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SYMPOSIUM ON INTELLECTUAL PROPERTY
LAW THEORY

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DESERVING TO OWN INTELLECTUAL PROPERTY

Lawrence C. Becker 609

Desert-based arguments for intellectual property have great intuitive appeal but have not received much philosophical attention. Three forms of desert-arguments can be distinguished: those based on excellence, reciprocation, and need, respectively. Each of these arguments has the interesting consequence that the ownership rights it justifies may not be "preclusive"—that is, may not preclude similar rights for independent co-inventors.

INSTITUTIONAL UTILITARIANISM AND INTELLECTUAL PROPERTY

Patrick Croskery 631

This Article provides an institutional-utilitarian framework for debate about the relative roles of the government and the marketplace in the provision of information goods. The provision of information goods is broken into four components: production, reward, fencing and fine-tuning. Considerations related to collective action problems and limits of information are used to bring out the relative advantages of the government and the marketplace for performance of each component.

VALUING INTELLECTUAL PROPERTY

Russell Hardin 659

Most material values are merely prices established by supply and demand relations. The value of any creation cannot be determined as the product of inputs to it and it is incoherent to attempt to do so in assigning rewards of ownership in a context in which market prices govern most rewards. If the creation of intellectual property is inadequately stimulated by normal market devices, or if the utilization of such property is impeded by ownership rules, the problem must be addressed systematically and not at the level of the evaluation of a particular bit of intellectual property.

COPYRIGHT, PROPERTY, AND THE RIGHT TO DENY

Timothy J. Brennan 675

Despite apparent legal, economic, and social differences between copyright and property, there is little reason to regard copyrighted work differently from property. Justifica-
tions for and unease with copyright match policies toward property; limits on copyright mirror limits on property rights. We can take advantage of these similarities to assess the extent to which copyright holders may prevent non-competing or unintended uses of their works.

**Does It Matter Whether Intellectual Property Is Property?**

Stephen L. Carter 715

This Article departs from the traditional argument of whether intellectual property fits within the common definitions of property and instead considers the value of the debate to those outside of academia. Using Professor Brennan's article as a starting point, Professor Carter discusses how conversation and changes in patent and trademark law affect the need or desire to categorize intellectual property as property and how the demands of a changing world may continue to shape the way property is defined.

**Beyond Metaphor: Copyright Infringement and the Fiction of the Work**

Robert H. Rotstein 725

In recent years, many legal scholars have examined the interrelationship between the law and literary thought. This Article discusses the impact that recent literary thought has on copyright law—the area of the law that perhaps most directly concerns the "literary." The Article suggests an approach to copyright law that would reconcile copyright and current literary thought by recognizing that the "work" in copyright is a process of speech rather than an "object."

**Adrift in the Intertext: Authorship and Audience "Recoding" Rights**

Keith Aoki 805

This Article speculatively discusses some of the implications raised by Robert Rotstein's article, "Beyond Metaphor: Copyright Infringement and the Fiction of the Work," in particular, the implications of heightened legal recognition of open-ended texts (intertextuality) in relation to (1) deeply-entrenched legal ideas of individuated authorship; (2) conservative opposition to importation of deconstructive approaches implied by poststructuralism's promotion of intertextuality into the law; (3) resulting co-optation of such approaches, to the extent that they do become legally adopted; (4) problems regarding speech regulation; and (5) problems arising from commodification of intertextual expression.

**From Authors to Copiers: Individual Rights and Social Values in Intellectual Property**

Jeremy Waldron 841

This Essay discusses the topic of intellectual property—particularly copyright—from the perspective of those whose freedom is constrained by intellectual property rules. Defenders of copyright often argue that potential copiers suffer no hardship by being so constrained: for they are prevented only from exploiting something that would not have existed but for another's efforts. The symmetries and paradoxes in this argument are examined, and the hardship of intellectual property restraints is related to the inescapability of action in a cultural world furnished largely by other peoples' intellectual products.

**Who Owns This?**

J.S.G. Boggs 889

J.S.G. Boggs is a full-time fine artist whose interdisciplinary work in the field of visual art has placed him at the center of many controversial issues. His work with the image of money as vehicle to other subject matters has inspired two countries to prosecute him for counterfeiting, and the United States Secret Service to raid his office at Carnegie Mellon University in Pittsburgh, Pennsylvania, where he holds a research position as
Fellow of Art & Ethics. He is, at the time of publication, awaiting a decision from the Department of the Treasury whether to prosecute him yet again.

NOTES

TOTAL CONCEPT AND FEEL OR DISSECTION?:
APPROACHES TO THE MISAPPROPRIATION
TEST OF SUBSTANTIAL SIMILARITY  Sarah Brashears-Macatee  913

Under copyright law, there is currently a disagreement among Federal Circuit Courts on how to approach the misappropriation test of substantial similarity. This Note first discusses these approaches in general, then theorizes that it may make sense to vary the choice of approach with the type of work at issue. Finally, this Note analyzes the application of the theory to visual, musical and literary works to examine whether it is possible to make any general statements about applying the two approaches.

ENFORCEABILITY OF PRECONTRACTUAL
AGREEMENTS IN ILLINOIS: THE
NEED FOR A MIDDLE GROUND  Mark K. Johnson  939

Business persons often agree on the general terms of a proposed transaction and execute a "precontractual agreement" (e.g., letter of intent) to memorialize the settled terms in anticipation of further negotiations. At this point, most business persons consider themselves "bound," if not legally, at least morally or ethically. The commercial reality of modern business dictates that transactions go forward in these imperfect contractual settings, even if the parties must make substantial expenditures or partially perform before formal contract execution. Consequently, when a court applies the traditional "all or nothing" contract logic to a disputed precontractual agreement, uncertainty regarding enforceability may produce an inequitable result.

This Note examines the factors that Illinois courts consider relevant to the enforceability of precontractual agreements and canvasses how courts applying Illinois law have dealt with the obligation of good faith in negotiation. The Note discusses the possible business consequences of legal enforcement of precontractual agreements and makes recommendations for drafting such agreements under Illinois law depending upon the desired binding effect. The Note concludes by recommending that the Illinois courts accept an intermediate, flexible regime of enforceable precontractual agreements, which will better reflect the actual intentions of business users of such agreements.

COLOR AS A TRADEMARK AND THE MERE
COLOR RULE: THE CIRCUIT SPLIT
FOR COLOR ALONE  Craig Summerfield  973

The mere color rule has traditionally acted to bar any trademark rights in just a color, or color alone. The Federal Circuit Courts of Appeals recently changed that precedent, but the later acting Seventh Circuit Court of Appeals did not abandon the mere color rule. This Note will show that for policy and practical reasons, the mere color rule should not be an absolute bar to trademark rights in color scheme.