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Preface (Symposium on Intellectual Property Law Theory)

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PREFACE*

WENDY J. GORDON**

For primary contributors to this symposium we have sought out people whose thoughts on intellectual property are not well known to readers of the standard law reviews. We are very gratified by the results. Of our three philosopher contributors, none has published much explicitly discussing intellectual property before,¹ though the work of each of them is highly relevant to the topic; our economist, who publishes most often in philosophic, economic and communications journals, here brings his various perspectives to bear;² our practitioner contributor proves that the most esoteric of academic topics—postmodern literary theory—has relevance to everyday copyright problems;³ and our artist (ah, how proprietary that adjective is!) brings to the intellectual property debate a flavor of what is really at issue—and what issues must be faced—when law meets art.⁴

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** Professor of Law, Rutgers-Newark School of Law. A symposium is a compendium of many peoples' efforts. I express appreciation to my co-editor, Ken Port, and join him in giving particular thanks to Jim Lindgren and Mark Johnson, and to the Symposium participants.

1. Lawrence C. Becker, *Deserving to Own Intellectual Property*, 68 CHI.-KENT L. REV. 609 (1993); Patrick Croskery, *Institutional Utilitarianism and Intellectual Property*, 68 CHI.-KENT L. REV. 631 (1993); Jeremy Waldron, *From Authors to Copiers: Individual Rights and Social Values in Intellectual Property*, 68 CHI.-KENT L. REV. 841 (1993).

Lawrence C. Becker discusses intellectual property briefly in his book *PROPERTY: PHILOSOPHIC FOUNDATIONS* 47, 55, 116 (1977), and Patrick Croskery contributed an annotated bibliography, plus a short essay called *The Intellectual Property Literature: A Structured Approach*, to *OWNING SCIENTIFIC AND TECHNICAL INFORMATION: VALUE AND ETHICAL ISSUES* (Vivian Weil & John W. Snapper eds., 1989).

I should make one comment about Professor Waldron's article, *From Authors to Copiers: Individual Rights and Social Values in Intellectual Property*, *supra*. Professor Waldron presents an interesting treatment of liberty, at section VIII of his article, that I fear may mislead readers about my views. For example, the distinction between preference and liberty that Waldron employs to criticize my arguments, *id.* at discussion following note 89, is a distinction I raise myself. See Wendy Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent and Encouragement Theory*, 41 STAN. L. REV. 1343, 1431 (1989). My critique of the libertarian position rests most fundamentally not on a claim of symmetry, but on the claim that issues of moral entitlement should condition our assessment of liberty issues. See *id.* at 1425-35.

2. Timothy J. Brennan, *Copyright, Property, and the Right to Deny*, 68 CHI.-KENT L. REV. 675 (1993). Professor Brennan's views on copyright have been cited by the Supreme Court. See *Harper & Row, Publishers v. Nation Enter.*, 471 U.S. 539, 568 n.9 (1985). Also see his article *Harper & Row v. The Nation: Copyrightability and Fair Use*, 33 J. COPYRIGHT SOC'Y U.S.A. 368 (1986).

3. Robert H. Rotstein, *Beyond Metaphor: Copyright Infringement and the Fiction of the Work*, 68 CHI.-KENT L. REV. 725 (1993).

4. J.S.G. Boggs, *Who Owns This?*, 68 CHI.-KENT L. REV. 889 (1993).

We are fortunate in our commentators as well. Using the primary papers as starting points, two law-trained commentators ring provocative changes on the issues raised and venture into new territory of their own.⁵ The third commentator, a political scientist and philosopher, beards the very lion in its den:⁶ he takes the concept of "value" that undergirds so much of the writing and adjudication on intellectual property and challenges its coherence.⁷

Professional philosophy journals pay little attention to intellectual property as yet. We lawyers retaliate by publishing reams of philosophy on the topic. I think this is one time the lawyers are riding the wave. Since the seventeenth century tangible property has provided a robust agenda for philosophers; it is only a matter of time before they notice that intangible property is coming to play as key a role as tangible property did.⁸ One goal of this symposium is to hasten that recognition.

5. Keith Aoki, *Adrift in the Intertext: Authorship and Audience "Recoding" Rights—Comment on Robert H. Rotstein, "Beyond Metaphor: Copyright and Fiction of the Work,"* 68 CHI.-KENT L. REV. 805 (1993); Stephen L. Carter, *Does It Matter Whether Intellectual Property Is Property?*, 68 CHI.-KENT L. REV. 715 (1993).

6. Russell Hardin, *Valuing Intellectual Property*, 68 CHI.-KENT L. REV. 659 (1993).

7. *Id.*

8. I am indebted for a variant of this point to Pat Croskery.