INTRODUCTION

WHAT'S REAL? IP THROUGH THE LENS OF PROPERTY THEORY

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The relationship between property (land and chattels) and intellectual property is—perhaps surprisingly—fraught.[1] For those outside the field, asking whether intellectual property is property likely seems a baffling question about an obvious point. Intellectual property plainly includes the very word "property." And intuitively, artists and inventors think of creations as theirs in the same sense that owners of real property feel attached to their land.[2]

For lawyers, of course, nothing can ever be simple, and this matter is no exception. Numerous scholars contest the notion that intellectual property is property on a variety of bases. Some point to the formal differences between copyright and patent on one hand, and land and chattels on the other. Others express concern about the expanding private rights in information, often warning that the "propertization" of intellectual property threatens outsized social costs. The objection to equating intellectual property and property tends to find more purchase among scholars who favor a lower-protection view of IP rights.[3]

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1. Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 YALE L.J. 1742, 1744 (2007) ("At the core of controversies over the correct scope of intellectual property lie grave doubts about whether intellectual property *is* property.").

2. *See* Christopher Buccafusco & David Fagundes, *The Moral Psychology of Copyright Infringement*, 100 MINN. L. REV. 2433, 2463–79 (2016) (listing examples of authors' deep connection to their works and their outrage at infringement).

3. *See* Hanoch Dagan, Commentary, *Property and the Public Domain*, 18 YALE J.L. & HUMAN. (SPECIAL ISSUE) 84, 84 (2006) (observing that "friends of the public domain" tend to resist property).

And as befits any debate among lawyers and law professors, there is robust disagreement as well. Other scholars argue that the essential characteristics of ownership inhere as much in legal rights over intangibles as they do in tangibles. These scholars point to shared doctrinal features, like the right to exclude, as well as shared conceptual features, such as incentives to create and own. This view, as one might imagine, finds favor with writers who tend to profess a more sanguine perspective about the positive social welfare generated by private ownership more generally.[4]

The topic of this year's IPIL National Conference is "What's Real? IP from a Property Theory Perspective," which explicitly and intentionally takes no position on the conceptualist question of whether IP is or is not property. Rather, it asks what we feel to be the more interesting question of how these different but deeply related fields influence and interact with each other at the level of doctrine, policy, and theory. The Conference brought into dialogue five of the nation's leading scholars whose interests touch on property—intellectual and otherwise—and allied fields. The result was a rich variety of conversations about the law of ownership in all its guises.

Michael Carrier's interests include IP, antitrust and a host of other topics. His contribution, "Why Property Law Does Not Support the Antitrust Abandonment of Standards," illustrates the danger that property can have as a rhetorical device. Focusing on the contemporary antitrust debate about standard-setting organizations and patent holdup, Carrier first identifies how deeply the arguments of the current Assistant Attorney General Makan Delrahim are bound up with absolutist conceptions of property. He then shows how each of these arguments are rooted in foundational misconceptions about the nature of property. By discrediting the property foundations of Delrahim's position, Carrier's piece promises to force a more intellectually valid dialogue about standard-setting organizations and antitrust law.

T.J. Chiang is known as a patent scholar, though his work has touched on topics as diverse as the First Amendment and statutory interpretation as well. In "Questioning Patent Alienability," Chiang takes aim at one of the core features of patent (and indeed all of property): the assumption that ownership rights must be alienable to maximize economic efficiency. Chiang invites us to consider how the presence of predatory users—patentees who seek only to prevent others' use to extract high rents, not to use the invention productively—complicates the traditional story of

4. *See, e.g.*, Frank H. Easterbrook, *Intellectual Property Is Still Property*, 13 HARV. J.L. & PUB. POL'Y 108, 108–09, 118 (1990).

alienability. In so doing, Chiang shows that the case for alienability of patents is far less straightforward than is traditionally assumed in other property regimes.

Brett Frischmann's interests range all over the domain of law's regulation of information and innovation. His piece "Comparative Analysis of Innovation Failures and Institutions in Context" (co-authored with Mark McKenna) warns of the temptation of choosing institutions to regulate broadly because they promise to solve one particular problem. Instead of looking only at what institutions succeed in doing, Frischmann argues that we should also highlight how institutions fail, thereby giving us a more complete sense of the upsides and downsides of that institution in its full context.

Irina Manta writes about property without limit, including physical property, copyright, patents, and trademarks. Her contribution to this event, felicitously titled "Keeping IP Real," hones in on a notion that property scholars regularly invoke: rivalrousness. This is the notion that some resources (like land) can be used by only one person at a time, while others (like a copyrighted work of authorship) can be used by many people simultaneously. Manta takes aim at this standard conception of rivalrousness, which focuses on the physical capacity for use, and instead argues that we should understand rivalrousness in terms of economic value. Refracted through this novel lens, certain uses that we would normally regard as nonrivalrous (e.g., two people reading the same novel) may actually come into conflict (e.g., if the second person reading that novel copied it from the first one without paying the owner).

Finally, Carol Rose is part of the pantheon of great American property scholars. Her work has for decades shown how the deployment of rigorous economic analysis does not necessarily yield a vision of property concerned solely with individual wealth-maximization, and in fact that common property is essential to optimizing social welfare. Her conference piece, "Cold Corpses, Hot News, and Dead IP: The Reasons for and Consequences of a Legal Status of No-Property," typifies her unrivaled blend of creativity and insight. Rose examines different kinds of things that law declines to treat as property, including ideas, facts, and dead bodies, with the surprising result that these seemingly very different kinds of no-property actually share a great deal in common.

For better or worse, IP and property continue to lie in tension with one another, too dissimilar to be equated, yet too similar to be disentangled. This year's National Conference in Santa Fe was premised on the idea that this entanglement is a feature, not a

bug, of the law of ownership and that it may serve as a source of illumination for tangible and intangible property alike. And its participants embraced this premise, offering five truly original and fascinating perspectives on this issue that shed new light on these old legal institutions. Working with these authors has been a true pleasure, and we hope you enjoy engaging with their contributions as much as we at IPIL did.