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Book Review

JUSTIFYING INTELLECTUAL PROPERTY, by Robert P. Merges[1]

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IT IS CURIOUS THAT AFTER more than four centuries of troubled existence[3] and repeated assertions of its indispensability to innovation in society,[4] the intellectual property rights (IPRs) regime inspires a compulsive need to justify its place in society. In the face of empirical agnosticism,[5] the advocacy for IPRs regimes[6] and the regular makeover[7] required for their justification often raise more questions than answers. Robert Merges's *Justifying Intellectual Property* is the latest attempt at providing a coherent justification for the IPRs regime.

The histories of the most theorized IPRs—patents and copyrights—can be described as anthologies of blackmail[8] and exaggeration of the purported benefits

1. (Cambridge: Harvard University Press, 2011) 405 pages.
2. Associate Professor at Osgoode Hall Law School, Toronto, Ontario.
3. See generally Frederick Abbott, Thomas Cottier & Francis Gurry, *The International Intellectual Property System: Commentary and Materials* (The Hague: Kluwer Law International, 1999).
4. Robert M Sherwood, *Intellectual Property and Economic Development* (Boulder: Westview Press, 1990).
5. US, Senate Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, *An Economic Review of the Patent System* (Washington: US Government Printing Office, 1958); Edith Tilton Penrose, *The Economics of the International Patent System* (Baltimore: The Johns Hopkins Press, 1951) at 76-98.
6. Robert M Sherwood, Vanda Scartezini & Peter Dirk Siemsen, "Promotion of Inventiveness In Developing Countries Through a More Advanced Patent Administration" (1999) 39:4 JL & Tech 473.
7. David Vaver, "Sprucing Up Patent Law" (2010) 23:1 IPJ 63.
8. Owen Lippert, "One Trip to the Dentist is Enough: Reasons to Strengthen Intellectual Property Rights through the Free Trade Area of the Americas Now" in Owen Lippert, ed, *Competitive Strategies for the Protection of Intellectual Property* (Vancouver: Fraser Institute, 1999) 125 at 131; Bruce Willis Bugbee, *The Early American Law of Intellectual Property: The Historical Foundations of the United States Patent and Copyright Systems* (Ann Arbor:

of a robust IPRs regime.[9] Society is often threatened, at least implicitly, with technological and artistic stagnation or deterioration if a strong IPRs regime is not implemented.[10] Since Brunelleschi's confrontation with the City of Florence to procure the first patent, the trajectory of the IPRs system has been uneven, but ultimately successful with the emergence of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) as a global benchmark. Amidst travails and remarkable successes for IPRs regimes, advocacy for strong IPRs regimes has largely rested on overstated benefits and hype.

Take for instance the copyrights regime: emerging from the theatrics of and turf wars between printers and publishers in England, it was not designed to protect authors and writers.[11] Although significant progress has been made in accommodating the needs of authors,[12] it is common knowledge that even today, few authors, especially academic writers, live off their royalties.[13]

Two questions remain. First, is it justifiable to have property in ideas? The second question asks whether private property in ideas, as defined by contemporary IPRs laws, accounts for the socio-cultural dimensions of creativity and the debts owed by authors and innovators to information already in the public domain, from which innovation and creativity emanate. Scholarly justification for the propertization of ideas[14] has tended to resemble martyrdom—an act of faith. The philosophical and policy challenges presented by the propertization of ideas are so well-documented,[15] one wonders why a highly respected scholar like Robert Merges would tilt at the windmills of philosophical resistance to the propertization of ideas. Is *Justifying Intellectual Property* an act of courage or folly?

University Microfilms, 1961) at 76.

9. Giuseppina D'Agostino, *Copyright, Contract, Creators: New Media, New Rules* (Cheltenham: Edward Elgar, 2010) ch 3.
10. See Ikechi Mgbeoji, "TRIPS and TRIPS-Plus Impacts in Africa" in Daniel L Gervais, ed, *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS-Plus Era* (Oxford: Oxford University Press, 2007) 259.
11. Brad Sherman & Lionel Bently, *The Making of Modern Intellectual Property Law: The British Experience, 1760-1911* (Cambridge: Cambridge University Press, 1999) at 123.
12. Robert P Merges, Peter S Menell & Mark A Lemley, *Intellectual Property in the New Technological Age*, 5th ed (Austin: Aspen, 2010) at 504-508.
13. Indeed, the use of regal terms such as "royalty" to characterize an otherwise impoverished remuneration would seem to be a deliberate joke, particularly on academic writers and authors.
14. Margaret Jane Radin, "A Comment on Information Propertization and its Legal Milieu" (2006) 54:1-2 Clev St L Rev 23.
15. See *e.g.* Siva Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity* (New York: New York University Press, 2001).

Merges himself provides a glimpse of his motivation:

> I had reached a point where I needed to disrupt the scholarly rhythm I had fallen into ... . I wanted to take on something bigger, more sustained; to go back to the dugout, pick up a bigger bat, and swing from the heels. This book is the result of that fateful, and very foolish, decision.[16]

This is not a foolish book.

With inspired zeal, intellect, and a broad vision, Merges proceeds to "defend IP rights against a host of charges leveled in recent years … ."[17] He provides an account of mischief allegedly attributable to IPRs and describes critics' claims that they are no longer necessary in a digital age, that the field of IP is an incoherent tangle of made up rationales and half-baked theories, and that IP is not really property at all. Although these are weighty critiques, Merges undertakes to do more than defend the besmirched honour of IPRs. He sets an ambitious goal of suggesting ways in which the regime of IPRs could be "trimmed and tailored to better serve its main purpose, which [is] … protecting creative works as a way of honoring and rewarding creative people."[18]

The book is an impressive 405 pages of meticulous research and is divided into three interlinked themes. The first theme deals with the theoretical foundations of IPRs; the second focuses on the mid-level principles of IPRs; and the third details the emerging issues of IPRs. These three themes are discussed in ten chapters spanning just over 300 pages, and the book concludes with a section that contemplates the future of IPRs.

The supreme virtue of the book is its readability. Unlike many philosophical texts that seemingly take pride in being impenetrable and dense, Merges writes in a clear and engaging fashion. Substantively, Merges first examines the Kantian conception of property, which conceivably lends itself to a balanced theoretical basis for IPRs by offering a common ground between creators and users of IP. Kant's theory is further explicated by Rawls's concept of distributional justice.[19] More importantly, both Kant and Rawls offer a framework that, while not quite a universal construct, has the attractive quality of being mid-level, as both Kant and Rawls straddle the divide between foundational doctrines and the harsh reality of factual details. Much IP theory has foundered on the rocks of factual details.

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16. *Supra* note 1 at ix.
17. *Ibid.*
18. *Ibid* at ix.
19. See John Rawls, *A Theory of Justice* (Cambridge: Belknap Press of Harvard University Press, 1971); John Rawls, *Justice as Fairness: A Restatement*, 1st ed by Erin Kelly (Cambridge: Belknap Press of Harvard University Press, 2001).

Indeed, a substantial aspect of Merges' contribution is his masterful explication of the proportionality principle: that is, the idea of rewards proportioned to effort or value.

Despite this principle's obvious attraction, critics may wonder whether "information feudalism"[20] (a likely consequence of a rentier or license economy) squares with proportionality, or whether the proportionality principle means much to the many inventors whose inventions did not make it to the market. What does proportionality do for the failed writers whose sleepless nights with their muse were never rewarded with a bestseller listing, let alone a royalty? The whims and idiosyncrasies of the marketplace as well as luck are significant factors left untreated by the proportionality argument.[21]

Merges seeks to avoid the constraints of fundamentalist dogma on IP by borrowing from and expanding on a vocabulary that both transcends and ties together multiple foundational concepts. By looking at the works of Kant, Rawls, Coleman, Waldron, and other philosophers for inspiration and insight, Merges creates a safe space for dialogue and argumentation between those who believe in the propertization of ideas and those with a different view. The question of whether the "propertization of labour" is consistent with the nature and function of IP makes two fundamental and contestable assumptions: that there is always an "intellectual" component in intellectual property and if there is, that such intellectual input or intervention is akin to "property."[22] Merges concedes that other scholars have questioned these assumptions.[23]

There are many forms of IP that cannot lay legitimate claim to being the result of extraordinary intellectual intervention by their owners or that require intellectual merit for legal protection. An obvious example is a trademark. Conversely, there are profound intellectual interventions that IP law does not protect for policy reasons—examples are found in mathematics and theoretical physics. Moreover, in dominant forms of IP law, there are cultural prejudices that privilege western intellectual work over non-western innovations. For example,

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20. See Peter Drahos & John Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?* (London: Earthscan, 2002); Martin Kretschmer, "Feudalism, Retreat or Revolution?" (Paper delivered at Bournemouth University Centre for IP Policy & Management, 26 June 2001), [unpublished] online: <http://eprints.bournemouth.ac.uk/3010/1/martin.pdf>.
21. Ikechi Mgbeoji, *Global Biopiracy: Patents, Plants and Indigenous Knowledge* (Vancouver: UBC Press, 2006) at 35-36.
22. *Supra* note 1 at 197.
23. Giuseppe Mazziotti, *EU Digital Copyright Law and the End-User* (Springer: Berlin, 2008) at 16-18.

Indigenous and traditional knowledge does not yet enjoy legal protection.[24] This raises significant questions about the universality and even-handed nature of the philosophical foundations of IPRs.

The second assumption is that "creations of the mind" are akin to physical property, and as such, the legal principles and doctrines of property law may be adapted to suit the vagaries and peculiarities of the former.[25] In the context of privatization and conferral of property rights over creations of the mind, the fear is that absent property rights, creative minds would cease to be creative. Of course, this subtle blackmail fails to take into account the non-rivalrous nature of IPRs and more importantly, the experiential truth that property rights are not the only motivations or incentives for creativity. In western legal tradition, few principles have attained the divine status enjoyed by individual property rights. The theology of property as a right of unquestioned merit has in some ways bred a fundamentalist concept of property. It is therefore to be expected that creations of the mind would be dragged to the altar of property for initiation. The question remains, however, whether creations of the mind are of the same kind as physical property. Merges himself observes: "To begin, I must concede that on one narrow view of what 'property' is, I cannot succeed."[26] This, of course, refers to the historical essentialist concept of property as a tangible, physical thing, with attendant legal characteristics dissimilar to ideas. This may also be referred to as the Blackstonian concept of property as absolute dominion.[27]

Merges' candor in this book disarms the potential critic. He proceeds to posit an adaptable concept of property, expansive enough to account for both tangible and intangible 'property.' By mapping out a one-to-one concept of power relations between the owner and the user, Merges seems to escape the constraints imposed by a historical essentialist view of property. However, this expansion of the concept of property is problematic. At what stage does an idea metamorphose into property, and what is the principled basis for this alleged transfiguration? Although arguments surrounding efficiency and the supposed need to preserve the public domain are expertly tackled by Merges, the problem here is that the non-rivalrous nature of IPRs renders invalid the imaginary fears of "a tragedy of the commons"[28] with respect to IPRs.

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24. Mgbeoji, *supra* note 21 at 120-68.
25. But see Peter Drahos, *A Philosophy of Intellectual Property* (Aldershot: Dartmouth, 1996) at 97-100.
26. *Supra* note 1 at 4.
27. I am grateful to Dr Carys Craig for reminding me of this alternate interpretation.
28. See Garrett Hardin, "The Tragedy of the Commons" (1968) 162:3859 Science 1243 (referring to the tragic deterioration which is inevitable in the unregulated use of a common resource).

Merges' method of resolving this problem is to proceed from the mid-level principles then to approach the deontological question. IPRs theorists distinguish between essentialist notions of property and mid-level principles. The former refer to the argument of whether IPRs are like 'real' property—no adaption of the concept of property is permissible in this formulation. On the other hand, mid-level principles focus on the conception and characteristics of property rights with a view to adapting those characteristics to create or sustain new manifestations or notions of property. Interestingly, the mid-level principles—non-removal, proportionality, efficiency, and dignity—are largely independent of the fundamental justification for IPRs.[29] Merges' approach results in the scenario in which IPRs may be justified on the basis of the four pillars constituting the mid-level principles. What, then, are the "first-order principles"?[30] Drawing from Jules Coleman, Rawls, Locke, Kant, and Justin Hughes, Merges lays down three foundational principles: Lockean appropriation, Kantian (liberal) individualism, and Rawlsian attention to the distributive effects of property.[31] Ultimately, these arguments are premised on possessive individualism.

On Locke, especially when considering the when and how of the transfiguration of ideas into property, Merges seeks to make a distinction between applying one's labour to a thing on the one hand and mixing one's labour with a thing, on the other. Through this archeological excavation and re-reading of Lockean philosophy, Merges seeks to restore Locke's account of appropriation by arguing that what Locke meant in his writings was that property is grounded in the application of labour. By asking how much labour was involved, and how the pre-existing thing changed or was affected by labour, Locke justifies the existence of property rights over the resulting product of labour. Is this really a reformulation of Locke, or crass semantics? If it is the former, then this is arguably an egalitarian and secular reading of Locke.[32] However, we must note that the Lockean argument is ineluctably theological and thus problematic for a secular society such as ours.[33]

Be that as it may, the distinction between mixing labour with property and applying labour to create property goes only so far. It is self-evident that not all efforts give rise to property rights and, more importantly, equal expenditures

29. *Supra* note 1 at 139.
30. *Ibid* at 13.
31. *Ibid*.
32. See John Dunn, *The Political Thought of John Locke: A Historical Account of the Argument of the 'Two Treatises of Government'* (Cambridge, UK: Cambridge University Press, 1969).
33. Gopal Sreenivasan, *The Limits of Lockean Rights in Property* (Oxford: Oxford University Press, 1995) at 4.

of effort do not give rise to equal property claims. If Locke's philosophy was the first foundation, how do we justify intellectual property rights that accrue to shareholders of companies, even when the shareholders are unaware of the copyrights, trademarks, and patents that bear their names? What effort of theirs was applied to the thing to create the property? Is their shareholding to be construed as effort or labour? It seems that Locke is inadequate in explaining modern realities on the propertization of ideas.[34]

The dominance of large corporations in the business of IP ownership is well documented. While not entirely sympathetic to the view that the era of the mythical lone inventor is gone, Merges struggles with justifying corporate ownership of IP rights at the expense of the individual creator.[35] He recognizes that corporate IP holders are not ideal "creator collectives";[36] in attempting to mitigate this, he argues that legal rules must be tilted in favour of individual creators. On the same basis, Merges makes an argument for a liberal interpretation of the "rules of exit"[37] for employees whose intellectual property has been owned or used by their corporate employers. In his words, "IP claims by large corporate entities should be carefully scrutinized to ensure they are not being used to prevent the formation of legitimate start-up companies."[38] Given the strengthened position of corporate IP owners in the creeping era of information feudalism, Merges' assertion must be construed as a wish, rather than an expectation.

On Kant, Merges notes that "the basic foundations of IP law are individual autonomy and freedom."[39] Kant's deontological approach to philosophy offers Merges a context for understanding the more complicated vistas of IPRs. What did Merges see through this lens? While viewing the field of IP as one occupied by individuals in their most autonomous state of expression may help to justify individual ownership in western traditions, it also helps to explain the resistance of major forms of IP to recognize the enormous debt owed by creators and innovators to society and its accumulated wisdom. The lionization of the individual innovator and creator disparages the common pool of knowledge, experience, and know-how from which every innovation, creation, and ingenuity springs. As Malcolm Gladwell and other scholars of innovation have repeatedly

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34. For a fuller discussion, see Carys J Craig, "Locke, Labour and Limiting the Author's Right: A Warning against a Lockean Approach to Copyright Law" (2002) 28:1 Queen's LJ 1 at 28.
35. *Supra* note 1 at 31-67.
36. *Ibid* at 22.
37. These are legal rules and doctrines that control how easy it is for an employee to leave a large company and start a new company. See *supra* note 1 at 23.
38. *Ibid*.
39. *Ibid* at 15.

pointed out, there is a cultural, social, and historical context to every innovation.[40] Kant places the individual in the center of his philosophical universe. The notion of possessive individualism pervading the Kantian approach is very problematic.

The dominant conception of IPRs as private property fails to account for or reflect the realities of cultural creativity.[41] The dialogic and interactive nature of innovation and creativity is compromised in favour of glorifying the individual; however, every innovator or creator owes a debt of capital to the commons. As Isaac Newton memorably put it, "If I have seen a little further it is by standing on the shoulders of Giants."[42] Merges, like so many other influential western scholars, downplays the cultural and historical contingencies of IPRs, especially the social contexts in which creativity and innovation operate. It is remarkable that this intensely western construct of individual authorship (the independent originator) has achieved universal status despite overwhelming evidence from all parts of the globe that creativity and innovation are socially and culturally contingent. A system in which full property rights are granted over the whole, simply because of a minuscule improvement to a part of that whole, is theoretically suspect and morally problematic.

Read in conjunction, neither Locke nor Kant offers a comprehensive justification for IPRs as being analogous to property rights. To fill this gap, Merges turns to Rawls's influential works on property and distributive justice. Rawls and other thinkers have "argue[d] persuasively that dedicated development and application of talent gives rise to a legitimate desert claim."[43] The profound brilliance of Rawls's foundational idea is the predicate "that much individual action is the result of pervasive social influence, so that society too has a legitimate interest—but not a coequal right—in the results of individual initiative."[44] Rawls fills a significant hole in the theses of Kant and Locke. Merges's explication and detailed analysis of this aspect of IP theory is

40. Malcolm Gladwell, *Outliers: The Story of Success* (New York: Little, Brown and Company, 2008); Malcolm Gladwell, *The Tipping Point: How Little Things Can Make a Big Difference* (New York: Little, Brown and Company, 2000). See also Linda McQuaig & Neil Brooks, *The Trouble with Billionaires* (Toronto: Penguin Group, 2010) at 74.
41. For a discussion of the importance of cultural creativity, see Carys J Craig, *Copyright, Communication and Culture: Towards a Relational Theory of Copyright Law* (Cheltenham: Edward Elgar, 2011). See also Thomas Kuhn, *The Structure of Scientific Revolutions* (Chicago: University of Chicago Press, 1962), and Rosemary J Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation, and the Law* (Durham: Duke University Press, 1998).
42. McQuaig & Brooks, *supra* note 39 at 84 (quoting Isaac Newton).
43. *Supra* note 1 at 19.
44. *Ibid.*

his most enduring contribution. Rarely has any IP scholar provided such clear insight on the Rawlsian philosophical conception of IP.[45]

The misconception surrounding the nature of the Internet has given rise to absurd claims of the emergence of a new economy, the arrival of the information age, and with it, the exaggerated obituaries of the old economy. This froth has had more than mere philosophical repercussions. Although traditional IP doctrines are quickly declared moribund and every development in Internet and digital media is seemingly celebrated as a revolution, Merges pours a well-deserved bucket of cold water on the excessive hype that has captured the IP world.

Clearly, Merges has succeeded in challenging much of the existing rhetoric in the IPRs regime. This book blazes several pathways through which IPRs can be charted with greater clarity. While some fundamental challenges in the IPRs regime remain, this book is a good aid for traversing the IPRs regime, especially as we contemplate the possibility of information feudalism. Although Merges deserves credit for his courage, the question of whether intellectual property can be justified remains in doubt.

45. Rawls too bows before the temple of individual authorship and possessive individualism.