
FOREWORD

Is Nozick Kicking Rawls's Ass? Intellectual Property and Social Justice

Anupam Chander & Madhavi Sunder***

TABLE OF CONTENTS

INTRODUCTION	563
I. ARGUMENTS ABOUT INTELLECTUAL PROPERTY AND SOCIAL JUSTICE	567
A. <i>Intellectual Property and Distributive Justice</i>	568
B. <i>Intellectual Property and Human Rights</i>	571
C. <i>Copyrights, Creativity, and Catalogs</i>	572
II. WHY CONSIDER SOCIAL JUSTICE WITHIN INTELLECTUAL PROPERTY?	573
A. <i>The Case for a Broader View of Intellectual Property Values</i> ..	574
B. <i>Critiques of the Social Justice Approach</i>	576
CONCLUSION	578

INTRODUCTION

“Nozick is kicking Rawls’s ass.” So proclaimed Talha Syed to a group of intellectual property scholars assembled in the small college town of Davis, California, for a conference on Intellectual Property and Social Justice in March 2006.¹ No one in the august group rebutted the claim.

* Professor, UC Davis School of Law. A.B. Harvard; J.D. Yale.

** Carnegie Scholar, 2006-2008; Professor, UC Davis School of Law. A.B. Harvard; J.D. Stanford. We wish to thank Dean Rex Perschbacher and Associate Dean Kevin Johnson for the enormous support that made this symposium possible. We are also grateful to the participants in the Symposium for their hard work and dedication to a productive exchange. We thank Rochelle Cooper Dreyfuss and Pamela Samuelson for their important contributions to our discussions.

¹ Talha Syed, himself, does not believe that this is a happy state of affairs, as is evident from his symposium paper with Professor William Fisher, which embraces a

Robert Nozick stands as one of the foremost intellectual antagonists to claims for distributive justice.² John Rawls, meanwhile, penned the most important modern political theory justifying an egalitarian society.³ Thus, the suggestion that Nozick is prevailing over Rawls would appear to cast a pall on calls for embedding demands for social justice within the law of intellectual property. Social justice, after all, is generally taken to require significant obligations towards the poor.

Is the libertarian vision of Nozick indeed in ascendance in intellectual property, overshadowing Rawls's egalitarianism? There is strong reason to answer "no." From Doha to Geneva, from Rio de Janeiro to Ahmedabad, from Palo Alto to New Haven, from Davis to Copenhagen, individuals and groups insist that intellectual property must serve a broad array of human ends. These cities mark the launching pads for some of the growing networks dedicated to improving the distribution of intellectual property. In Doha, Qatar, in 2001, member states of the World Trade Organization declared that intellectual property law "does not and should not prevent Members from taking measures to protect public health."⁴ In Geneva, the World Intellectual Property Organization ("WIPO") General Assembly sought in 2004 to commit WIPO to a "development agenda."⁵ A decade earlier, in Rio de Janeiro in 1992, nations agreed to a Convention on Biological Diversity, recognizing that sovereign control over biological resources would aid the preservation of biological diversity.⁶ In Ahmedabad, India, a Honey Bee Network seeks to share local agricultural innovations with a wider population on equitable terms.⁷ Palo Alto gave birth to the Creative Commons, which helps creators share their work widely through streamlined licenses. In Davis, the organization Public Intellectual Property Resource for Agriculture seeks to leverage the patents held by public institutions to form useful patent pools for facilitating humanitarian use of crop knowledge. In Copenhagen, the artist and activist group Superflex helps developing country farmers brand their products in the same fashion as large

vision of a just and attractive society with a strong egalitarian ethic. See generally William W. Fisher & Talha Syed, *Global Justice in Health Care: Developing Drugs for the Developing World*, 40 UC DAVIS L. REV. 581 (2007).

² See generally ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* (1974).

³ See generally JOHN RAWLS, *A THEORY OF JUSTICE* (rev. ed. 1999).

⁴ World Trade Organization, Ministerial Declaration of 14 November 2001, ¶ 4, WT/MIN(01)/DEC/2, 41 I.L.M. 755 (2002) [hereinafter Doha Declaration].

⁵ World Intellectual Prop. Org. [WIPO], General Assembly, *Report: Thirty-First (15th Extraordinary) Session*, ¶ 218, WO/GA/31/15 (Oct. 5, 2004).

⁶ See Convention on Biological Diversity art. 15, June 5, 1992, S. TREATY DOC. NO. 103-20, 1760 U.N.T.S. 79.

⁷ See Honey Bee Network, What Is Honeybee?, <http://knownetgrin.honeybee.org/honeybee.htm> (last visited Nov. 28, 2006).

multinationals, so that these farmers can exploit trademarks in products they cultivated.

These are not merely fringe efforts, tilting at windmills, but rather practical engagements with real world problems, from increasing access to medicines and culture to fostering socially useful innovations and economic development. Nor are these activities necessarily hostile to intellectual property; rather, many seek to harness intellectual property for social ends.

Thus far, intellectual property theory has been behind the practice. But the papers in this Symposium, considered collectively, form a rebuttal to the declaration that a libertarian vision dominates both intellectual property law and scholarship.

Social justice in intellectual property has recently gained special urgency because of three developments, the first two technological, and the third legal: (1) the rise of the Internet; (2) the rise of biotechnology; and (3) the entry into force of the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS").

The Internet — through its various applications, from the World Wide Web and e-mail to peer-to-peer file sharing — enables anyone to share the stuff of intellectual property, the intellectual products themselves, relatively cheaply and widely. This radical change in the technology for disseminating intellectual products fosters hope for the most widespread use of human knowledge. Borges's infinite library becomes almost conceivable, though it is not clear whether its midwife will be Google or a coalition of libraries.⁸ At the same time, the ready dissemination of information (facilitating copyright infringement) led to the adoption of laws that criminalize the circumvention of technologies that protect intellectual property, laws that might be exploited to limit the dissemination of information or to lock out competition.⁹ The broad vision of human advancement through information sharing has roused many to focus on how intellectual property might hamper or facilitate that vision's realization.

⁸ See Siva Vaidhyanathan, *The Googlization of Everything and the Future of Copyright*, 40 UC DAVIS L. REV. 1207, 1220 (2007) (asking whether public libraries may be better suited to task of administering such library because "[l]ibraries and universities last. Companies wither and crash. Should we entrust our heritage and collective knowledge to a company that has been around for less than a decade?").

⁹ See, e.g., LAWRENCE LESSIG, *FREE CULTURE* 160 (2004) ("Technology becomes a means by which fair use can be erased; the law of the [Digital Millennium Copyright Act] backs up that erasing."); Anupam Chander, *Exporting DMCA Lockouts*, 54 CLEV. ST. L. REV. 205, 208 (2006) (noting how DMCA might be deployed to limit competition in goods in which software is embedded); Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised*, 14 BERKELEY TECH. L.J. 519, 546 (1999) (arguing that DMCA "may have a chilling effect on legitimate activities, including those affecting free speech").

The growing importance of biotechnology to advances in agriculture and medicine increasingly implicates intellectual property in these areas. The Green Revolution was made possible by scientific advances in agriculture largely independent of intellectual property claims, but today's breakthroughs will depend on patentable (and likely patented) innovation. This may help incentivize private research, but may also obstruct innovation which would have to clear a thicket of prior patents. The efforts to develop a genetically modified strain of "golden rice" infused with beta carotene stumbled when it was discovered that some seventy patents had been filed on the genes and constructs owned by some thirty-two companies and institutions.¹⁰ There may be little freedom to operate in many areas of biotechnology, at least in the absence of permission from dozens of entities worldwide.

The third development, TRIPS, now in effect in all but the world's very least developed countries, requires patents in everything from seeds to drugs, making intellectual property law literally an issue of life or death. Yet, paradoxically, intellectual property's "march into all corners of our lives and to the most destitute corners of the world in the last century has . . . exposed the fragility of its economic foundations while amplifying its social and cultural effects."¹¹ We now know, for example, that intellectual property rights do not incentivize the creation of drugs to treat poor people's ills, and that intellectual property may offer no incentive for creation when a country lacks infrastructure necessary for technical innovation. As Professor Laurence Helfer points out in his paper, a United Nations committee recently recognized the broad impact of TRIPS on "(1) the transfer of technology to developing countries; (2) the consequences for the right to food of plant breeders' rights and patents for genetically modified organisms; (3) biopiracy; (4) the protection of the culture of indigenous communities; and (5) the impact on the right to health of legal restrictions on access to patented pharmaceuticals."¹²

¹⁰ See R. DAVID KRYDER ET AL., THE INTELLECTUAL AND TECHNICAL PROPERTY COMPONENTS OF PRO-VITAMIN A RICE (GOLDENRICE™): A PRELIMINARY FREEDOM-TO-OPERATE REVIEW 7 (2000), available at <http://lsr.nellco.org/cgi/viewcontent.cgi?article=1007&context=piercelaw/facseries>. Some criticize GoldenRice on the merits of its nutritional value or its reliance on genetic modification. Greenpeace, *All That Glitters Is Not Gold: The False Hope of Golden Rice*, May 2005, <http://www.greenpeace.org/raw/content/international/press/reports/all-that-glitters-is-not-gold.pdf>; Vandana Shiva, *The "Golden Rice" Hoax: When Public Relations Replaces Science*, available at <http://online.sfsu.edu/~rone/GEessays/goldenricehoax.html> (last visited Jan. 17, 2007).

¹¹ Madhavi Sunder, *IP*³, 59 STAN. L. REV. 257, 260 (2006).

¹² Laurence R. Helfer, *Toward a Human Rights Framework for Intellectual Property*, 40 UC DAVIS L. REV. 971, 985 (2007).

In this Foreword, we seek to contextualize the papers in this Symposium issue, showing how they outline the major arguments with respect to approaching intellectual property through the lens of social justice. We also seek to defend the fundamental project, explaining why we must heed considerations of social justice as we deliberate on the contours of intellectual property. In Part I, we situate the papers within the larger philosophical debate between Nozick and Rawls, showing that egalitarian norms pulsate through a significant strain of intellectual property scholarship. Some will demur. They will argue that intellectual property should serve a single goal: incentivizing the creation of cultural and scientific products, as the market dictates. Concerns about social justice should be dealt with through other means — perhaps through taxation and welfare payments.¹³ In Part II, we will argue against such an impoverished vision of the values of intellectual property law.

I. ARGUMENTS ABOUT INTELLECTUAL PROPERTY AND SOCIAL JUSTICE

For Nozick, social justice requires that governments interfere as little as possible with private arrangements, and devote themselves instead to protecting such arrangements.¹⁴ Nozick separates the question of social justice in property into three issues: (1) justice in the initial acquisition, (2) justice in subsequent transfers, and (3) justice with respect to reparations for violating (1) and (2).¹⁵ With respect to initial acquisition, Nozick largely follows John Locke, granting a laborer rights to own what she makes and to appropriate anything not already owned, provided her appropriation leaves “enough and as good” for others.¹⁶ Justice in subsequent transfers is left largely to the free market; governments should avoid interfering with or coercing transfers (including taxation, which Nozick likens to forced labor). Justice in reparations is quite simply that: reimbursing victims of harm done by others.

Where Nozick's foremost value is liberty, which he sees as freedom from the state, Rawls's theory seeks to structure a more egalitarian society, requiring more direct state involvement. Political institutions must always seek to improve the lot of the worst off in society; their success or failure hangs on how well they achieve this goal. This is

¹³ See LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* 33 (2002) (“[D]istributional objectives can often be best accomplished directly, using the income tax and transfer (welfare) programs.”).

¹⁴ NOZICK, *supra* note 2, at 12 (describing need for protective associations such as states to resolve disputes about private arrangements); *id.* at 149 (“The minimal state is the most extensive state that can be justified.”).

¹⁵ *Id.* at 151-52.

¹⁶ *Id.* at 174-78.

Rawls's central disagreement with Nozick, who would have political institutions protect private property and free contract, with minimal redistribution.

A. *Intellectual Property and Distributive Justice*

Distributive justice through intellectual property, however, occupies many of the papers in this Symposium. Professor William Fisher and Talha Syed lead their powerful paper with a staggering fact, one designed to motivate distributive justice in intellectual property on a global level:

Each year, roughly nine million people in the developing world die from infectious diseases. The large proportion of those deaths could be prevented, either by making existing drugs available at low prices in developing countries, or by augmenting the resources devoted to the creation of new vaccines and treatments for the diseases in question.¹⁷

Fisher and Syed address the central question for global distributive justice: why should the richer nations pay for the health care needs of the poorer nations? Like Rawls, they focus not on “the morality of individual choice” (e.g., to give or not give), but on “the responsibilities of institutions.”¹⁸ They consider arguments “from historical equity, social utility, and deontological and teleological theories of distributive justice.”¹⁹ They conclude that each of these philosophies — from utilitarianism to cosmopolitanism — supports health-related obligations from the North to the South.

Fisher and Syed provide a strong philosophical foundation for James Love's practical suggestion: a Medical Research and Development Treaty where developed nations would fund the creation and delivery of essential medicines to treat AIDS and other diseases in the developing world.²⁰ Innovators in both developing and developed nations would be rewarded not by royalties from patents on their inventions, but rather through prizes for the incremental health benefits of their invention, when compared to existing medicines. Love explores the possibility of using privately managed research and development funds to channel money into research that could not otherwise access private capital.

Professor Margaret Chon identifies distributive justice as a central issue in determining how to allocate rights to technical knowledge between

¹⁷ Fisher & Syed, *supra* note 1, at 583.

¹⁸ *Id.* at 588.

¹⁹ *Id.* at 584.

²⁰ James Love, *Measures to Enhance Access to Medical Technologies, and New Methods of Stimulating Medical R & D*, 40 UC DAVIS L. REV. 679, 696-705 (2007).

producers and users.²¹ Taking a Rawlsian “bottom up” perspective which considers the impact of the global intellectual property regime on those at global society’s margins, she describes how the world’s poor lack access to basic textbooks. She argues that intellectual property law should not stand in the way of the widespread dissemination of textbooks, even where those seeking education lack the means to compensate the copyright owner.

Professor Keith Aoki questions the justice in the initial acquisition of some important intellectual properties. “The exclusion of slaves from owning patents,”²² for example, meant that black inventors could be exploited — even while some justified the denial of patents to blacks on the theory that they “lacked the requisite inventive agency to generate or possess patentable ideas.”²³ Some historians, for example, suggest that Eli Whitney may have borrowed the central idea of the cotton gin from a slave. Aoki’s goal is not to simply argue for restitution for the past injustice of failing to recognize black authorship, but to put intellectual property law into a social context. For example, Aoki points out the cruel irony that the cotton gin may have prolonged the economic viability of slavery, which had come under increasing pressure in the marketplace until this innovation.²⁴ Similarly, after demonstrating the failure of copyright law to recognize the inventiveness of black blues artists, Aoki seeks not to grant individual intellectual property rights to such artists, but rather to create limited commons property regimes that would give these artists freedom to borrow from each other while increasing their bargaining power with respect to outside parties.

Where Aoki describes communities that did not receive the economic benefit of their creations (a Lockean-Nozickian concern, to be sure), the paper by Professor Rosemary Coombe, Steven Schnoor, and Mohsen Ahmed examines efforts by traditional communities to commodify their cultural knowledge.²⁵ These communities are using the tools of intellectual property — trademarks, certification marks, copyrights, patents, and geographical indications — for their own economic advantage. They are learning to market their place, tradition, history, and

²¹ Margaret Chon, *Intellectual Property “from Below”: Copyright and Capability for Education*, 40 UC DAVIS L. REV. 803, 807 (2007) (“The calibration of this foundational balance [in TRIPS Article 7] is fundamentally a question of distributive justice . . .”).

²² Keith Aoki, *Distributive and Syncretic Motives in Intellectual Property Law (with Special Reference to Coercion, Agency, and Development)*, 40 UC DAVIS L. REV. 717, 741 (2007).

²³ *Id.* at 742.

²⁴ *Id.* at 745-46.

²⁵ Rosemary J. Coombe, Steven Schnoor & Mohsen Ahmed, *Bearing Cultural Distinction: Informational Capitalism and New Expectations for Intellectual Property*, 40 UC DAVIS L. REV. 891 (2007).

narrative. But Coombe and her coauthors have two worries: first, that this strategy puts greater burdens on intellectual property to serve as a governance mechanism within the community; and second, that this strategy may reify certain customs or hierarchies.

Professor Shubha Ghosh spins a tale to distinguish the real property commons from the intellectual property commons.²⁶ Unlike real property which at least today has already been clearly demarcated, intellectual property remains yet unexplored. This characteristic, Ghosh suggests, should lead us to consider distributive justice directly when we evaluate justice among intellectual property creators, justice among creators and users, and justice between generations.

Professor Ann Bartow expands the discussion from the structure of intellectual property to the implications for social justice of the commonplace practice of naming public sites.²⁷ Such naming practices, she argues, have enormous, though often neglected, cultural significance. She observes, for example, that we are likely to view “a community in which a public school is named for Robert E. Lee very differently from a community in which a public school is named for Martin Luther King, Jr.”²⁸ (the example strikes home: the UC Davis School of Law, housed in an edifice named for Martin Luther King, Jr., seeks to carry on meaningfully King’s legacy for social justice through law). Given the cultural implications of public names, she worries that the usual processes for selection are undemocratic. She calls for transparency and accountability in the selection process.

Like Nozick and Rawls, the contributors to this Symposium have fundamental disagreements about the means for making this area of law more socially just. A number of the papers raise objections, or at least cautions, to a social justice approach to intellectual property.

In his paper, winkingly titled *Locke Remixed ; -*), Professor Robert Merges offers two important arguments against redistribution through unlicensed cultural remixes, a position he associates with one of us (Sunder) and with Coombe.²⁹ His principal argument follows Nozick (whose theory of initial acquisition remixes Locke’s): creators deserve the fruits of their labors, and forcing them to yield a significant amount of these fruits would be unfair.³⁰ His second argument is more pragmatic:

²⁶ Shubha Ghosh, *The Fable of the Commons: Exclusivity and the Construction of Intellectual Property Markets*, 40 UC DAVIS L. REV. 855 (2007).

²⁷ Ann Bartow, *Trademarks of Privilege: Naming Rights and Physical Public Domain*, 40 UC DAVIS L. REV. 919 (2007)

²⁸ *Id.* at 932-33.

²⁹ Robert Merges, *Locke Remixed ; -*), 40 UC DAVIS L. REV. 1259 (2007).

³⁰ *Id.* at 1262 (“[I]t would not be fair to the people who create original mass market content for remixers to ‘redistribute’ too much of the money creators earn from their work.”).

even when copyright owners might have the legal right to stop a remix, they very often do not exercise the right, perhaps because they do not object to the particular use or because of the transactions costs of enforcing their right. “[R]emix culture has sprouted and grown quite rapidly,” Merges argues, “without any major changes in the law.”³¹

Merges’s first argument relies on a particular moral philosophy and can thus be disputed by those who do not share that philosophy. Even if one does accept Nozick’s account of property, we must still pay attention to the justice of the initial acquisition; today’s copyright holders often drew upon the labors of others without meaningful consent or compensation. Yet another difficulty is one presented by Nozick himself: where do we draw the limits on the property rights that flow from one’s labor? Should a can of tomato juice poured into the ocean, Nozick memorably asks, make the ocean mine? This critique becomes particularly sharp in the context of remixing, where one must define the scope of the derivative work correctly; after all, remixers, too, are laborers hard at work creating value. Where should the original author’s control end? A Lockean theory of control might grant much greater rights than a purely incentive-driven account; it might provide the creator with windfalls far beyond those necessary to motivate the creation. Relying upon the Lockean proviso to set the limits seems much too abstract and indefinite.

Merges’s second argument — that remixers are doing fine even without legal rights because the copyright owners have waived their claims out of generosity or for practical reasons — can be turned around: if the default rule were set otherwise — to give broader remix rights to third parties — perhaps the “kindness of strangers”³² would still flow, now in the reverse direction.

B. *Intellectual Property and Human Rights*

Helfer argues that both the human rights and intellectual property domains have moved towards each other, such that their language and claims increasingly overlap.³³ He imagines three possible futures for the intertwining of human rights and intellectual property. First, intellectual property owners might use human rights to expand their intellectual

³¹ *Id.* at 1263. Of course, the law itself gives remixers legal rights through the fair use exceptions to copyright. *See, e.g.,* Anupam Chander & Madhavi Sunder, *Everyone’s a Superhero: A Cultural Theory of Mary Sue Fan Fiction as Fair Use*, 95 CAL. L. REV. (forthcoming 2007) (arguing that unlicensed fan fiction that valorizes types of people neglected in original work will often qualify as fair use).

³² Merges, *supra* note 29, at 1264.

³³ Helfer, *supra* note 12, at 975 (writing that “[i]n this maelstrom of reaction, resistance, and regime shifting, international human rights law is poised to become an increasingly central subject of contestation” in international intellectual property debates).

property claims, now founded on a fundamental human right. Second, countries could use human rights to impose external limits on intellectual property, establishing “external limits, or maximum standards of protection, upon rights holders.”³⁴ Third, policymakers might seek to achieve human rights ends through intellectual property means (that is, recognizing that intellectual property might either help or harm a particular effort to promote a minimum human need).

Professor Kal Raustiala offers a sobering intervention, questioning “whether the infusion of human rights concepts and rhetoric will serve, on balance, to make international IP rights more socially just, or just more powerful.”³⁵ We respond to Raustiala’s concerns in Part II below.

Professor Peter Yu reviews the drafting history leading up to the intellectual property-related provisions in the Universal Declaration of Human Rights and the International Covenant on Economic, Social, and Cultural Rights.³⁶ He argues that “it is important to clearly delineate which attributes of intellectual property rights would qualify as human rights and which attributes or forms of those rights should be subordinated to human rights obligations due to their lack of any human right basis.”³⁷ Such a clear delineation would show that intellectual property rights, even if conceived as human rights, are not absolute, but rather must be balanced with other, perhaps paramount, human rights.

C. Copyrights, Creativity, and Catalogs

Noting the absence of theories of cultural creation — a seemingly central question for copyright law — Professor Julie Cohen ambitiously begins to weave a story of how we create.³⁸ She sees creativity as characterized (in Professor Leslie Kurtz’s words) by “intrinsic rewards, creative play, serendipity, cross-fertilization, and the unstructured freedom to see what happens without knowing in advance.”³⁹ Copyright law, Cohen argues, should seek not simply to incentivize more creative goods, but to facilitate the conditions for creativity — including centrally the ability to “play.”⁴⁰

³⁴ *Id.* at 1017.

³⁵ Kal Raustiala, *Density and Conflict in International Intellectual Property Law*, 40 UC DAVIS L. REV. 1021, 1023-24 (2007).

³⁶ Peter K. Yu, *Reconceptualizing Intellectual Property Interests in a Human Rights Framework*, 40 UC DAVIS L. REV. 1039, 1047-70 (2007).

³⁷ *Id.* at 1128.

³⁸ Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 UC DAVIS L. REV. 1151, 1190-92 (2007).

³⁹ Leslie A. Kurtz, *Copyright and the Human Condition*, 40 UC DAVIS L. REV. 1233, 1244 (2007).

⁴⁰ Cohen, *supra* note 38, at 1190.

For many, Google Book Search promises to enhance such play in the field of the word. Google has begun to digitize the collections of some of the world's biggest libraries and make them available worldwide, in snippet form for books in copyright, and in full text form for books in the public domain. But Professor Siva Vaidhyanathan fears that Google's fair use defense for this copying will fail, and the similar not-for-profit projects of libraries will be jeopardized by an adverse legal precedent.⁴¹ Libraries, he believes, should be public, not private, projects. Vaidhyanathan, who teaches at NYU's education school, distrusts Google as the librarian for all human knowledge.

Kurtz and Professor Molly Van Houweling elegantly summarize the contributions by Cohen and Vaidhyanathan. Van Houweling worries about what may be lost in the move from physical to virtual libraries, including physical encounters with books, and people, in the same aisle.⁴²

In discussing Cohen's description of the playful, unpredictable, and culturally embedded nature of creativity, Kurtz concludes, "If copyright is to promote creativity, it will not be well served by rigid control over the ability to access and use cultural goods."⁴³ Kurtz is more optimistic than Vaidhyanathan about Google's library project, both from the standpoint of law and from the standpoint of social justice. She argues that Google "may have a strong fair use defense," primarily because "the project does not appear to harm any of the publishers' markets."⁴⁴ She also believes Google offers a "valuable research tool," especially for those far from the world's metropolises, allowing anyone with Internet access "to engage with all sorts of materials."⁴⁵

II. WHY CONSIDER SOCIAL JUSTICE WITHIN INTELLECTUAL PROPERTY?

Intellectual property law is a human construction designed to solve a fundamental problem of information economics: without intellectual property protections, the ready duplicability of information undermines incentives to create information. Armed with this economic insight and fortified by a constitutional mandate to "promote the Progress of Science and useful Arts,"⁴⁶ some intellectual property scholars — let's call them

⁴¹ Vaidhyanathan, *supra* note 8, at 1230 (arguing that Google's claim "is destined to backfire").

⁴² Molly Shaffer Van Houweling, *Bumping Around in Culture: Creativity, Spontaneity, and Physicality in Copyright Policy*, 40 UC DAVIS L. REV. 1253, 1257 (2007) (considering implications of Google Library Project's loss of physical encounters with books).

⁴³ Kurtz, *supra* note 39, at 1244.

⁴⁴ *Id.* at 1249.

⁴⁵ *Id.* at 1250-51.

⁴⁶ U.S. CONST. art. I, § 8, cl. 8.

“Intellectual Property Originalists”⁴⁷ — would keep intellectual property’s focus single-minded: to incentivize the production of information.⁴⁸ They would thus resist any call to expand the values of intellectual property to the broad array of values constituting social justice.

A. *The Case for a Broader View of Intellectual Property Values*

We will argue here that the view of intellectual property as serving only to incentivize more information production is too narrow. We offer a set of arguments for an expansive understanding of the values motivating and structuring intellectual property law.

Spurring different kinds of innovation. Even if we are interested solely in spurring innovation, are we disinterested entirely in what kind of innovation we are spurring? Does it matter if the intellectual property regime fails to incentivize the creation of treatments for poor people’s diseases?⁴⁹ While some might prefer official technological neutrality, governments often are keen to spur more socially useful inventions. In *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, the Supreme Court observed that a rule that encouraged one kind of innovation might simultaneously curtail another kind of innovation: “The more artistic protection is favored, the more technological innovation may be discouraged. . . .”⁵⁰

Providing grounds for limiting intellectual property claims. A single-minded focus on incentivizing creation could lead to maximalist intellectual property claims. The only limit on intellectual property would be found in (1) the claim that additional intellectual property rights are unnecessary to spur creation, and (2) situations where expanding intellectual property rights for some will interfere with others’ ability to create. A broad range of human values should help restrain maximalist intellectual property demands.

Precipitating purpose need not require inattention to other values. The fact that a legal regime might be created for one purpose should not mean that the implications of that regime for all other purposes should be ignored.

⁴⁷ Sunder, *supra* note 11, at 330.

⁴⁸ See, e.g., Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1031 (2005) (“Intellectual property protection in the United States has always been about generating incentives to create.”).

⁴⁹ This is, of course, a central concern for both the Fisher and Syed and Love papers in this Symposium. See Fisher & Syed, *supra* note 1, at 583 (expressing concern that “pharmaceutical firms concentrate their research and development . . . resources on diseases prevalent in Europe, the United States, and Japan — areas from which they receive 90-95% of their revenues — and most of the diseases that afflict developing countries are uncommon in those regions”); Love, *supra* note 20, at 696-705.

⁵⁰ 125 S. Ct. 2764, 2775 (2005).

The state raises an army because of the need to assure its security against foreign invasions. Yet, the state might deploy the army domestically in case of natural disasters. And it might need to create limits on how the army might operate (such as prohibitions on torture and sexual harassment) — limits stemming not necessarily from self-defense but from other human values. Similarly, the fact that intellectual property law might be established for instrumental reasons does not mean that other purposes should not be considered when we set its metes and bounds. Furthermore, we could even treat the incentive rationale as primary, but other goals as important factors nonetheless.

Redistribution through tax inadequate. Those who disfavor a social justice agenda for intellectual property are not necessarily antagonistic to social justice itself. They would often simply prefer what they find to be a superior forum for considering such issues: tax. But it seems unrealistic to expect the effects to be sorted out through a redistributive tax regime.⁵¹ Furthermore, why compound disadvantage through an intellectual property system indifferent to equality⁵² in the hopes that it might be sorted out later through a tax system?

Intellectual property laws not necessarily globally scalable. The insistence on a single maximand for intellectual property law becomes even more problematic as Western-style intellectual property law is imposed on developing countries. A narrow focus on spurring innovation through intellectual property rights fails to differentiate between capacities to innovate or, more importantly, capacities to commercialize innovation. Such capacities may be limited perhaps because of small home markets or the absence of governmental research and development funding.⁵³ Furthermore, the expansion of intellectual property rights globally has not been coupled with a reinvigorated commitment to global development. Foreign aid budgets have largely stagnated or declined — hardly likely to compensate for the larger net royalty payments now likely to flow from the South to the North as a result of TRIPS.⁵⁴

⁵¹ For the general argument that most subject areas of law should ignore distributional consequences in favor of direct redistribution through the tax system, see generally LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* (2002).

⁵² See generally Anupam Chander, *The New, New Property*, 81 *TEX. L. REV.* 715 (2003) (describing how assignment of initial entitlements in domain name system compounds inequality); Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 *CAL. L. REV.* 1331, 1353 (2004) [hereinafter Chander & Sunder, *Romance*] (arguing that TRIPS creates “an international intellectual property regime that is sharply tilted in favor of the developed world”).

⁵³ Chander & Sunder, *Romance*, *supra* note 52, at 1351-54 (describing reasons why developing world companies might find it difficult to exploit resources from their home states globally).

⁵⁴ In 1999, developing countries paid some \$7.5 billion more in royalties and license fees than the royalties and license fees they received, even though this was well

Single-minded focus not true of most other areas of the law. Property law, like most or perhaps all other areas of law, does not have such a single-minded focus. Property rights in land serve a myriad of values, and are justified and cabined accordingly.

Hard to justify copyright fair use if intellectual property limited to incentives. Intellectual property has long harbored multiple values, such as the First Amendment values implicit in fair use. Recent efforts to reconstruct fair use doctrine as principally a response to transaction costs-induced market failure⁵⁵ might jeopardize the doctrine itself. As transaction costs of finding the copyright owner and negotiating a license diminish as a result of electronic information networks, markets may well transform fair use into fared use, undermining fair use. A broad understanding of intellectual property values might justify fair use in the face of technological erosion.

Theory is behind the practice. Where theoreticians seem to prefer the incentive story, in practice, intellectual property law is already replete with concerns for many values. In a recent Supreme Court intervention, for example, Justice David Souter, writing for the Court, was “mindful of the need to keep from trenching on regular commerce”⁵⁶ — a value quite beyond simply incentivizing production of more music. Explicitly acknowledging the plural values implicated by intellectual property in our theoretical framework will help rationalize this law.

B. Critiques of the Social Justice Approach

We consider here three critiques of our approach.

Whose values? Many will worry that our approach would constitute the legal academy as Platonic rulers. How do we identify the myriad values to be considered? And whose values? Rawls’s? Nozick’s? Or someone else’s entirely?⁵⁷

before the deadlines for full implementation of TRIPS obligations in the developing states. COMMISSION ON INTELLECTUAL PROPERTY RIGHTS, U.K. SEC’Y OF STATE FOR INT’L DEV., INTEGRATING INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT POLICY 21 (2002), available at http://www.iprcommission.org/graphic/documents/final_report/CIPRfullfinal.pdf. The United States, by contrast, saw an \$8 billion increase in its surplus of royalties and fees related mainly to intellectual property transactions between 1991 and 2001. *Id.*

⁵⁵ See, e.g., Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1627-30 (1982) (describing fair use as justified by market breakdowns resulting from transaction costs, externalities, and anti-dissemination motives).

⁵⁶ *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764, 2780 (2005).

⁵⁷ See generally BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980); BRIAN BARRY, *WHY SOCIAL JUSTICE MATTERS* (2005).

But we do not presume to offer any particular teleology for intellectual property. Rather, that is the domain of the democratic process. The values of intellectual property will be determined dynamically through the politics of the age, just as the social movements of the past marked real property law.

Judges, of course, will make many of these decisions, and thus, as the legal realists recognized, the values of the judges themselves will play an important part in determining intellectual property law. Yet, even Bickel did not find common law adjudication to be undemocratic. His complaint was with *constitutional* adjudication.⁵⁸

Too complex. Introducing additional values to intellectual property analysis will necessarily complicate that analysis. But if our move adds complexity, it is just the complexity necessary to get things right. *Narrowing the calculus to ease the calculation will likely lead to the wrong answer.* Simplifying assumptions are useful only when their omissions are not so critical as to render the results invalid. Economy should not come at the expense of achieving a just outcome.

Threat to public domain. Intellectual property scholars have mounted a heroic effort to staunch the enclosure of the public domain of information. Many worry that broadening our understanding of intellectual property will buttress maximalist intellectual property claims. As Raustiala writes, “the introduction of human rights language to the policy debate over IP may have a . . . strengthening influence” for intellectual property claims.⁵⁹ Raustiala understands that many find “unfairness in a system whereby refined products based on traditional knowledge and genetic resources are protected via international IP law, while the underlying traditional knowledge and resources are not.”⁶⁰ But he worries that human rights-based claims for intellectual property “will serve to wall off still more from the public domain,” stifling innovation.⁶¹ He cautions that “the risk is that the language and politics of human rights, as it filters into the language and politics of IP rights, will make it harder for governments to resist the siren songs of those seeking ever more powerful legal entitlements.”⁶²

While we appreciate this warning, we believe that human rights are a principal source for *delimiting* intellectual property, not simply expanding it. For example, the arguments for access to medicines (and the compulsory license schemes they often entail) typically rely not on claims of authorship or incentive, but rather on the desire to expand human

⁵⁸ See Anupam Chander, *Globalization and Distrust*, 114 YALE L.J. 1193, 1194-95 (2005).

⁵⁹ Raustiala, *supra* note 35, at 1032.

⁶⁰ *Id.* at 1033.

⁶¹ *Id.*

⁶² *Id.* at 1037.

capabilities. Yu discusses the case of *Ashdown v. Telegraph Group Ltd.*,⁶³ in which the English Court of Appeals relied on human rights law to establish a compulsory license allowing a paper to publish a memo of a secret meeting with Prime Minister Tony Blair, despite claims that it would infringe copyright.⁶⁴ Thus, human rights arguments may help repel the advance of intellectual property by providing justifications for limiting it.

Indeed, rather than shrinking the public domain, our argument may likely expand it. Recognizing the diversity of values underlying intellectual property should lead us to share certain rights in intellectual products, rather than reserve them more closely. Recall that new theories of property, from personhood to social relations, enhanced our ability to explain and justify legal limits on property, even while they served to bolster some property claimants, such as tenants.

Still others pragmatically warn that rights intended to aid the poor are more likely to be wielded ultimately by those already in power. But this suggests that it is analytically difficult to distinguish Disney from the dissident, or Monsanto from a mountain tribe.⁶⁵ In fact, courts can make such distinctions when they are justified by other normative reasons.

Furthermore, this is the risk of any legal reform effort — even the public domain movement itself. Elsewhere we have argued that the campaign to preserve the public domain, which is taken up in everyone's name, in fact may be to the benefit of the powerful who are in a better position to quickly appropriate ideas and goods in the public domain for themselves.⁶⁶ We suggest that an intellectual property regime that expressly acknowledges and confronts its social and cultural effects will be best suited to resolve these issues.

CONCLUSION

No human domain should be immune from the claims of social justice. Intellectual property, like property law, structures social relations and has profound social effects. The papers in this Symposium describe, critique, and propose ways of governing this interplay between law and society. It is often said that the twenty-first century will be the Age of Knowledge

⁶³ [2002] EWCA (Civ) 1142, [2001] W.L.R. 967 (Eng.).

⁶⁴ Yu, *supra* note 36, at 1096-99.

⁶⁵ Merges asserts a version of this claim explicitly, suggesting that limits on Disney will also be limits on the little creator: "There is no principle way to distinguish a big Disney production from an animated film made by a group of film school friends, or a Beatles recording from a homemade garage band master tape. Therefore, any legal regime that strikes against the authority and hegemony of Disney and the Beatles will inevitably impact small producers of original content." Merges, *supra* note 29, at 1270 n.19.

⁶⁶ See Chander & Sunder, *Romance*, *supra* note 52, at 1340-41.

and Participation. Intellectual property law will help define the possibilities and human capabilities of this Age.

Both Rawls and Nozick sought to craft principles for the most just society within human grasp. Their debate should not be verboten within intellectual property scholarship. Indeed, intellectual property appears in their scholarship.⁶⁷ The writers in this Symposium employ philosophy, sociology, welfare economics, cultural studies, feminist theory, communications theory, and critical race theory to understand intellectual property. In going beyond a narrow, economic incentive-based account, they demonstrate the broad range of values and approaches necessary to the study of intellectual property today. Intellectual property regulates the production and distribution of information. Considerations of social justice cannot be peripheral to such a central human construction.

⁶⁷ See, e.g., NOZICK, *supra* note 2, at 141 (discussing copyrights and patents).