”—as “[e]xcluding all other persons from the rights conferred. Hence of a right, privilege, possession, quality, etc.: In which others have no share. . . .” *Oxford English Dictionary* (electronic version) (Oxford: Oxford Univ. Press, 1989), at “Exclusive.”
2. Jeremy Waldron, *The Right to Private Property* 258 (New York: Oxford Univ. Press, 1988).