

NEW ESSAYS
IN THE LEGAL
AND POLITICAL
THEORY OF
PROPERTY

Edited by
STEPHEN R. MUNZER

CAMBRIDGE STUDIES IN
PHILOSOPHY AND LAW

Theories of Intellectual Property

WILLIAM FISHER

The term “intellectual property” refers to a loose cluster of legal doctrines that regulate the uses of different sorts of ideas and insignia. The law of copyright protects various “original forms of expression,” including novels, movies, musical compositions, and computer software programs. Patent law protects inventions and some kinds of discoveries. Trademark law protects words and symbols that identify for consumers the goods and services manufactured or supplied by particular persons or firms. Trade-secret law protects commercially valuable information (soft-drink formulas, confidential marketing strategies, etc.) that companies attempt to conceal from their competitors. The “right of publicity” protects celebrities’ interests in their images and identities.

The economic and cultural importance of this collection of rules is increasing rapidly. The fortunes of many businesses now depend heavily on intellectual-property rights. A growing percentage of the legal profession specializes in intellectual-property disputes. And lawmakers throughout the world are busily revising their intellectual-property laws.¹

Partly as a result of these trends, scholarly interest in the field has risen dramatically in recent years. In law reviews and in journals of economics and philosophy, articles deploying “theories” of intellectual property have proliferated. This essay canvasses those theories, evaluates them, and considers the roles they do and ought to play in lawmaking.

This essay has benefited substantially from the comments of Charles Fried, Paul Goldstein, Jim Harris, Ned Hettinger, Edmund Kitch, Ed McCaffery, Stephen Munzer, Samuel Oddi, J. E. Penner, John T. Sanders, F. M. Scherer, Seanna Shiffrin, Stewart Sterk, and a generous group of anonymous outside readers.

¹ The history of these doctrines in the United States – and possible reasons for their growing importance – are considered in William Fisher, “Geistiges Eigentum – ein ausufernder Rechtsbereich: Die Geschichte des Ideenschutzes in den Vereinigten Staaten,” in *Eigentum im internationalen Vergleich* (Göttingen: Vandenhoeck and Ruprecht, 1999) (available in English at http://www.law.harvard.edu/Academic_Affairs/coursepages/tfisher/iphistory.html).

I. A Preliminary Survey

Most of the recent theoretical writing consists of struggles among and within four approaches. The first and most popular of the four employs the familiar utilitarian guideline that lawmakers' beacon when shaping property rights should be the maximization of net social welfare. Pursuit of that end in the context of intellectual property, it is generally thought, requires lawmakers to strike an optimal balance between, on one hand, the power of exclusive rights to stimulate the creation of inventions and works of art and, on the other, the partially offsetting tendency of such rights to curtail widespread public enjoyment of those creations.

A good example of scholarship in this vein is William Landes's and Richard Posner's essay on copyright law. The distinctive characteristics of most intellectual products, Landes and Posner argue, are that they are easily replicated and that enjoyment of them by one person does not prevent enjoyment of them by other persons. Those characteristics in combination create a danger that the creators of such products will be unable to recoup their "costs of expression" (the time and effort devoted to writing or composing and the costs of negotiating with publishers or record companies), because they will be undercut by copyists who bear only the low "costs of production" (the costs of manufacturing and distributing books or CDs) and thus can offer consumers identical products at very low prices. Awareness of that danger will deter creators from making socially valuable intellectual products in the first instance. We can avoid this economically inefficient outcome by allocating to the creators (for limited times) the exclusive right to make copies of their creations. The creators of works that consumers find valuable – that is, for which there are not, in the opinions of consumers, equally attractive substitutes – will be empowered thereby to charge prices for access to those works substantially greater than they could in a competitive market. All of the various alternative ways in which creators might be empowered to recover their costs, Landes and Posner contend, are, for one reason or another, more wasteful of social resources. This utilitarian rationale, they argue, should be – and, for the most part, has been – used to shape specific doctrines within the field.²

A related argument dominates the same authors' study of trademark law. The primary economic benefits of trademarks, they contend, are (1) the reduction of consumers' "search costs" (because it's easier to pick a box of "Cheerios" off the grocery shelf than to read the list of ingredients on each container, and because consumers can rely upon their prior experiences with

2 William Landes and Richard Posner, "An Economic Analysis of Copyright Law," *Journal of Legal Studies*, 18 (1989): 325. This argument is derived in substantial part from Jeremy Bentham, *A Manual of Political Economy* (New York: Putnam, 1839); John Stuart Mill, *Principles of Political Economy*, 5th ed. (New York: Appleton, 1862); and A. C. Pigou, *The Economics of Welfare*, 2d ed. (London: Macmillan and Co., 1924).

various brands of cereal when deciding which box to buy in the future) and (2) the creation of an incentive for businesses to produce consistently high-quality goods and services (because they know that their competitors cannot, by imitating their distinctive marks, take a free ride on the consumer good will that results from consistent quality). Trademarks, Landes and Posner claim, also have an unusual ancillary social benefit: they improve the quality of our language. By increasing our stock of nouns and by “creating words or phrases that people value for their intrinsic pleasingness as well as their information value,” they simultaneously economize on communication costs and make conversation more pleasurable. To be sure, trademarks can sometimes be socially harmful – for example, by enabling the first entrant into a market to discourage competition by appropriating for itself an especially attractive or informative brand name. Awareness of these benefits and harms should (and usually does), Landes and Posner claim, guide legislators and judges when tuning trademark law; marks should be (and usually are) protected when they are socially beneficial and not when they are, on balance, deleterious.³

The second of the four approaches that currently dominate the theoretical literature springs from the propositions that a person who labors upon resources that are either unowned or “held in common” has a natural property right to the fruits of his or her efforts – and that the state has a duty to respect and enforce that natural right. These ideas, originating in the writings of John Locke, are widely thought to be especially applicable to the field of intellectual property, where the pertinent raw materials (facts and concepts) do seem in some sense to be “held in common” and where labor seems to contribute so importantly to the value of finished products.⁴

A good illustration of this perspective is Robert Nozick’s brief but influential discussion of patent law in *Anarchy, State, and Utopia*.⁵ After associating himself with Locke’s argument, Nozick turns his attention to Locke’s famously ambiguous “proviso” – the proposition that a person may legitimately acquire property rights by mixing his labor with resources held “in common” only if, after the acquisition, “there is enough and as good left in common for others.”⁶ Nozick contends that the correct interpretation of this limitation (“correct” in the senses (a) that it probably corresponds to Locke’s original intent and (b)

3 William Landes and Richard Posner, “Trademark Law: An Economic Perspective,” *Journal of Law & Economics*, 30 (1987): 265. Other works that address trademark law in similar terms include Nicholas Economides, “The Economics of Trademarks,” *Trademark Reporter*, 78 (1988): 523–39 and Daniel McClure, “Trademarks and Competition: The Recent History,” *Law and Contemporary Problems*, 59 (1996): 13–43.

4 See, for example, Justin Hughes, “The Philosophy of Intellectual Property,” *Georgetown Law Journal*, 77 (1988): 287, at 299–330. These initial impressions are examined in more detail in Section III below.

5 Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 178–82.

6 John Locke, *Two Treatises of Government* (P. Laslett, ed., Cambridge: Cambridge University Press, 1970), *Second Treatise*, Sec. 27.

that, in any event, it is entailed by “an adequate theory of justice”) is that the acquisition of property through labor is legitimate if and only if other persons do not suffer thereby any net harm. “Net harm” for these purposes includes such injuries as being left poorer than they would have been under a regime that did not permit the acquisition of property through labor or a constriction of the set of resources available for their *use* – but does not include a diminution in their opportunities to acquire property rights in unowned resources by being the first to labor upon them. Construed in this fashion, the Lockean proviso is not violated, Nozick argues, by the assignment of a patent right to an inventor because, although other persons’ access to the invention is undoubtedly limited by the issuance of the patent, the invention would not have existed at all without the efforts of the inventor. In other words, consumers are helped, not hurt, by the grant of the patent. Nozick contends, however, that fidelity to Locke’s theory would mandate two limitations on the inventor’s entitlements. First, persons who subsequently invented the same device independently must be permitted to make and sell it. Otherwise the assignment of the patent to the first inventor would leave them worse off. Second, for the same reason, patents should not last longer than, on average, it would have taken someone else to invent the same device had knowledge of the invention not disabled them from inventing it independently. Although Nozick may not have been aware of it, implementation of the first of these limitations would require a substantial reform of current patent law – which, unlike copyright law, does not contain a safe harbor for persons who dream up the same idea on their own.

The premise of the third approach – derived loosely from the writings of Kant and Hegel – is that private property rights are crucial to the satisfaction of some fundamental human needs; policymakers should thus strive to create and allocate entitlements to resources in the fashion that best enables people to fulfill those needs. From this standpoint, intellectual property rights may be justified either on the ground that they shield from appropriation or modification artifacts through which authors and artists have expressed their “wills” (an activity thought central to “personhood”) or on the ground that they create social and economic conditions conducive to creative intellectual activity, which in turn is important to human flourishing.⁷

In perhaps the most fully developed argument of this sort, Justin Hughes derives from Hegel’s *Philosophy of Right* the following guidelines concerning the proper shape of an intellectual-property system: (a) We should be more willing to accord legal protection to the fruits of highly expressive intellectual activities, such as the writing of novels, than to the fruits of less expressive activities, such as genetic research. (b) Because a person’s “persona” – his “public image, including his physical features, mannerisms, and history” – is

⁷ See Margaret Jane Radin, *Reinterpreting Property* (Chicago: University of Chicago Press, 1993); Jeremy Waldron, *The Right to Private Property* (Oxford: Clarendon, 1988).

an important “receptacle for personality,” it deserves generous legal protection, despite the fact that ordinarily it does not result from labor. (c) Authors and inventors should be permitted to earn respect, honor, admiration, and money from the public by selling or giving away copies of their works, but should not be permitted to surrender their right to prevent others from mutilating or misattributing their works.⁸

The last of the four approaches is rooted in the proposition that property rights in general – and intellectual-property rights in particular – can and should be shaped so as to help foster the achievement of a just and attractive culture. Theorists who work this vein typically draw inspiration from an eclectic cluster of political and legal theorists, including Jefferson, the early Marx, the Legal Realists, and the various proponents (ancient and modern) of classical republicanism.⁹ This approach is similar to utilitarianism in its teleological orientation, but dissimilar in its willingness to deploy visions of a desirable society richer than the conceptions of “social welfare” deployed by utilitarians.

A provocative example may be found in Neil Netanel’s recent essay, “Copyright and a Democratic Civil Society.” Netanel begins by sketching a picture of “a robust, participatory, and pluralist civil society,” teeming with “unions, churches, political and social movements, civic and neighborhood associations, schools of thought, and educational institutions.” In this world, all persons would enjoy both some degree of financial independence and considerable responsibility in shaping their local social and economic environments. A civil society of this sort is vital, Netanel claims, to the perpetuation of democratic political institutions. It will not, however, emerge spontaneously; it must be nourished by government. In two ways, copyright law can help foster it.

The first is a production function. Copyright provides an incentive for creative expression on a wide array of political, social, and aesthetic issues, thus bolstering the discursive foundations for democratic culture and civic association. The second function is structural. Copyright supports a sector of creative and communicative activity that is relatively free from reliance on state subsidy, elite patronage, and cultural hierarchy.

Promotion of these two objectives does not require that we retain all aspects of the current copyright system. On the contrary, Netanel suggests, they would be advanced more effectively by a copyright regime trimmed along the following lines: The copyright term should be shortened, thereby increasing the size

⁸ See Hughes, “Philosophy of Intellectual Property,” at 330–50.

⁹ See, for example, James Harrington, *Oceana* (Westport, Conn.: Hyperion Press, 1979); Thomas Jefferson, *Notes on the State of Virginia* (New York: Norton, 1972); Karl Marx, *Economic and Philosophic Manuscripts of 1844* (New York: International Publishers, 1964); Morris Cohen, “Property & Sovereignty,” *Cornell Law Quarterly*, 13 (1927): 8; Frank Michelman, “Law’s Republic,” *Yale Law Journal*, 97 (1988): 1493; William Fisher, Morton Horwitz, and Thomas Reed, eds., *American Legal Realism* (New York: Oxford University Press, 1993).

of the “public domain” available for creative manipulation. Copyright owners’ authority to control the preparation of “derivative works” should be reduced for the same reason. Finally, compulsory licensing systems should be employed more frequently to balance the interests of artists and “consumers” of their works.¹⁰

Other writers who have approached intellectual-property law from similar perspectives include Keith Aoki, Rosemary Coombe, Niva Elkin-Koren, Michael Madow, and myself.¹¹ As yet, however, this fourth approach is less well established and recognized than the other three. It does not even have a commonly accepted label. To describe a closely analogous perspective developed in the context of land law, Greg Alexander suggests the term “Proprietarian” theory.¹² I find more helpful the phrase, “Social Planning Theory.”

II. Explaining the Pattern

Those, then, are (in order of prominence and influence) the four perspectives that currently dominate theoretical writing about intellectual property: Utilitarianism; Labor Theory; Personality Theory; and Social Planning Theory. What accounts for the influence of these particular approaches? In large part, their prominence derives from the fact that they grow out of and draw support from lines of argument that have long figured in the raw materials of intellectual property law – constitutional provisions, case reports, preambles to legislation, and so forth.

The dependence of theorists on ideas formulated and popularized by judges, legislators, and lawyers is especially obvious in the case of utilitarianism. References to the role of intellectual-property rights in stimulating the production of socially valuable works riddle American law. Thus, for example, the constitutional provision upon which the copyright and patent statutes rest indicates that the purpose of those laws is to provide incentives for creative intellectual efforts that will benefit the society at large.¹³ The United States

10 “Copyright and a Democratic Civil Society,” *Yale Law Journal*, 106 (1996): 283. See also *idem.*, “Asserting Copyright’s Democratic Principles in the Global Arena,” *Vanderbilt Law Review*, 51 (1998): 217–329.

11 See, for example, Rosemary J. Coombe, “Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue,” *Texas Law Review*, 69 (1991): 1853; Niva Elkin-Koren, “Copyright Law and Social Dialogue on the Information Superhighway: The Case Against Copyright Liability of Bulletin Board Operators,” *Cardozo Arts & Entertainment Law Journal*, 13 (1995): 345; Michael Madow, “Private Ownership of Public Image: Popular Culture and Publicity Rights,” *California Law Review*, 81 (1993): 125; William Fisher, “Reconstructing the Fair Use Doctrine,” *Harvard Law Review*, 101 (1988): 1659–795, at 1744–94.

12 Gregory S. Alexander, *Commodity and Propriety* (Chicago: University of Chicago Press, 1997), p. 1.

13 Article I, Section 8, Clause 8 of the United States Constitution empowers Congress “to Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”

Supreme Court, when construing the copyright and patent statutes, has repeatedly insisted that their primary objective is inducing the production and dissemination of works of the intellect.¹⁴ A host of lower courts have agreed.¹⁵

References to the importance of rewarding authors and inventors for their labor are almost as common. Proponents of legislative extensions of copyright or patent protection routinely make arguments like: "Our American society is founded on the principle that the one who creates something of value is entitled to enjoy the fruits of his labor."¹⁶ The United States Supreme Court often uses a similar vocabulary. For example, Justice Reed ended his opinion in *Mazer v. Stein* with the solemn statement: "Sacrificial days devoted to . . . creative activities deserve rewards commensurate with the services rendered."¹⁷ Lower court opinions and appellate arguments frequently take the same tack.¹⁸

Until recently, the personality theory had much less currency in American law. By contrast, it has long figured very prominently in Europe. The French and German copyright regimes, for example, have been strongly shaped by the writings of Kant and Hegel. This influence is especially evident in the generous protection those countries provide for "moral rights" – authors' and artists' rights to control the public disclosure of their works, to withdraw their works from public circulation, to receive appropriate credit for their creations, and above all to protect their works against mutilation or destruction. This cluster of entitlements has traditionally been justified on the ground that a work of art embodies and helps to realize its creator's personality or will. In the past two decades, "moral-rights" doctrine – and the philosophic perspective on which it rests – have found increasing favor with American lawmakers, as evidenced most clearly by the proliferation of state art-preservation statutes and the recent adoption of the federal Visual Artists Rights Act.¹⁹

14 See, for example, *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127–28 (1932); *Kendall v. Winsor*, 62 U.S. (21 How.) 322, 327–28 (1858).

15 See, for example, *Hustler Magazine v. Moral Majority*, 796 F.2d 1148, 1151 (9th Cir. 1986); *Consumers Union of United States v. General Signal Corp.*, 724 F.2d 1044, 1048 (2d Cir. 1983).

16 Testimony of Elizabeth Janeway, Copyright Law Revision: Hearings on H.R. 4347, 5680, 6831, 6835 Before Subcomm. No. 3 of the House Comm. on the Judiciary, 89th Cong., 1st Sess. (1965), reprinted in George S. Grossman, *Omnibus Copyright Revision Legislative History*, vol. 5 (1976), p. 100.

17 347 U.S. 201, 219 (1954). For a similar argument in the patent context, see *Motion Picture Patents Co. v. Universal Film Manufacturing Co.*, 243 U.S. 502 (1917).

18 Many examples are set forth in Stewart E. Sterk, "Rhetoric and Reality in Copyright Law," *Michigan Law Review*, 94 (1996): 1197; Alfred C. Yen, "Restoring the Natural Law: Copyright as Labor and Possession," *Ohio State Law Journal*, 51 (1990): 517; and Lloyd L. Weinreb, "Copyright for Functional Expression," *Harvard Law Review*, 111 (1998): 1149–254, at 1211–14.

19 See Thomas Cotter, "Pragmatism, Economics, and the *Droit Moral*," *North Carolina Law Review*, 76 (1997): 1, at 6–27; Jeri D. Yonover, "The 'Dissing' of Da Vinci: The Imaginary Case of Leonardo v. Duchamp: Moral Rights, Parody, and Fair Use," *Valparaiso University Law Review*, 29 (1995): 935–1004.

Finally, deliberate efforts to craft or construe rules in order to advance a vision of a just and attractive culture – the orientation that underlies Social Planning Theory – can be found in almost all of the provinces of intellectual property law. Such impulses underlie, for example, both the harsh response of most courts when applying copyright or trademark law to scatological humor and the generally favorable treatment they have accorded criticism, commentary, and education. Social-planning arguments also figure prominently in current debates concerning the appropriate scope of intellectual-property rights on the Internet.²⁰

To summarize, one source of the prominence of utilitarian, labor, personality, and social-planning theories in recent theoretical literature is the strength of similar themes in judicial opinions, statutes, and appellate briefs. But two circumstances suggest that such parallelism and resonance cannot fully explain the configuration of contemporary theories. First, there exist in the materials of intellectual-property law several important themes that have not been echoed and amplified by a significant number of theorists. Many American courts, for example, strive when construing copyright or trademark law to reflect and reinforce custom – either customary business practices or customary standards of “good faith” and “fair dealing.”²¹ That orientation has deep roots both in the common law in general and in the early-twentieth-century writings of the American Legal Realists.²² Yet, few contemporary intellectual-property theorists pay significant attention to custom.²³ Much the same can be said of concern for privacy interests. Long a major concern of legislators and courts,²⁴ protection of privacy has been given short shrift by contemporary American theorists.

The second circumstance is that, in legislative and judicial materials, arguments of the various sorts we have been considering typically are blended. Here, for example, is the preamble to Connecticut’s first copyright statute:

Whereas it is perfectly agreeable to the principles of natural equity and justice, that every author should be secured in receiving the profits that may arise from the sale of his works, and such security may encourage men of learning and genius to publish their writings; which may do honor to their country, and service to mankind. . . .²⁵

20 See Niva Elkin-Koren, “Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace,” *Cardozo Arts & Entertainment Law Journal*, 14 (1996): 215.

21 *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 563 (1985). See also *Time v. Bernard Geis Associates*, 293 F.Supp. 130, 146 (S.D.N.Y. 1968); *Rosemont Enterprises v. Random House*, 366 F.2d 303, 307 (2d Cir. 1966); *Holdridge v. Knight Publishing Corp.*, 214 F.Supp. 921, 924 (S.D.Cal. 1963).

22 See Fisher et al., *American Legal Realism*, p. 170.

23 But cf. Lloyd L. Weinreb, “Fair’s Fair: A Comment on the Fair Use Doctrine,” *Harvard Law Review*, 103 (1990): 1137–61.

24 See *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 564 (1985); *Salinger v. Random House*, 811 F.2d 90, 97 (2d Cir. 1987).

25 1783 Conn. Pub. Acts Jan. Sess., reprinted in U.S. Copyright Office, *Copyright Enactments of the United States, 1783–1906*, at 11 (2nd ed., Washington: Government Printing Office, 1906).

Two hundred years later, in the *Harper & Row* case, the Supreme Court took a similar line:

We agree with the Court of Appeals that copyright is intended to increase and not to impede the harvest of knowledge. But we believe the Second Circuit gave insufficient deference to the scheme established by the Copyright Act for fostering the original works that provide the seed and substance of this harvest. The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors.²⁶

Fairness, incentives, culture-shaping – in these and countless other passages, they swirl together. In contemporary theoretical writing, by contrast, such themes are typically disentangled and juxtaposed.

How can we account for these two respects in which intellectual-property theory deviates from extant legal materials? The answer seems to be that the theorists are seeing the law through glasses supplied by political philosophy. In contemporary philosophic debates, natural law, utilitarianism, and theories of the good are generally seen as incompatible perspectives.²⁷ It is not surprising that legal theorists, familiar with those debates, should separate ideas about intellectual property into similar piles.

One additional circumstance also likely plays a part: Many contemporary *intellectual-property* theorists also participate in similar arguments about the appropriate shape of property law in general. In that arena, there is now a well-established canon of rival perspectives, again drawn in large part from Anglo-American political philosophy. Labor theory, utilitarianism, and personality theory are the primary contenders.²⁸ We should not be surprised to see them replicated in the context of intellectual property.

III. Gaps, Conflicts, and Ambiguities

Lawmakers are confronted these days with many difficult questions involving rights to control information. Should the creators of electronic databases be able to demand compensation from users or copyists? What degree of similarity between two plots or two fictional characters should be necessary to trigger a finding that one infringes the other? Should computer software be

26 *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 545–46 (1985).

27 The pertinent literature is enormous. A few entries, suggesting the importance of the divisions drawn in the text, are H. L. A. Hart, "Between Utility and Rights," *Columbia Law Review*, 79 (1979): 828; Michael Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982).

28 For discussions and illustrations of the canon, see J. Roland Pennock and John W. Chapman, eds., *Property* (Nomos XXII) (New York: New York University Press, 1980); Alan Ryan, *Property and Political Theory* (Oxford: Blackwell, 1984); Waldron, *Right to Private Property*. To be sure, not all property theorists are inclined to maintain the traditional boundaries between natural law, utilitarianism, and theories of the good. For one prominent pluralist theory, see Stephen R. Munzer, *A Theory of Property* (Cambridge: Cambridge University Press, 1990).

governed by copyright law, patent law, or a *sui generis* legal regime? Should we expand or contract intellectual-property protection for the configurations of consumer products? Should time-sensitive information (e.g., sports scores, news, financial data) gathered by one party be shielded from copying by others? Many other, similar problems demand attention.

The proponents of all four of the leading theories of intellectual property purport to provide lawmakers with answers to questions of these sorts. In other words, they understand their arguments to be, not merely systematic accounts of the impulses that have shaped extant legal doctrines, but guides that legislators and judges can use in modifying or extending those doctrines in response to new technologies and circumstances. Unfortunately, all four theories prove in practice to be less helpful in this regard than their proponents claim. Ambiguities, internal inconsistencies, and the lack of crucial empirical information severely limit their prescriptive power. Subsections III.A. – III.D., below, explore those limitations. Section IV contends that the theories nevertheless have considerable value.

A.

The first task in developing a utilitarian theory of intellectual property is translating the Benthamite ideal of the “greatest good of the greatest number” into a more precise and administrable standard. Most contemporary writers select for this purpose either the “wealth-maximization” criterion, which counsels lawmakers to select the system of rules that maximizes aggregate welfare measured by consumers’ ability and willingness to pay for goods, services, and conditions,²⁹ or the “Kaldor–Hicks” criterion, under which one state of affairs is preferred to a second state of affairs if, by moving from the second to the first, the “gainer” from the move *can*, by a lump-sum transfer, compensate the “loser” for his loss of utility and still be better off.³⁰

This preliminary analytical maneuver is vulnerable to various objections. First, the wealth-maximization and Kaldor–Hicks criteria, though similar, are not identical, and much may turn on the choice between them. Next, skeptics commonly object to both criteria on the grounds that they ignore the incommensurability of utility functions and bias analysis in favor of the desires of the rich, who, on average, value each dollar less than the poor. Finally, some economists and political theorists who draw inspiration from the rich tradition of utilitarianism contend that both criteria (but especially the first) define social welfare too narrowly and would prefer a more encompassing analytical net. But because these objections are by no means limited to the field of intellectual

29 For more thorough discussion of this standard, see Richard Posner, *Economic Analysis of Law* (3rd ed., Boston: Little, Brown, 1986), pp. 11–15.

30 See Nicholas Kaldor, “Welfare Propositions in Economics and Interpersonal Comparisons of Utility,” *Economic Journal*, 69 (1939): 549–52.

property and because they have been well aired elsewhere, I will not pause to explore them here.³¹

Assume that we are comfortable with at least one of these criteria as our beacon. How might it be applied to intellectual-property law? What system of rules, in other words, will most improve social welfare? It turns out that there are at least three general ways in which we might try to answer that question:³²

1. *Incentive Theory.* The first and most common of the three approaches is well illustrated by William Nordhaus' classic treatment of patent law.³³ Nordhaus was primarily concerned with determining the optimal duration of a patent, but his analysis can be applied more generally. Each increase in the duration or strength of patents, he observed, stimulates an increase in inventive activity. The resultant gains to social welfare include the discounted present value of the consumer surplus and producer surplus associated with the distribution of the intellectual products whose creation is thereby induced. At the same time, however, social welfare is reduced by such things as larger administrative costs and larger deadweight losses associated with the higher prices of intellectual products that would have been created even in the absence of the enhanced incentive. Ideally, patent duration or strength should be increased up to the point where the marginal benefits equal the marginal costs.³⁴

2. *Optimizing Patterns of Productivity.* Many years ago, Harold Demsetz argued that the copyright and patent systems play the important roles of letting

- 31 For explorations of these difficulties, see, for example, C. Edwin Baker, "Starting Points in Economic Analysis of Law," *Hofstra Law Review*, 8 (1980): 939, at 966–72; Duncan Kennedy, "Cost-Benefit Analysis of Entitlement Problems: A Critique," *Stanford Law Review*, 33 (1981): 387; Ronald Dworkin, "Is Wealth a Value?," *Journal of Legal Studies*, 9 (1980): 191; Louis Kaplow and Steven Shavell, "Principles of Fairness versus Human Welfare: On the Evaluation of Legal Policy," John M. Olin Foundation, Discussion Paper No. 277 (2000).
- 32 A thorough review of the many varieties of economic analysis may be found in Peter Menell, "Intellectual Property: General Theories," *Encyclopedia of Law & Economics* (forthcoming 2000).
- 33 William D. Nordhaus, *Invention, Growth, and Welfare: A Theoretical Treatment of Technological Change* (Cambridge: M.I.T. Press, 1969).
- 34 Among the lessons that Nordhaus derived from his analysis are that "commodities that have lower elasticity of demand have higher optimal [patent] lives" and that "patents for industries having more progressive (or easier) invention should have shorter lives." *Ibid.*, p. 79.

A wide array of essays in both the patent and copyright fields attempt to refine or apply the general approach developed by Nordhaus. See, for example, Pankaj Tandon, "Optimal Patents with Compulsory Licensing," *Journal of Political Economy*, 90 (1982): 470–86; Richard Gilbert and Carl Shapiro, "Optimal Patent Protection and Breadth," *RAND Journal of Economics*, 21 (1990): 106–12; Paul Klemperer, "How Broad Should the Scope of Patent Protection Be?," *RAND Journal of Economics*, 21 (1990): 113–30; Landes and Posner, "Economic Analysis of Copyright Law"; William Fisher, "Reconstructing the Fair Use Doctrine," at 1698–1744; S. J. Liebowitz, "Copying and Indirect Appropriability: Photocopying of Journals," *Journal of Political Economy*, 93 (1985), 945; A. Samuel Oddi, "Beyond Obviousness: Invention Protection in the Twenty-First Century," *American University Law Review*, 38 (1989): 1097, at 1101–2, 1114–16; and Frederic M. Scherer, *Industrial Market Structure and Economic Performance* (2nd ed., Chicago: Rand McNally, 1980), pp. 439–58. The history of this perspective is traced in Gillian K. Hadfield, "The Economics of Copyright: An Historical Perspective," *Copyright Law Symposium (ASCAP)*, 38 (1992): 1–46.

potential producers of intellectual products know what consumers want and thus channelling productive efforts in directions most likely to enhance consumer welfare.³⁵ In the past decade, a growing group of theorists has argued that recognition of this function justifies expanding the copyright and patent systems. In Paul Goldstein's words:

The logic of property rights dictates their extension into every corner in which people derive enjoyment and value from literary and artistic works. To stop short of these ends would deprive producers of the signals of consumer preference that trigger and direct their investments.³⁶

Won't adoption of this strategy impede public dissemination of intellectual products? Not at all, say the proponents of this approach. Sales and licenses will ensure that goods get into the hands of people who want them and are able to pay for them. Only in the rare situations in which transaction costs would prevent such voluntary exchanges should intellectual-property owners be denied absolute control over the uses of their works – either through an outright privilege (such as the fair-use doctrine) or through a compulsory licensing system.³⁷

3. *Rivalrous Invention.* The final approach is related to but distinguishable from the second. Its objective is to eliminate or reduce the tendency of intellectual-property rights to foster duplicative or uncoordinated inventive activity. The foundation for this approach was laid by a group of economists, led by Yoram Barzel, who over the last three decades have explored the ways in which competition among firms complicates the impact of the patent system upon inventive activity.³⁸ This body of literature has sensitized legal theorists

35 See Harold Demsetz, "Information and Efficiency: Another Viewpoint," *Journal of Law and Economics*, 12 (1969): 1.

36 See Paul Goldstein, *Copyright's Highway* (New York: Hill & Wang, 1994), pp. 178–9.

37 See Wendy J. Gordon, "An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory," *Stanford Law Review*, 41 (1989): 1343, at 1439–49; Robert P. Merges, "Are You Making Fun of Me?: Notes on Market Failure and the Parody Defense in Copyright," *American Intellectual Property Law Association Quarterly Journal*, 21 (1993): 305, at 306–7; Netanel, "Copyright and Democratic Civil Society," at 308–10. In this vein, Robert Merges has argued that lawmakers should not be quick to institute compulsory licensing systems. Private institutions such as collective-rights management organizations are likely to be superior to any governmentally mandated regime – and will often spring up spontaneously if lawmakers refuse to intervene.

38 The work of this group of economists is well summarized in Menell, "General Theories," at 7–8. Among the leading works are: Yoram Barzel, "Optimal Timing of Innovations," *Review of Economics and Statistics*, 50 (1968): 348–55; Partha Dasgupta, "Patents, Priority and Imitation or, The Economics of Races and Waiting Games," *Economics Journal* 98 (1988): 66, at 74–8; Partha Dasgupta and Joseph Stiglitz, "Uncertainty, Industrial Structure and the Speed of R & D," *Bell Journal of Economics*, 11 (1980); 1, at 12–13; Drew Fudenberg, Richard Gilbert, Joseph Stiglitz, and Jean Tirole, "Preemption, Leapfrogging, and Competition in Patent Races," *European Economic Review*, 77 (1983): 176–83; Michael L. Katz and Carl Shapiro, "R & D Rivalry with Licensing or Imitation," *American Economic Review*, 77 (1987): 402; Steven A. Lippman and Kevin F. McCardle, "Dropout Behavior in R & D Races with

to three stages in the inventive process at which economic waste can occur. First, the pot of gold represented by a patent on a pioneering, commercially valuable invention may lure an inefficiently large number of persons and organizations into the race to be the first to reach the invention in question. Second, the race to develop a lucrative improvement on an existing technology may generate a similar scramble for similar reasons at the "secondary" level. Finally, firms may try to "invent around" technologies patented by their rivals – that is, to develop functionally equivalent but non-infringing technologies – efforts that, although rational from the standpoint of the individual firm, represent a waste of social resources. Heightened awareness of these risks has prompted legal scholars to search for possible reforms of intellectual property law – or of related doctrines, such as antitrust law – that would mitigate the dissipation of resources at these various sites.³⁹

Serious difficulties attend efforts to extract from any one of these approaches answers to concrete doctrinal problems. With respect to incentive theory, the primary problem is lack of the information necessary to apply the analytic. To what extent is the production of specific sorts of intellectual products dependent upon maintenance of copyright or patent protection? With respect to some fields, some commentators have answered: very little. Other monetary or nonmonetary rewards – such as profits attributable to lead time, inventors' opportunities to speculate in markets that will be affected by the revelation of their inventions, the prestige enjoyed by artistic and scientific innovators, academic tenure, and the love of art – would be sufficient to sustain current levels of production even in the absence of intellectual-property protection.⁴⁰ Other commentators sharply disagree.⁴¹ The truth is that we don't have enough information to know who is right. Empirical work has suggested that

Learning," *RAND Journal of Economics*, 18 (1987): 287; Glenn C. Loury, "Market Structure and Innovation," *Quarterly Journal of Economics*, 93 (1979): 395; Frederic M. Scherer, "Research and Development Resource Allocation Under Rivalry," *Quarterly Journal of Economics*, 81 (1967): 359, at 364–6; Pankaj Tandon, "Rivalry and the Excessive Allocation of Resources to Research," *Bell Journal of Economics*, 14 (1983): 152; Brian D. Wright, "The Resource Allocation Problem in R & D," in *The Economics of R & D Policy*, 41, 50 (George S. Tolley, James H. Hodge & James F. Oehmke eds., 1985).

39 See Louis Kaplow, "The Patent–Antitrust Intersection: A Reappraisal," *Harvard Law Review*, 97 (1984): 1813–92; Edmund Kitch, "The Nature and Function of the Patent System," *Journal of Law and Economics*, 20 (1977): 265; idem, "Patents, Prospects, and Economic Surplus: A Reply," *Journal of Law and Economics*, 23 (1980): 205; Mark F. Grady & J. I. Alexander, "Patent Law and Rent Dissipation," *Virginia Law Review*, 78 (1992): 305; Robert Merges and Richard Nelson, "On the Complex Economics of Patent Scope," *Columbia Law Review*, 90 (1990): 839–916; Mark Lemley, "The Economics of Improvement in Intellectual Property Law," *Texas Law Review*, 75 (1997): 993–1084.

40 See, for example, Joan Robinson, *The Economics of Imperfect Competition* (London: Macmillan, 1933); Arnold Plant, "The Economic Aspects of Copyright in Books," in *Economica (n.s.)* (1934): 30–51; Jack Hirshleifer, "The Private and Social Value of Information and the Reward to Inventive Activity," *American Economic Review*, 63 (1973): 31–51; Stephen Breyer, "The Uneasy Case for Copyright," *Harvard Law Review*, 87 (1970): 281–351.

41 See, for example, Barry Tyerman, "The Economic Rationale for Copyright Protection for Published Books: A Reply to Professor Breyer," *UCLA Law Review*, 18 (1971): 1100.

patent law has been more important in stimulating innovation in certain industries (e.g., pharmaceuticals and chemicals) than in others, but has failed to answer the ultimate question of whether the stimulus to innovation is worth its costs.⁴² With respect to forms of intellectual-property protection other than patents, we know even less.

Even if we were able to surmount this enormous hurdle – and concluded that society would be better off, on balance, by supplying authors and inventors some sort of special reward – major sources of uncertainty would remain. Is an intellectual-property system the best way of providing that reward or might it be better, as Steven Shavell and Tanguy van Ypersele have recently suggested, for a government agency to estimate the social value of each innovation and pay the innovators that sum out of tax revenues?⁴³ If the former, how far should creators' entitlements extend? Should they include the right to prepare "derivative works"? To block "experimental uses" of their technologies? To suppress their inventions? Some scholars continue to seek the data necessary to begin to answer questions of this sort. Most have given up the game, despairing of acquiring the kinds of information one would need.⁴⁴ Almost everyone agrees that such information is not yet at our disposal. Until it is, lawmakers will gain little guidance from the first variant of the utilitarian approach.

Theorists who seek to optimize patterns of productivity confront less severe informational problems. To be sure, they are obliged to make difficult judgments – often with thin data – on such questions as whether the failure of creators to license certain uses of their works results from the fact that such

42 The relevant literature includes John Kay, "The Economics of Intellectual Property Rights," *International Review of Law & Economics*, 13 (1993): 337, at 344–6; R. C. Levin, A. K. Klevorick, R. R. Nelson, and S. G. Winter, "Appropriating the Returns from Industrial Research and Development," *Brookings Papers Economic Activity* (1987): 783–831; Edwin Mansfield, "Patents and Innovation: An Empirical Study," *Management Science*, 32 (1986): 173–81; George L. Priest, "What Economists Can Tell Lawyers About Intellectual Property," *Research in Law and Economics*, Vol. 8 (John Palmer, ed., 1986), pp. 19, 21; Antoon A. Quaendvlieg, "The Economic Analysis of Intellectual Property Law," in Willem F. Korthals Altes et al., eds., *Information Law Towards the 21st Century* (Boston: Kluwer Law and Taxation Publishers, 1992), pp. 379, 393; D. Schwartzmann, *Innovation in the Pharmaceutical Industry* (Baltimore: Johns Hopkins University Press, 1976); C. Taylor and Z. Silberston, *The Economic Impact of the Patent System* (London: Cambridge University Press, 1973).

43 More specifically, Shavell and Ypersele contend that a regime in which, after an invention had been commercialized, the government used sales data and surveys to assess its social value and then periodically paid the inventor accordingly might be better, despite the familiar difficulties associated with governmental estimates of this sort, than a patent regime – and that a system in which each inventor had the option of either obtaining a traditional patent or collecting the government's reward would certainly be better than a simple patent system. See "Rewards versus Intellectual Property Rights," *National Bureau of Economic Research*, Working Paper 6956 (February 1999).

44 See, for example, Robert M. Hurt and Robert M. Schuchman, "The Economic Rationale of Copyright," *American Economic Review*, 56 (1966): 425–6; Jessica Litman, "The Public Domain," *Emory Law Journal*, 34 (1990): 997; Lloyd L. Weinreb, "Copyright for Functional Expression," at 1232–6; John Shepard Wiley, Jr., "Bonito Boats: Uninformed but Mandatory Innovation Policy," *Supreme Court Review* (1989), 283.

uses are worth less to consumers than preventing them is worth to creators (in which case, the absence of licenses is socially desirable) or from excessively high transaction costs (in which case, the creators should be compelled to grant licenses – for free or for a governmentally determined fee). But inquiries of this sort are not as frighteningly complex as those that confront incentive theorists. However, scholars and lawmakers who take this road confront an additional problem: What is the set of productive activities the incentives for which we are trying to adjust? For the reasons sketched above, if we confine our attention to intellectual products, the optimal legal doctrine may be one that confers upon creators a very generous set of entitlements. Only thereby will potential producers be provided refined signals concerning how consumers wish to make use of which sorts of intellectual products. However, as Glynn Lunney has argued, if we expand our frame of reference, that solution proves highly problematic.⁴⁵ In virtually no field of economic activity are innovators empowered to collect the full social value of their innovations. The elementary schoolteacher who develops a new technique for teaching mathematics, the civil-rights activist who discovers a way to reduce racial tension, the physicist who finds a way to integrate our understandings of gravity and quantum mechanics – all of these confer on society benefits that vastly exceed the innovators' incomes. Enlarging the entitlements of intellectual-property owners thus might refine the signals sent to the creators of different sorts of fiction, movies, and software concerning consumers' preferences, but would lead to even more serious *overinvestment* in intellectual products as opposed to such things as education, community activism, and primary research. Unfortunately, Lunney's proposed response to this problem – reducing copyright protection until the creators of entertainment receive rewards no greater than the returns available to innovators in other fields – would sacrifice most of the economic benefits highlighted by Demsetz and Goldstein. The optimal solution is thus far from clear.

Theorists bent on avoiding redundant inventive activity have problems of their own. The most serious difficulty arises from the fact that reducing social waste at one stage of the inventive process commonly increases it at another. Thus, for example, in the leading article in this subfield, Edmund Kitch highlighted the advantages of granting to the developer of a pioneering invention an expansive set of entitlements, thereby enabling him or her to coordinate research and development dedicated to improving the invention, thus reducing the dissipation of rents at the secondary level.⁴⁶ However, as Robert Merges argues, granting generous patents on pioneering inventions will exacerbate rent

45 See Glynn Lunney, Jr., "Reexamining Copyright's Incentives-Access Paradigm," *Vanderbilt Law Review*, 49 (1996): 483.

46 See Kitch, "The Nature and Function of the Patent System." See also Suzanne Scotchmer, "Protecting Early Innovators: Should Second-Generation Products Be Patentable?," *RAND Journal of Economics*, 27 (1996): 322–31.

dissipation at the primary level. An even greater – and more socially wasteful – number of persons or firms will now race to be the first to develop pioneering patents. Mark Grady and Jay Alexander have developed an ingenious theory for determining which of these dangers is more salient in particular cases.⁴⁷ Primary inventions that have only modest social value but that “signal” a large potential for improvement are likely to draw potential improvers like flies. To cut down on the swarms, the developer of the primary invention should be granted a broad patent of the sort commended by Kitch. Primary inventions with large social value but minimal “signalling” power should, instead, be given only narrow patents – to reduce the risk of duplicative activity at the primary level. Finally, and most surprisingly, socially valuable inventions so well conceived they cannot be improved upon should be given no patents whatsoever, thereby discouraging rent dissipation at both levels. This typology, though intriguing, has many defects, both practical and theoretical. To begin with, it is difficult to determine in advance which inventions “signal” possibilities for improvement. Next, what are we to do with cases in which the invention at issue is of a type that both is highly socially valuable (thus creating a danger of waste at the primary level) and signals a large number of improvements (thus creating a danger of waste at the secondary level)? Finally, Robert Merges and Richard Nelson point out that efforts, through broad patent grants, to mitigate rent dissipation at the secondary level may have serious economic side effects. Instead of enabling the original inventor to coordinate efficiently the exploitation of the technology, it may lead to “satisficing” behavior⁴⁸ and an inefficiently narrow focus on improvements related to the primary inventor’s principal line of business.⁴⁹ In short, a combination of limited information and theoretical tensions render this third approach just as indeterminate in practice as the other two.⁵⁰

Even if the difficulties specific to each of the three economic approaches could be resolved, an even more formidable problem would remain: there exists no general theory that integrates the three lines of inquiry. How should the law be adjusted in order simultaneously (i) to balance optimally incentives for creativity and concomitant efficiency losses, (ii) to send potential producers

47 Grady and Alexander, “Patent Law and Rent Dissipation.”

48 First developed by Herbert A. Simon, the concept of “satisficing” has come to be associated with behavior under which a decision maker ceases activity after meeting a minimum requirement – such as the laziness displayed by lions when prey is abundant. See David Ward et al., “The Role of Satisficing in Foraging Theory,” *Oikos*, 63:2 (1992): 312–17.

49 Merges and Nelson, “Complex Economics of Patent Scope.”

50 For debate on these issues, see Donald G. McFetridge and Douglas A. Smith, “Patents, Prospects, and Economic Surplus: A Comment,” *Journal of Law & Economics*, 23 (1980): 197; A. Samuel Oddi, “Un-Unified Economic Theories of Patents – The Not-Quite-Holy Grail,” *Notre Dame Law Review*, 71 (1996): 267, at 283 (disagreeing with Merges and Nelson); Donald L. Martin, “Reducing Anticipated Rewards from Innovation Through Patents: Or Less is More,” *Virginia Law Review*, 78 (1992): 351, at 356; Robert P. Merges, “Rent Control in the Patent District: Observations on the Grady–Alexander Thesis,” *Virginia Law Review*, 78 (1992): 359, at 376–7.

of all kinds of goods accurate signals concerning what consumers want, and (iii) to minimize rent dissipation? To date, no theorist has even attempted to answer this overarching question. Until that challenge is successfully met, the power of the utilitarian approach to provide guidance to lawmakers will be sharply limited.⁵¹

B.

Similar difficulties afflict efforts to apply labor theory to intellectual property. The problems begin at the threshold. As was true of utilitarianism, it is not altogether clear that the labor theory supports *any* sort of intellectual-property law. The source of the difficulty is ambiguity in Locke's original rationale for property rights – from which this entire theory springs. Why exactly should labor upon a resource held “in common” entitle the laborer to a property right in the resource itself? Scattered in Chapter 5 of the *Second Treatise* can be found six related but distinguishable answers to that question.

- (1) “Natural reason” tells us that men have “a right to their Preservation,” and the only practicable way in which they can sustain themselves is by individually “appropriating” materials necessary to provide them food and shelter.⁵²
- (2) Religious obligation reinforces the foregoing proposition. God did not merely give the Earth to man in common, but “commanded” him to “subdue” it – that is, “improve it for the benefit of Life” – which man can do only by both laboring upon it and appropriating the fruits of that labor.⁵³
- (3) Intuitions regarding self-ownership point in the same direction. Each person plainly has “a Property in his own Person,” including the “Labour of his Body, and the Work of his Hands.” It seems only natural that whatever he mixes that Labour with should belong to him as well.⁵⁴
- (4) The moral value of work reinforces the foregoing insight. God gave the World to “the Industrious and Rational, . . . not to the Fancy or Covetousness of the Quarrelsome and Contentious.” It is thus fitting that the former acquire, through their labour, title to that which they labor upon.⁵⁵
- (5) A sense of proportionality and fairness also figures in the inquiry. Most of the value of things useful to men derives not from the value of the raw materials from which they are made, but from the labour expended on them. It is thus not “so Strange” that, when determining whether ownership should be assigned to the worker or the community, the individual “Property of labour should be able to over-balance the Community of Land.”⁵⁶
- (6) Finally, Locke relies throughout the chapter on an imagery of productive transformation. By labouring upon unclaimed land or other resources, the worker changes

51 See Oddi, “Un-Unified Economic Theories of Patents.”

52 *Two Treatises of Government*, Sections 25–6.

53 *Ibid.*, Sections 32, 35.

54 *Ibid.*, Sections 27, 44.

55 *Ibid.*, Section 34.

56 *Ibid.*, Sections 38, 40–43.

them from wild to domestic, from raw to cultivated, from chaotic to ordered, from pointless to purposeful. The self-evident desirability of that transformation supports a reward for the worker.⁵⁷

Whether Locke's theory provides support for *intellectual* property depends upon which of these various rationales one regards as primary. If, for example, one sees arguments 4 and 5 as the crux of the matter, then the *Second Treatise* would seem to provide strong support for most sorts of intellectual property. After all, most authors and inventors work hard, and their intellectual labor typically is a far more important contributor to the total value of their creations than the raw materials they have employed. On the other hand, if arguments 1 and 2 are stressed, the case for intellectual-property rights is far weaker. As Seana Shiffrin shows, crucial to these two arguments is the proposition that certain articles essential to life, such as food, cannot be enjoyed in common; "their use must, of necessity, be exclusive."⁵⁸ Yet, intellectual products plainly are not like that. Not only is access to them typically not necessary for survival, but they can be used by an infinite number of persons, simultaneously or in sequence, without being used up.

Whether Locke's theory provides support for *any* intellectual-property rights is thus uncertain. It depends on which aspects of Locke's original theory are dominant. Locke did not say, and no interpreter of his work has yet provided us a convincing way of ascertaining his original intent.⁵⁹ Assume, however, that we somehow surmount the barricade identified by Shiffrin and conclude that intellectual labor does give rise to a natural entitlement to its fruits – an entitlement that the state must recognize and enforce. Other difficulties await us.

Perhaps the most formidable is the question: What, for these purposes, counts as "intellectual labor"? There are at least four plausible candidates: (1) time and effort (hours spent in front of the computer or in the lab); (2) activity in which one would rather not engage (hours spent in the studio when one would rather be sailing); (3) activity that results in social benefits (work on socially valuable inventions); and (4) creative activity (the production of new ideas). The first of the four may be closest to Locke's original intent, but he was not focusing on *intellectual* labor. Justin Hughes has shown that serious arguments can be made in support of the both the second and the third. And Lawrence Becker reminds us how important the fourth is to our images of deserving authors and inventors.⁶⁰ No grounds on which we might select one or another are readily apparent.

57 See Ryan, *Property and Political Theory*, at 22 ff.

58 See Seana Shiffrin, "Lockean Arguments for Private Intellectual Property," in this volume.

59 See Tom Palmer, "Are Patents and Copyrights Morally Justified?," *Harvard Journal of Law and Public Policy*, 13 (1990): 817–65, at 832.

60 Lawrence Becker, "Deserving to Own Intellectual Property," *Chicago-Kent Law Review*, 68 (1993): 609.

Unfortunately, our choice among these four options will often make a big difference. The third, for instance, suggests that we should insist, before issuing a patent or other intellectual-property right, that the discovery in question satisfy a meaningful “utility” requirement; the other three would not. The second would counsel against conferring legal rights on artists who love their work; the other three point in the opposite direction. The fourth would suggest that we add to copyright law a requirement analogous to the patent doctrine of “nonobviousness”; the others would not. In short, a lawmaker’s inability to choose among the four will often be disabling.

Similar troubles arise when one tries to apply Locke’s conception of “the commons” to the field of intellectual property. What exactly are the raw materials, owned by the community as a whole, with which individual workers mix their labor in order to produce intellectual products? At least seven possibilities come to mind:

- a. the universe of “facts”;⁶¹
- b. languages – the vocabularies and grammars we use to communicate and from which we fashion novel intellectual products;
- c. our cultural heritage – the set of artifacts (novels, paintings, musical compositions, movies, etc.) that we “share” and that gives our culture meaning and coherence;
- d. the set of ideas currently apprehended by at least one person but not owned by anyone;
- e. the set of ideas currently apprehended by at least one person;
- f. the set of all “reachable” ideas – that is, all ideas that lie within the grasp of people today;
- g. the set of all “possible ideas” – that is, all ideas that someone might think of.⁶²

When applying the Lockean argument to intellectual property, it will often make a difference which of these options one selects. For example, option (c) is difficult to reconcile with contemporary copyright and trademark law, under which much of our cultural heritage – Mickey Mouse, “Gone with the Wind,” the shape of a Coke bottle – is owned, not by the community, but by individual persons or organizations; options (a) and (b) present no such difficulty. Patent law is consistent with option (d) but not (e) – insofar as it permits ownership of many extant “ideas.” Copyright law, which (at least formally) does not allow

61 The first of these options – though common in the discourse of copyright law – is vulnerable to criticism as naively Platonist. See, for example, Jessica Litman, “The Public Domain,” *Emory Law Journal*, 39 (1990): 965, at 996; Jane Ginsburg, “Sabotaging and Reconstructing History,” *Bulletin of the Copyright Society*, 29 (1982): 647, at 658.

62 Plainly these options are not mutually exclusive. For example, one intuitively plausible interpretation of the “the commons” would be $a + b + c$. Some of the options nest. For example, d is a subset of e, which is a subset of f, which is a subset of g.

the ownership of any “ideas” (only distinctive ways of “expressing” them) meshes comfortably with either (d) or (e). As Justin Hughes has shown, the Lockean “sufficiency” proviso can be satisfied fairly easily if one chooses option (f) – on the theory that the deployment of most ideas enables other people to “reach” an even larger set of ideas and, thus, enlarges rather than subtracts from the commons. By contrast, if one adopts option (g) – as both Wendy Gordon and Robert Nozick appear to do – the sufficiency proviso becomes a good deal more constraining (a topic to which we will return in a minute). Which is the correct approach? Who knows?⁶³

Suppose we arbitrarily select one interpretation – say, option (d). Trying to fit it into the Lockean analytic quickly gives rise to three additional, related problems. First, the act of mixing labor with a piece of the commons does not, under any of the various extant intellectual-property regimes, work the way Locke supposed real-property law works. When one mixes one’s physical labor with a plot of virgin land, one should acquire, Locke suggested, a natural right not merely to the crops one produces but to the land itself. By contrast, when one mixes one’s intellectual labor with an existing idea, one acquires a property right only to the “original” or “novel” material one has generated, not to the idea with which one began. Second, the set of entitlements one acquires does not have the kind of exclusivity Locke apparently attributed to real-property rights.⁶⁴ For example, the issuance of a patent on a better mousetrap prevents others from making that mousetrap, but not from reading the patent and using the information contained therein to make an even better mousetrap. The issuance of a copyright on a novel prevents others from copying it but not from reading it, discussing it, parodying it, and so on. Finally, Locke suggested that the property rights one acquires through labor upon resources held in common do and should last forever – that is, are alienable, devisable, and inheritable indefinitely.⁶⁵ Most intellectual-property rights, by contrast, sooner or later expire.

One might respond that none of these observations indicates that the application of labor-desert theory to intellectual property is indeterminate. They indicate merely that intellectual-property law would have to be radically revised to conform to the Lockean scheme. Perhaps. But the scale of the necessary revision is daunting. Is it plausible – on Lockean or any other premises – that by working to express in distinctive form the idea that infidelity usually

63 For discussions of alternative understandings of “the commons,” see Yen, “Restoring the Natural Law”; Wendy Gordon, “A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property,” *Yale Law Journal*, 102 (1993): 1533–1609; Hughes, “Philosophy of Intellectual Property”; Shiffrin, “Lockean Arguments.”

64 Closely examined, real-property rights also lack the exclusivity Locke attributed to them, but the difficulty is more apparent in the case of property in ideas. See William Fisher, “Property and Contract on the Internet,” *Chicago-Kent Law Review*, 73 (1998) 1203, at 1207.

65 Seana Shiffrin points out, however, that some evidence that Locke understood property rights to be more temporally limited may be found in *Two Treatises of Government, First Treatise*, Secs. 88–9.

corrodes a marriage, one would acquire ownership of the idea itself? Is it plausible that, by registering the trademark "Nike," one could prevent others from using it in any way – including reproducing it in an essay on intellectual property? If not, then what set of more limited entitlements would satisfy the obligation of the state to "determine" and "settle" natural property rights? Locke's argument contains few clues.

We have not exhausted, unfortunately, the troubles associated with the "sufficiency" proviso. Some of the commentators who have sought to harness Locke's argument to intellectual property have seen little difficulty in the requirement that a laborer leave "as much and as good" for others. Justin Hughes, for example, emphasizes the myriad ways in which the expansion of the set of available ideas stimulated by intellectual property improves the lot of everyone. Robert Nozick, as suggested above, sees the sufficiency proviso as somewhat more constraining, but has identified to his satisfaction a way of structuring patent law that avoids violating it. Wendy Gordon, by contrast, construes the proviso as a much more serious limitation on the scope of intellectual-property rights. Conferring monopoly privileges on the creators of intellectual products, she claims, can hurt more than help the public. Take the word "Olympics." If the term did not exist, we would have contrived other ways to communicate the notion of periodic amateur international sports competitions untainted by ideology or warfare. But because the word does exist, we have become dependent on it. No other word or collection of words quite captures the idea. Consequently, if we now prohibit "unauthorized" uses of the word – for example, in connection with the "Gay Olympics" or on a t-shirt highlighting the hypocritical way in which the ideal has been applied in recent years – we have left the public worse off than if the word never existed. Fidelity to the Lockean proviso (and to a more general "no-harm" principle that runs through Locke's work), Gordon insists, requires that we withhold property rights in situations such as these. Once again, a wide range of interpretations of an important component of Locke's theory is available, and no one member of the set seems plainly superior to the others.⁶⁶

We come, finally, to the well-known problem of proportionality. Nozick asks: If I pour my can of tomato juice into the ocean, do I own the ocean? Analogous questions abound in the field of intellectual property. If I invent a drug that prevents impotence, do I deserve to collect for twenty years the extraordinary amount of money that men throughout the world would pay for access to the drug? If I write a novel about a war between two space empires, may I legitimately demand compensation from people who wish to prepare motion-picture adaptations, write sequels, manufacture dolls based on my

66 For exploration of these issues, see Gordon, "Property Right in Self-Expression"; Edwin C. Hettinger, "Justifying Intellectual Property," *Philosophy and Public Affairs*, 18 (1989), 31–52; Sterk, "Rhetoric and Reality"; Weinreb, "Copyright in Functional Expression," at 1218.

characters, or produce t-shirts emblazoned with bits of my dialogue? How far, in short, do my rights go? Locke gives us little guidance.⁶⁷

C.

Private property rights, argue contemporary personality theorists, should be recognized when and only when they would promote human flourishing by protecting or fostering fundamental human needs or interests. The first step in the application of this perspective to intellectual property is identification of the specific needs or interests one wishes to promote. As Jeremy Waldron has argued, a wide variety of interests might be deemed fundamental, each of which arguably could be advanced by a system of property rights. Here are some:

1. *Peace of Mind*. An exclusive right to determine how certain resources shall be used might be thought essential to avoid moral exhaustion – the sense of guilt that arises from awareness that one’s actions, one’s use of the commons, disadvantages countless other people.⁶⁸
2. *Privacy*. Property rights may be necessary to provide persons “refuge[s] from the general society of mankind” – places where they can either be alone or enjoy intimacy with others.⁶⁹
3. *Self-Reliance*. An exclusive right to control certain resources may be thought necessary to enable persons to become independent, self-directing.⁷⁰
4. *Self-Realization as a Social Being*. The freedom to own and thus trade things may be necessary to enable persons to help shape their social environments and establish their places in communities.⁷¹
5. *Self-Realization as an Individual*. Ownership of property may be necessary to enable a person to assert his or her will and to be recognized as a free agent by others.⁷²
6. *Security and Leisure*. Control over a certain amount of resources may be necessary to free persons from obsession with obtaining the means of

67 See Hughes, “Philosophy of Intellectual Property”; Becker, “Deserving Intellectual Property.” Cf. James W. Child, “The Moral Foundations of Intangible Property,” *The Monist* (1990); Wendy Gordon, “Property Right in Self-Expression.”

68 See Waldron, *The Right to Private Property*, at 295; cf. Charles Fried, *Right and Wrong* (Cambridge, Mass.: Harvard University Press, 1978), p. 1.

69 See Waldron, *The Right to Private Property*, at 296.

70 See *ibid.*, at 300–01; cf. Abraham Lincoln, “Address to the Wisconsin State Fair, 1859,” in Richard N. Current, ed., *The Political Thought of Abraham Lincoln* (Indianapolis: Bobbs-Merrill, 1967), p. 134.

71 See Waldron, *The Right to Private Property*, pp. 296–7; Carol Rose, *Property and Persuasion* (Boulder, Colo.: Westview Press, 1994), pp. 146–7.

72 See Waldron, *The Right to Private Property*, pp. 302–3; Margaret Jane Radin, *Reinterpreting Property*.

survival, the “impulsion of desire,” and thus to enable them to attend to higher pursuits.⁷³

7. *Responsibility.* Virtues like prudence, self-direction, and foresight may be cultivated by the opportunity and obligation to manage one’s own resources.⁷⁴
8. *Identity.* Selfhood may be thought to depend upon the ability to project a continuing life plan into the future, which in turn is fostered by connection to and responsibility for property.⁷⁵
9. *Citizenship.* Ownership of a certain amount of resources might be thought necessary to put a person in an economic and psychological position to participate effectively in the polity.⁷⁶
10. *Benevolence.* Property rights may be thought essential to enable a person to express ideas of what is beautiful or to enact benevolent wishes.⁷⁷

Six of these ten arguments – 1, 3, 4, 6, 7, 9 – provide support for some system of intellectual-property rights but give us little guidance in deciding *which* entitlements to recognize. To the extent that intellectual-property rights have economic value and may be bought and sold, gained and lost, they may contribute to their owners’ abilities to avoid guilt, become autonomous, engage in independent political action, etc. But those values could be promoted equally well by providing persons rights to land or shares in private corporations. Consequently, a lawmaker persuaded by one of these claims would be inspired to construct some system of private ownership of resources, but would have little help in determining which resources to privatize and which to leave to the public.

Personhood-based guidelines for crafting intellectual-property rights thus must be found, if anywhere, in some combination of themes 2, 5, 8, and 10: the interests of privacy, individual self-realization, identity, and benevolence. But the writers who have sought to extract from those sources answers to specific questions have come to widely divergent conclusions. Here are some examples:

When an author has revealed her work to the world, does it nevertheless continue to fall within the zone of her “personhood” – so that she may legitimately claim a right to restrict its further communication? Neil Netanel, relying on an exploration of the ideal of “autonomy,” thinks yes. Lloyd Weinreb, reasoning that, “once the individual has

73 See Waldron, *Right to Private Property*, pp. 304–6; cf. George Fitzhugh, *Cannibals All!* (1857), C. Vann Woodward, ed. (Cambridge, Mass.: Harvard University Press, 1960) (defending the ownership of slaves on similar grounds).

74 See Waldron, *Right to Private Property*, pp. 308–10; Thomas Hill Green, *Lectures on the Principles of Political Obligation* (Ann Arbor: Univ. of Michigan Press, 1967), Lecture N.

75 See Radin, *Reinterpreting Property*.

76 See Hannah Arendt, *On Revolution* (New York: Viking Press, 1965); Alexander, *Commodity and Propriety*, pp. 43–71.

77 See Green, *Lectures on Political Obligation*, at Sec. 220.

communicated her expression publicly, it takes on a 'life of its own' and . . . its further communication does not involve her autonomous self," thinks no.⁷⁸

Assume the answer to the previous question is yes. May the author *alienate* his right to control the copying of his work? Kant, reasoning that "an author's interest in deciding how and when to speak [is] an inalienable part of his personality," thought no. Hegel, reasoning that expressions of mental aptitudes (as opposed to the aptitudes themselves) were "external to the author and therefore freely alienable," thought yes.⁷⁹

Should an artist's investment of his self in a work of visual art – say, a painting or sculpture – prevent others from imitating his creation? Hegel thought not – on the ground that the copy would be "essentially a product of the copyist's own mental and technical ability." Justin Hughes seems to take the opposite position.⁸⁰

Is the protection of trade secrets necessary to protect privacy interests? Edwin Hettinger thinks no – on the ground that most trade secrets are owned by corporations, which do not have the "personal features privacy is intended to protect." Lynn Sharp Paine disagrees. She argues that the right to privacy includes the freedom to reveal information to a limited circle of friends or associates without fear that it will be exposed to the world – a freedom that trade-secret law shields.⁸¹

Is a celebrity's persona a sufficiently important repository of selfhood that other persons ought not be permitted to exploit that persona commercially without permission? Justin Hughes suggests yes, reasoning that "[a]s long as an individual identifies with his personal image, he will have a personality stake in that image." Michael Madow, insisting that the "creative (and autonomous) role of the media and the audience in the meaning-making process" are at least as important as the "personality" of the celebrity, sharply disagrees.⁸²

Two related problems underlie these and many other disagreements. First, the conceptions of the self – the images of "personhood" that, through adjustments of intellectual-property doctrine, we are trying to nurture or protect – that underlie most avatars of personality theory are too abstract and thin to provide answers to many specific questions. Either a more fully articulated

78 Neil Netanel, "Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation," *Rutgers Law Review*, 24 (1993): 347; Weinreb, "Copyright for Functional Expression," at 1221. Good illustrations of both positions may be found in the current debate over the legitimacy of Gary Larson's effort to persuade his fans not to post copies of his cartoons on their websites. For a sample of the debate, see <http://stud.unisg.ch/rportmann/gary.html>.

79 See Cotter, "Pragmatism and the *Droit Moral*," at 8–9. For other treatments of the divergence of Kant and Hegel, see Palmer, "Are Patents Morally Justified?," at 837–41; Sterk, "Rhetoric and Reality in Copyright Law," at 1243.

80 Hughes, "Philosophy of Intellectual Property," at 338, 340.

81 Hettinger, "Justifying Intellectual Property"; Paine, "Trade Secrets and the Justification of Intellectual Property," *Philosophy & Public Affairs*, 20 (1991): 247, at 251–3.

82 Hughes, "Philosophy of Intellectual Property," at 340–41; Madow, "Private Ownership of Public Image," at 182–97 & n. 338.

vision of human nature (that would forthrightly address such grand questions as the importance of creativity to the soul) or a conception of personhood tied more tightly to a particular culture and time seems necessary if we are to provide lawmakers guidance on the kinds of issue that beset them.

Second, no personality theorist has yet dealt adequately with what Margaret Radin once called the problem of fetishism.⁸³ Which of the many tastes exhibited by current members of American culture should be indulged, and which should not? The quest for individuality? Nationalism? Nostalgia for a real or imagined ethnic or racial identity? The hope that audiences will treat one's creations with respect? The hunger for fifteen minutes (or more) of fame? Yearnings or orientations of all of these sorts are implicated by intellectual-property disputes. Deciding which merit our deference is essential to determining how those disputes should be resolved.

D.

The limitations of the guidance provided by general theories of intellectual property is perhaps easiest to see with respect to the last of the four approaches. Lawmakers who try to harness social-planning theory must make difficult choices at two levels. The first and most obvious involves formulating a vision of a just and attractive culture. What sort of society should we try, through adjustments of copyright, patent, and trademark law, to promote? The possibilities are endless.

The range of options is illustrated by my own effort in a recent essay to bring social-planning theory to bear on the question of the proper shape of intellectual-property law on the Internet. I offered, as the foundation for that analysis, a sketch of an attractive intellectual culture. A condensed version of that sketch follows:

Consumer Welfare. Other things being equal, a society whose members are happy is better than one whose members are, by their own lights, less happy. Applied to the field of intellectual property, this guideline urges us to select a combination of rules that will maximize consumer welfare by optimally balancing incentives for creativity with incentives for dissemination and use. That goal must, however, be tempered by other aspirations.

A Cornucopia of Information and Ideas. An attractive culture would be one in which citizens had access to a wide array of information, ideas, and forms of entertainment. Variety in this sense helps make life stimulating and enlivening. Access to a broad range of intellectual products is also crucial to widespread attainment of two related conditions central to most conceptions of the good life – namely, self-determination and self-expression – both by providing persons the materials crucial to self-construction, and by fostering a general condition of cultural diversity, which enables and compels individuals to shape themselves.

83 See Margaret Jane Radin, "Property and Personhood," *Stanford Law Review*, 34 (1982): 957, at 970.

A Rich Artistic Tradition. The more complex and resonant the shared language of a culture, the more opportunities it affords its members for creativity and subtlety in communication and thought. For reasons best explored by Ronald Dworkin, recognition of that fact points toward governmental policies designed to make available to the public “a rich stock of illustrative and comparative collections of art” and, more generally, to foster “a tradition of [artistic] innovation.”

Distributive Justice. To the greatest extent practicable, all persons should have access to the informational and artistic resources described above.

Semiotic Democracy. In an attractive society, all persons would be able to participate in the process of making cultural meaning. Instead of being merely passive consumers of images and artifacts produced by others, they would help shape the world of ideas and symbols in which they live.

Sociability. An attractive society is one rich in “communities of memory.” Persons’ capacity to construct rewarding lives will be enhanced if they have access to a variety of “constitutive” groups – in “real” space and in “virtual” space.

Respect. Appreciation of the extent to which self-expression is often a form of self-creation should make people respectful of others’ work.⁸⁴

The controversial character of a vision of this sort is immediately apparent. Many of its components – for example, the criterion of distributive justice – have for centuries been the subjects of furious debate among political philosophers.⁸⁵ It is plainly implausible that theorists of intellectual-property could resolve controversies of this scale in the course of analyses of copyright or patent doctrine.

Unfortunately, the choice of a particular social vision by no means exhausts the difficulties associated with this fourth approach. Equally serious problems commonly arise when one tries to apply such a vision to a specific doctrinal problem. Take the problem of parody, for example. Intellectual products that make fun of other intellectual products are becoming increasingly common: “Don’t leave home without it” on a condom container crafted to resemble an American Express card. Comic books depicting Mickey Mouse and Donald Duck participating in a drug-infested, promiscuous culture. Altered photographs of John Wayne suggesting that he was homosexual, embellished with the caption, “It’s a bitch to be butch.” Trademarks that allude humorously to

⁸⁴ See Fisher, “Property and Contract on the Internet.”

⁸⁵ On distributive justice, see, for example, Aristotle, *Nicomachean Ethics*, Book V, Ch. 2; Bruce Ackerman, *Social Justice in the Liberal State* (New Haven: Yale University Press, 1980); Charles Fried, “Distributive Justice,” *Social Philosophy & Policy*, 1 (1983): 45; John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971); Michael Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982).

other trademarks (“Dom Popignon” popcorn; “Lardache” bluejeans). Should these be permitted? The particular social vision sketched above points in inconsistent directions. On one hand, permitting, even encouraging, parody of this sort would seem to facilitate semiotic democracy. Parody erodes the control over the meanings of cultural artifacts exerted by powerful institutions and expands opportunities for creativity by others. On the other hand, parodies (especially if effective) may cut seriously into the legitimate personhood interests of the artists who originally fashioned the parodied artifacts. Which of these two concerns should predominate must be determined by reflection on the cultural context and significance of individual cases. The social vision on its own does not provide us much guidance.

IV. The Value of Theory

The indeterminacy of the personality and social-planning perspectives has long been recognized. That recognition is reflected, for example, in the common accusation that those perspectives are “illiberal” insofar as they seek to regulate persons’ behavior on the basis of necessarily controversial “theories of the good” – the sort of thing that governments ought not do.⁸⁶ A closely related, equally common charge is that the social-planning and personhood perspectives are “paternalistic” insofar as they curtail persons’ freedom on the basis of conceptions of what is “good for them” with which they themselves may not agree.⁸⁷ By contrast, the utilitarian and labor-desert approaches, especially the former, have enjoyed an aura of neutrality, objectivity, and above all determinacy. That aura helps to explain why courts, when presented with difficult problems of statutory interpretation, have sought guidance most often from economic arguments and least often from social-planning arguments. One of the burdens of this essay has been to disrupt that pattern – to show that the prescriptive powers of all four arguments are sharply limited.

That conclusion, however, does not imply that the theories have no practical use.⁸⁸ In two respects, I suggest, they retain considerable value. First, while they have failed to make good on their promises to provide comprehensive prescriptions concerning the ideal shape of intellectual-property law, they can help identify nonobvious attractive resolutions of particular problems. Second, they can foster valuable conversations among the various participants in the lawmaking process.

A good example of the first of these uses of theory involves the recent history of the “right of publicity” – the entitlement of celebrities to prevent (or

⁸⁶ See, for example, Ronald Dworkin, “Liberalism,” in *A Matter of Principle* (Cambridge, Mass.: Harvard University Press, 1985), pp. 181–204.

⁸⁷ For exploration of this argument, see Fisher, “Fair Use Doctrine,” at 1762–66.

⁸⁸ Cf. Weinreb, “Copyright for Functional Expression,” at 1252–4 (suggesting that courts should cease trying to resolve complex copyright questions through efforts to ascertain and then apply underlying policies and should instead rely upon the traditional common-law interpretive techniques of “analogy and metaphor”).

demand compensation for) commercial depictions or imitations of their faces, voices, distinctive turns of phrase, characteristic poses, and so on. Until quite recently, this right was widely thought by American courts and commentators to be “commonsensical.” For example, the author of the principal treatise on the subject describes the right of publicity as “a self-evident legal right, needing little intellectual rationalization to justify its existence.”⁸⁹ Sentiments of this sort prompted one state after another to recognize the entitlement – either through legislation or through common-law decisionmaking – and then give it generous scope.

In the mid-1990s, a small group of commentators began drawing explicitly on theories of intellectual property to criticize the right of publicity. None of the four major perspectives, they argued, provided support for such an entitlement. (a) From a utilitarian standpoint, the right seems senseless. It is not necessary to induce people to cultivate distinctive identities. It encourages people, once they have become celebrities, to coast on their endorsement incomes rather than continue to provide the public the services that made them famous. And it wastes social resources by inducing excessive numbers of adolescents to seek fame. (b) Nor is the right justified as a reward for labor. Often, fame results from luck, fickle public tastes, or the efforts of third parties more than it does from the efforts of the celebrity. In any event, celebrities are adequately remunerated in other ways for their labor. (c) If protecting personhood were one’s goal, the right of celebrity would be a poor way to achieve it. The right protects the ability of celebrities to make money from their personae – an ability not particularly close to the heart of personality development – and does nothing to prevent disclosure of intimate details concerning celebrities’ lives. (d) Last but not least, the right of celebrity exacerbates the centralization of semiotic power in the United States and undermines popular control over “popular culture.”⁹⁰

A few influential courts have begun to take notice. For example, in a recent decision, the Court of Appeals for the Tenth Circuit relied explicitly on this emerging body of critical commentary to turn aside a challenge by the Major League Baseball Players to the sale of a set of baseball cards that parodied the league’s stars. The power of theory is especially evident in the following passage:

Parodies of celebrities are an especially valuable means of expression because of the role celebrities play in modern society. As one commentator explained, celebrities are

89 J. Thomas McCarthy, *The Rights of Publicity and Privacy* (New York: C. Boardman, 1992), Sec. 1.1[B][2], at 1–5. See also *ibid.*, Section 2.1[B] (“The advocate of a Right of Publicity, when called upon to explain why such a right should exist at all, is not being illogical in simply challenging: ‘Why not?’”).

90 The three scholars most influential in developing these arguments are Jane Gaines, Rosemary Coombe, and Michael Madow. See Gaines, *Contested Culture: The Image, the Voice, and the Law* (Chapel Hill, N.C.: University of North Carolina Press, 1991); Coombe, “Objects of Property and Subjects of Politics”; and Madow, “Private Ownership of Public Image.”

“common points of reference for millions of individuals who may never interact with one another, but who share, by virtue of their participation in a mediated culture, a common experience and a collective memory.” Through their pervasive presence in the media, sports and entertainment celebrities come to symbolize certain ideas and values. . . . Celebrities, then, are an important element of the shared communicative resources of our cultural domain.

Because celebrities are an important part of our public vocabulary, a parody of a celebrity does not merely lampoon the celebrity, but exposes the weakness of the idea or value that the celebrity symbolizes in society. . . . In order to effectively criticize society, parodists need access to images that mean something to people, and thus celebrity parodies are a valuable communicative resource. Restricting the use of celebrity identities restricts the communication of ideas.⁹¹

A federal District Court recently employed a similar approach in rejecting a claim by Mayor Rudolf Giuliani that an advertisement describing *New York Magazine* as “possibly the only good thing in New York Rudy hasn’t taken credit for” violated Giuliani’s right of publicity.⁹² If this style of analysis becomes more popular, the doctrinal tide may well turn.

Another example of the deployment of theory to suggest solutions to specific problems comes from my own work. Should the producer of an intellectual product be permitted to engage in price discrimination – that is, to charge prices that vary with consumers’ ability and willingness to pay for access to the product? When it is feasible, producers frequently try to market their wares in this fashion.⁹³ Various doctrines in current intellectual property law limit (though certainly do not eliminate) their ability to do so. For instance, some kinds of patent license terms (e.g., agreements to purchase only from the patentee staple items of commerce for use in conjunction with the patented technology), though highly effective price-discrimination tools, are currently treated as “patent misuse.” The first-sale doctrine in copyright law prevents a seller from prohibiting low-margin consumers from reselling the copies they purchase to high-margin potential consumers, thereby limiting the power of the seller to exploit the latter. And some aspects of current trademark law concerning “parallel imports” discourage trademark owners from charging less for their products in poor countries than in rich countries. Should these rules, or related doctrines in contract law, be modified?

91 *Cardtoons, L.C. v. Major League Baseball Players Association*, 95 F.3d 959, 972–73 (10th Cir. 1996).

92 *New York Magazine v. Metropolitan Transit Authority*, 987 F. Supp. 254, 266 (1997).

93 See, for example, Patricia M. Danzon, *Pharmaceutical Price Regulation: National Policies versus Global Interests* (Washington, D.C.: AEI Press, 1997) (geographic price discrimination for drugs); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996) (discrimination between commercial and noncommercial customers in sales of nationwide telephone directories); Michael Meurer, “Price Discrimination, Personal Use, and Piracy: Copyright Protection of Digital Works,” *Buffalo Law Review*, 45 (1997): 845 (distribution of digital works on the Internet). For a useful taxonomy of types of price discrimination, see Scherer, *Industrial Market Structure*, pp. 315–34.

One's initial reaction is likely to be: no. Charging whatever the market will bear has an unsavory flavor. It smacks of greed and has no obvious social benefit. Impressions of that sort contributed to the Robinson–Patman Act⁹⁴ and have colored some courts' responses to price discrimination in the distribution of intellectual products.

Immersion in intellectual-property theory, however, suggests a different answer. At least two of the four approaches reviewed in this essay – utilitarianism and social-planning theory – converge to suggest that price discrimination in the sale of intellectual products may in some contexts be a good thing. Recall that one of the objectives of economic theorists is simultaneously to increase incentives for creative activity and to reduce the associated welfare losses. Price discrimination – by enabling producers to charge eager consumers more than less eager consumers – makes such an unlikely combination possible. By discriminating among subgroups of consumers, a producer is able both to increase his or her own monopoly profits and to reduce the number of consumers who are priced out of the market. In combination, these two effects sharply increase the ratio between incentives for creativity and welfare losses. Finally, price discrimination makes possible greater approximation of the ideal of distributive justice discussed briefly in Section III.D. Usually (though not always), the consumers able and willing to spend substantial sums for an intellectual product are more wealthy than the consumers able and willing to spend only a little. Because of that circumstance, price discrimination often enables a larger group of poor consumers to gain access to a product – and to pay less than their wealthy counterparts. Widespread adoption of this marketing strategy would thus enable us to approach the goal of providing all persons equal access to works of the intellect.⁹⁵

To be sure, price discrimination in some contexts may have substantial disadvantages. The resources expended in establishing and administering price discrimination schemes represent social losses that at least partially offset the efficiency gains described above. Price discrimination sometimes requires the producer to obtain information about the tastes or habits of potential consumers, and the gathering of that information may invade their privacy. In the patent context, the gathering of analogous information concerning the business practices of licensees may facilitate the formation of cartels. Finally, price discrimination might sometimes result in pricing out of the market consumers interested in making transformative uses of intellectual products.⁹⁶ Only through careful analysis of the markets for specific sorts of intellectual

94 15 U.S.C. Sec. 13.

95 The argument is developed at greater length in Fisher, "Property and Contract on the Internet," at 1234–40.

96 These disadvantages of price discrimination are explored in Julie E. Cohen, "Copyright and the Jurisprudence of Self-Help," *Berkeley Technology Law Journal*, 13 (1998): 1089–143; Wendy Gordon, "Intellectual Property as Price Discrimination," *Chicago-Kent Law Review*, 73 (1998): 1367–90; Kaplow, "Patent–Antitrust Intersection."

products can it be ascertained whether these drawbacks exceed the economic and social benefits reviewed above. But a combination of utilitarian and social-planning theory creates a nonobvious *prima facie* case for the expansion of opportunities for price discrimination.

The other reason why intellectual-property theory retains value is that it can catalyze useful conversations among the various people and institutions responsible for the shaping of the law. More specifically, continued explicit discussion of the kinds of themes addressed in this essay would be valuable in three contexts. First, interaction among Congress, the courts, and administrative agencies (in particular, the Patent and Trademark Office) would be improved. Congress, when it adopts or amends intellectual-property laws, frequently fails to anticipate difficult interpretive questions. If the courts, when compelled in the context of individual disputes to resolve those questions, articulate a general theory they are using to guide their decisionmaking, they increase the likelihood that Congress, during the next general revision of the relevant statute, will be able thoughtfully either to endorse or to reject the courts' judgments. Much the same can be said of decision-making by administrative agencies that are then appealed to the courts.

Second, explicit reliance upon intellectual-property theories will improve conversations between lawmakers and their constituents. *Why* should the term of a copyright be extended from the life of the author plus fifty years to the life of the author plus seventy years? Because the additional time is necessary to encourage additional creativity? Because authors deserve greater rewards for their labors? Because the culture would be worse off if works like "Steamboat Willie" were released to the public domain? *Why* should it be possible to register as a federal trademark the sound made by motorcycles bearing a particular brand—thereby preventing other manufacturers from making motorcycles that sound the same? Because otherwise consumers will be confused concerning the manufacturers of the motorcycles they are buying? Because a culture in which motorcycles can be recognized from a distance by the noise they make is better than a culture in which they cannot? Because employees of the first company deserve a reward for the effort they invested in constructing a muffler that emits a distinctive guttural sound? By articulating and defending a theoretical rationale for each innovation, Congress (in the first example) or the courts (in the second example) would increase the ability of the public at large or, more plausibly, affected interest groups critically to appraise the change. Lawmakers, in short, would become more accountable.⁹⁷

Finally, through continued conversations among scholars, legislators, judges, litigants, lobbyists, and the public at large, there may lie some hope of

⁹⁷ It was largely for this reason that the Legal Realists urged lawmakers (including judges, whom the Realists insisted were as much lawmakers as legislators) to be more explicit concerning the policy bases of their decisions. See, for example, Felix Cohen, "Transcendental Nonsense and the Functional Approach," *Columbia Law Review*, 35 (1935): 809.

addressing the inadequacies of the existing theories. For the reasons sketched above, the analytical difficulties associated with the effort to apply the Lockean version of labor theory to intellectual property may well prove insurmountable, but there may be some non-Lockean way of capturing the popular intuition that the law should reward people for hard work. Only by continuing to discuss the possibility – and trying to bring some alternative variant of labor theory to bear on real cases – can we hope to make progress. Much the same can be said of the gaps in personality theory. The conception of selfhood employed by current theorists may be too thin and acontextual to provide lawmakers much purchase on doctrinal problems. But perhaps, through continued reflection and conversation, we can do better.

Conversational uses of intellectual-property theories of the sort sketched above would be different from the way in which such theories most often have been deployed in the past. Instead of trying to compel readers, through a combination of noncontroversial premises and inexorable logic, to accept a particular interpretation or reform of legal doctrine, the scholar or lawmaker would attempt, by deploying a combination of theory and application, to strike a chord of sympathy in his or her audience. The sought-after response would not be, “I can’t see any holes in the argument,” but rather, “That rings true to me.”