

# Managing the Intellectual Property Sprawl

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## I. INTRODUCTION

“It’s an exciting time, to be sure; but a confusing time too.”<sup>1</sup> So Professor Merges describes the current state of intellectual property scholarship and policy, the backdrop to his book. Perhaps the description could fit any endeavor in any period. As such, Professor Merges’s search for foundations, for the essential core, is also familiar and admirable. Whether he is the modern Odysseus or Saint Augustine, or perhaps more appropriately a contemporary social reformer trying to sweep aside the corruption and return to more innocent and just times, Professor Merges has chosen a relevant and challenging project. The result is an account of intellectual property that places ownership at the center, but still has accommodation for the interests of nonowners, or users. It is this account that I seek to challenge in this Article.

Identifying authors and inventors as the keystone of intellectual property is not surprising. After all, the U.S. Constitution points in that direction. The familiar and oft-cited Article I, Section 8, Clause 8 empowers Congress to promote progress in “Science and [the] useful Arts” by securing exclusive rights in “Authors and Inventors.”<sup>2</sup> Such a command might seem justification enough in response to my impertinent challenge to an owner-centered intellectual property law. But the provision establishes a rule of initial vesting of rights under copyright and patent law and tells us nothing about the scope and meaning of the “exclusive Right[s].” In this Article, I am effectively asking whether exclusive rights should be based exclusively, or even predominantly, on the interests of creative people, or do what I call “*users’* interests” count as well? I argue that they do and use Professor Robert Merges’s book, *Justifying Intellectual Property*, as a foil to explain why.

Professor Merges certainly believes that creative people are special. His important and sweeping book, *Justifying Intellectual Property*, develops the proposition that intellectual property rights are meant to protect creative people and to channel their talents to the benefit of society. He invokes Locke, Kant, and Rawls to support this point. He uses this proposition as the linchpin for midlevel principles that drive intellectual property policy and practice. Statistics on creative professionals flesh out the proposition. And as for my question, what about the rest of us, Professor Merges shows that intellectual property rights in creative people can be channeled to serve users of digital technologies and those unfortunate victims of fatal diseases. Intellectual

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1. ROBERT P. MERGES, *JUSTIFYING INTELLECTUAL PROPERTY* 1 (2011).  
2. U.S. CONST. art. I, § 8, cl. 8.

property rights, in short, serve society by protecting the creative people. So I would summarize his argument without doing the book a disservice.

*Justifying Intellectual Property* is an engaging book. As often is the case with commentaries like this one, it serves to portray the book the commentator wishes he had written. Professor Merges's book, with its explorations of philosophy, law, policy, and a bit of ethics, serves as a perfect foil against which to map out the book one wishes to write. By asking what makes creative people special, I question Professor Merges's proposition that creative people are the key beneficiaries of intellectual property rights. I ask, "What about the rest of us?" to emphasize the range of constituencies that intellectual property rights can benefit. Professor Merges's argument does not ignore these constituencies. At one level, he recognizes that creativity is democratic—its presence not based on accidents of birth or one's station in society. Of course, some people are more talented than others for a number of reasons. But creativity cannot be constrained by social hierarchies or prejudices. At another level, however, the emphasis on creative persons ignores the broader social contexts that intellectual property rights serve. Professor Merges identifies the social benefits that can arise potentially from intellectual property rights. But as a servant only of creative persons, one has to ask what other than wishful thinking will ensure that intellectual property rights will yield benefits to all members of society and not just the legally protected creative class.

Professor Merges overemphasizes creative persons and underemphasizes the rest of us. My commentary is designed to correct this imbalance. To put my point more strongly, my argument is that we should view intellectual property law and policy as user centered, and not a balancing of interests between creative persons and the rest of us. This argument follows from what I hope is the uncontroversial observation that we are all users of the intellectual property subject matter. Uses will of course vary, and some judgment has to be made about which uses should trump. But to engage in intellectual property policy debate fully, I argue that intellectual property policy should center the user in the debate and structure rights with users in mind. This Article develops this thesis, following largely the structure of Professor Merges's argument from foundational principles to midlevel ones and then to practice. My goal is to shift his argument from one centered on creative persons to one centered on the much more broad and relevant class of users.

This shift is not just a pedantic or academic one. A user-centered approach to intellectual property has implications for how intellectual property law would operate in practice through public debate and through judicial and administrative enforcement. Shifting the focus to users would imply conceptualizing intellectual property not in terms of trespass, or the unauthorized crossing of a legal boundary, but in terms of nuisance, or the conflict in use between designated owners and purported infringers. Recognizing users of intellectual property would not relegate this class to outlaws or pirates, but to individuals with certain sets of interests and rights affected by private ownership. Expanding our understanding of intellectual property would aid in incorporating the interests and rights of users much like modern landlord-tenant law recognizes a property right in the leasing tenant that needs to be balanced against those of the owner. Such a reconceptualization would correctly categorize open source licensing as consistent with intellectual property rights managed and distributed in a particular way. These implications will become clear as Professor Merges's conceptual categories are reconfigured with a user focus.

How users have been misconstrued in intellectual property law became transparent in the Supreme Court's 2012 decision in *Golan v. Holder*.<sup>3</sup> At issue in the case was Congress's power to remove works that had failed to obtain copyright protection in the United States from the public domain. Congress had removed non-U.S. works from the public domain through the restoration of copyright under section 104A of the Copyright Act, enacted in 1994 pursuant to international treaty obligations.<sup>4</sup> The Supreme Court upheld Congress's power to restore copyright in this fashion.<sup>5</sup> In its opinion, Justice Ginsburg, writing for a six-Justice majority, stated that there were no vested rights in public domain works that Congress needed to respect.<sup>6</sup> More specifically, she pointed out that no one has an ownership interest in public domain works that could be the basis for injury should Congress remove works from the public domain through copyright restoration.<sup>7</sup> What is striking is that this characterization of the public domain assumes that rights can only be understood in terms of ownership. But the rights in the public domain—the rights, effectively, of users—are not solely matters of ownership. They constitute a set of reliance and other interests that the courts should at least recognize in assessing whether Congress has gone

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3. *Golan v. Holder*, 132 S. Ct. 873 (2012).

4. *See id.* at 881–82.

5. *Id.* at 884.

6. *Id.* at 892.

7. *Id.*

too far. The Court's failed analysis in *Golan* stems, in part, from a failure to understand or recognize users' rights.

Professor Merges, despite the centrality of creative persons to his argument, organizes a set of ideas that are conducive to refocusing intellectual property law on users. I present this user-focused argument in this Article through the following five Parts. Part II explains my suggested approach to questions about the design of intellectual property law—an approach based on the new institutional economics and the work of Ronald Coase. Part II also addresses objections to this approach. Part III identifies the user in Professor Merges's high-level principles grounded in Locke, Kant, and Rawls. Part IV follows this argument with a closer examination of the four midlevel principles that inform intellectual property. These midlevel principles, I argue, are more cogent when expanded to include all users and not just creative persons. Finally, in Part V, I make the case for including users within the practices of intellectual property. These practices are framed in terms of the three broad goals of any system of property rights: stability, management, and autonomy. Part VI concludes.

## II. MORAL OWNERS AND ECONOMIC USERS?

Professor Merges begins his book with an elegiac parallel between two global cities—Mexico City and Shanghai—and intellectual property scholarship. Like the cities, intellectual property scholarship is sprawling. As a denizen of this sprawl, Professor Merges confesses to find himself at a loss. He expresses nostalgia for a time when intellectual property law and policy was simpler, more rooted in core values, and less enmeshed in bright lights and new-fangled developments. At the same time, Professor Merges admits dissatisfaction with the overreliance on efficiency as the basis for gauging intellectual property policy. Although his scholarship had been grounded in the normative principle of efficiency, Professor Merges expresses dissatisfaction with the principle as one to aid in answering basic questions of intellectual property design. His book, subsequently, represents a return to foundational principles gleaned from a study of Locke, Kant, and Rawls to develop fundamental principles to then formulate midlevel, guiding principles. The midlevel principles—nonremoval, dignity, efficiency, and proportionality—ground an owner-centered intellectual property law that accommodates the needs of users in environments such as digital creation and access to medicines. At the end of the book, Professor

Merges appears to have constructed a comfortable and comforting niche in the contemporary sprawl.

I have described Professor Merges's exploration of the foundations for intellectual property as "soul-searching." This description was not intended as an insult. Introspection is a virtue, in my opinion, forcing us to rethink assumptions and reassess research agendas. The product of Merges's introspection is an engaging book that asks readers to reconsider the philosophical roots of intellectual property in a moral rather than economic tradition. At the end, the book leaves us with a theory justifying intellectual property ownership with limits that take into account the interests and needs of users of intellectual property. From Professor Merges's perspective, the core of the intellectual property sprawl has been identified, and sense is made of the law.

With all the exploration of canonical texts from Locke, Kant, and Rawls, I left myself wondering how much of what Professor Merges discovers is what he expected to find. Like any good attorney, Professor Merges is making a case, and any case can be rebutted. The owner-centered vision of intellectual property presented in the book seems to ignore what I claim is the central problem in contemporary intellectual property, namely the tension between users and owners of intellectual property. Users are a highly differentiated group including, among others, bloggers, medical professionals, documentary filmmakers, parodists, news commentators, fans of creative works, cultural critics, remixers, inventors, artists, consumers, entrepreneurs, academics, and cultural preservationists. This list is not exhaustive, but captures individuals who need to negotiate intellectual property in pursuing their own creative objectives, professional tasks, or ordinary life experiences. According to Professor Merges, these varied interests are accommodated through the four midlevel principles, particularly proportionality, with owners at the center. My question is, why should users not be at the center of the intellectual property system?

A user-centered intellectual property system is more pertinent to the current intellectual property sprawl.<sup>8</sup> Users as a group are a disparate and incoherent lot. But a user-centered understanding of intellectual

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8. See generally Julie E. Cohen, *The Place of the User in Copyright Law*, 74 *FORDHAM L. REV.* 347 (2005) (pointing out the recent growth in interest in copyright users by copyright scholars and owners); see also EDUARDO MOISÉS PEÑALVER & SONIA K. KATYAL, *PROPERTY OUTLAWS: HOW SQUATTERS, PIRATES, AND PROTESTORS IMPROVE THE LAW OF OWNERSHIP* 25–26 (2010) (making the case of how users operating outside the law improve institutions that regulate property by making them more inclusive and competitive); MADHAVI SUNDER, *FROM GOODS TO A GOOD LIFE: INTELLECTUAL PROPERTY AND GLOBAL JUSTICE* 105–07 (2012) (making the case for protection of derivative creations by users of protected works).

property is necessary precisely because the interests are so diffuse in practice. As public choice theory teaches us, laws based on concentrated benefits and diffuse costs tend to be skewed and subject to capture. Such a distribution of benefits and costs describes intellectual property with owners as beneficiaries and users as the bearers of the cost of an intellectual property system. From an analytical purpose, and with the goal of justifying or correcting intellectual property, a user-centered approach might create a more balanced and normative-grounded version of intellectual property. Users are the appropriate beneficiaries of how the intellectual property sprawl can be managed and controlled.

Before I explain how to design a user-centered intellectual property, let me address the big question of why this recentering matters. Of course, Professor Merges cares about intellectual property users, as his chapters on digital technologies and access to medicine show. But his recognition of users' interests is developed as a cloud over owners' rights based on principles of proportionality and charity. Waiver of owners' rights is a critical means through which users' interests are realized. One may ask why users should rely on the kindness of owners. As a practical matter, can users rely on owners?

Furthermore, in critical areas of intellectual property debate, a focus on owners rather than on users can have implications for policy. For example, one current debate is the scope of patentable subject matter. Should certain types of inventions, such as business methods or medical diagnostics, be the subjects of patent? An owner-centered approach may bias this debate toward recognizing property rights, allowing for exceptions. A user-centered approach may ask us to question whether property rights should be recognized in the first instance and provide grounds for recognizing limitations in the scope of any right that is recognized. In short, where one ends up may depend largely on where one starts. In the spirit of introspection, it is worth examining these unstated assumptions.

What I suggest is that an approach based on the new institutional economics, with its roots in the work of Ronald Coase,<sup>9</sup> can provide a basis for recentering users in the design of intellectual property law. Perhaps it is obtuse of me to suggest an economic answer when Professor Merges's book is based on the questioning of economics.

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9. *See generally* R. H. COASE, *THE FIRM, THE MARKET, AND THE LAW* (1988) (collecting Coase's seminal articles on legal and market theory).

Reconciling this paradox requires understanding Merges's rejection as one of wealth maximization as a basis for intellectual property policy. Instead, Professor Merges turns to philosophy.<sup>10</sup> The problem with this philosophical turn is that it potentially ignores the political, social, economic, and cultural contexts within which intellectual property operates. But if, as Professor Merges claims, the goal is to address an intellectual sprawl, one needs a map that provides some topographical contours that can make the sprawl reconcilable. Otherwise, one replaces a lived-in world with a fantasy. New institutional economics with its focus on comparing different institutional structures provides such an approach.<sup>11</sup> The methodology can be used with several different normative frameworks and does not necessarily rest on wealth maximization. An explanation of how the new institutional economics works and applies to intellectual property design will make these points clearer.

#### A. Coasean Roadmap to the Intellectual Property Sprawl

In this subpart, I describe the new institutional economics whose roots are in the writing of Ronald Coase and propose an application to intellectual property. I present the design of intellectual property institutions as a problem of comparative institutional choices and show how an institutional economic approach can guide those choices.

Ronald Coase is associated with the Coase Theorem and with transaction cost minimization as the principle for designing legal rules. But a more fundamental insight informs these two more familiar results as well as an understanding of intellectual property. In his article, *The Problem of Social Cost*, Coase addressed the familiar problem of negative externalities, or costs imposed on society by private decisionmaking.<sup>12</sup> One solution to this problem is to internalize the costs, through taxes or penalties, so that the private decisionmaker accounts for the social costs in his or her actions. Coase's insight was one of reciprocal harms. Drawing on examples from the law of nuisance, he posited that what we

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10. See MERGES, *supra* note 1, at 20–21 (describing the book's explorations into the foundations of property theory).

11. See AMARTYA SEN, *THE IDEA OF JUSTICE* 75–77 (2009) (distinguishing between theories of justice that build on institutions as ideals and those that build on actual institutions). For perspectives on institutions, see THRÁINN EGGERTSSON, *ECONOMIC BEHAVIOR AND INSTITUTIONS* 101–03 (1990), which presents institutional analysis as applied to disputes over use, and ROBERT H. FRANK, *THE DARWIN ECONOMY: LIBERTY, COMPETITION, AND THE COMMON GOOD* 85–87 (2011), which explains how Coase's ideas support a cooperative solution to competitive problems through transactions and coordinating conflicting uses.

12. See R. H. COASE, *The Problem of Social Cost*, in *THE FIRM, THE MARKET, AND THE LAW*, *supra* note 9, at 95.

see as negative externalities are conflicts over use.<sup>13</sup> For example, the pollution from a factory that harms a residential neighborhood is conceptually a problem of conflicting uses, with the factory owner wanting to pursue industrial uses and the homeowners wanting to pursue residential ones. In resolving nuisance cases, courts ask which of these conflicting uses should trump the other. Legal rules create rights that resolve this dispute between competing uses in order to further goals. These legal rights serve to allocate the social costs among the parties based on some normative principle.

I have presented Coase's result on reciprocity in general terms. Often, this description leads to the conclusion that under certain conditions, parties to a dispute over use can negotiate to the correct result irrespective of how the law sets the legal entitlements.<sup>14</sup> As Coase pointed out, this irrelevance of legal entitlements is true only if all transacting is costless.<sup>15</sup> This point serves as the basis for another formulation of the Coase Theorem: legal entitlements should be set to minimize transaction costs. In related work, I showed with coauthor David Driesen that a transaction cost minimization formulation is misleading because it ignores features of the environment in which actors operate and specifically can ignore transaction benefits.<sup>16</sup> In other words, in some situations, we may not want the parties to transact and so transaction costs can prevent undesirable transactions. However, none of these complications detract from the underlying observation that many social disputes involve conflicts over use rather than one party clearly and unilaterally causing harm to another.

Professor Lee Anne Fennell provides a criticism of how scholars have based property rights on transaction costs in a forthcoming article.<sup>17</sup> Her criticism has parallels with the argument of this Article that are worth pointing out even though I cannot develop those parallels fully here. Professor Fennell argues that transaction costs are ill-defined and instead offers the concept of "resource access costs" as a more coherent and

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13. *See id.*

14. *Id.* at 98–99.

15. *Id.* at 119.

16. David M. Driesen & Shubha Ghosh, *The Functions of Transaction Costs: Rethinking Transaction Cost Minimization in a World of Friction*, 47 ARIZ. L. REV. 61, 103–10 (2005).

17. Lee Anne Fennell, *Resource Access Costs*, 126 HARV. L. REV. (forthcoming 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2154069](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2154069).

tractable alternative.<sup>18</sup> Resource access costs represent the cost of accessing and transferring assets and reflect the goal of property rights as “a way of structuring access by designating an owner who has a specified set of rights and enjoys a residual claim on the asset.”<sup>19</sup> As I understand Professor Fennell’s argument, this Article illustrates how intellectual property rights are defined in order to reduce access costs and thereby benefit users.

The reciprocity principle applies to intellectual property as well. In many disputes over intellectual property, the owner of intellectual property claims that a third party is infringing a protected work. The legal claim is based on the alleged infringer either appropriating a benefit from the owner—free riding—or injuring the owner by usurping profit or market share. The owner’s claim of right permits an injunction or a claim of damages against the infringer unless special circumstances arise or the owner waives the claims. A reciprocal approach, however, would frame the problem in terms of conflicting uses over the work. For example, the designated owner would want to make her own movie from a copyrighted novel, while the alleged infringer wants to make his own movie based on the same novel. Often, the owner might tell the alleged infringer to create his own original novel and make a movie from that original work. Under the reciprocal approach, the alleged infringer might respond that the owner should create her own movie and let him be. Intellectual property law attempts to resolve this conflict over use by structuring legal entitlements. The question I am posing is, why should this conflict be weighed in favor of the owner rather than the so-called infringer? The labeled infringer in this case is an example of what I call a user.

At this point in my argument, I am reframing the problem. There are several objections to my claim, which I address in the next subpart. Here, let me object to one that I address in more detail below. The analogy to nuisance in real property, which provides the basis for Coase’s discussion of reciprocal harms, may seem inapposite to the intellectual property problem. At issue for intellectual property is the creation of new works. I call this the *ex nihilo* condition to emphasize that the subject matter of the dispute comes out of nothing. By contrast, the subject of dispute, the use of the land, already exists in nuisance cases. Therefore, the contention is the conception of reciprocal harms may be applicable to works that have been created but does not offer

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18. *Id.*

19. *Id.* (manuscript at 21).

guidance in whether works would be created in the first place. How, critics would ask, do I address the *ex nihilo* condition?

There are three responses. First, the *ex nihilo* condition applies to users as well. If someone wants to create or invent a new work based on something that is copyrighted or patented, this new work is also subject to the *ex nihilo* condition. The solution may be to obtain a license from the intellectual property owner. But that response begs the question, why should the owner's claim to a new work trump any claims by a creative or inventive user? To use the language of the law, what conditions would support the creation of derivative works or improvements? The last two are also subject to the *ex nihilo* condition. Licensing is of course one response, but that privileges owners over users. We are therefore in a condition of reciprocity, as described by Coase.

Furthermore, the conception of reciprocal harms applies outside the creation of derivative works and improvements to the creation of original works. The conflict over use that is at the heart of intellectual property appears in the decision whether to make a work in the first instance. Consider two individuals. One wants to make movies and television programs. The other wants to make a technology that can copy these works perfectly. These two plans are in conflict. How do we resolve the conflict? One objection is that I have shifted away from the problem of conflicting uses of a thing, like land, to conflicting plans, a shift that seems very different from the classic nuisance case. But the creation of new works and technologies does require inputs and resources, and we can recast the conflicting plans over seemingly irreconcilable uses of resources. For example, both the making of movies and of technologies to copy movies require comparable recording and storage equipment. The conflict is the use to which these resources should be put when we need to choose between uses that influence each other.

Finally, the *ex nihilo* condition is not unique to intellectual property. Although land is not manufactured or created, conflicts over real property have to do with the divergent uses to which land is put. A shopping mall, a housing project, a school, an airport—each is created *ex nihilo*. In resolving a dispute over conflicting uses, the effects of different entitlements on the creation of these tangible works are often taken into consideration. There is no reason why the *ex nihilo* condition could not similarly be adapted to conceptualizing intellectual property in reciprocal terms. The existence of a physical resource like land strikes

me as misleading. Nuisance disputes are often precisely about conflicting plans and visions that are translated into the practical terms of reconciling conflicting uses.<sup>20</sup> I propose a similar approach to intellectual property.

Why does this conceptualization matter and what are its implications? The conceptualization matters because it allows for a more careful consideration of the interests of users without displacing concerns for owners. It permits precisely a more structured balancing of interests that intellectual property law purports to establish. Its implications also permit a type of methodological and normative heterogeneity to the intellectual property debate. Careful and sympathetic readers may conclude that my Coasean rendition of intellectual property would lead to the transaction cost minimization rationale for policy that we see in the various versions of the Coase Theorem. Such readers would also be familiar with Wendy Gordon's work on fair use.<sup>21</sup> Professor Gordon argues that fair use in copyright serves to allow uses to occur when the transaction costs of licensing are too high. A criticism of this pathbreaking work is that it leaves open the question of situations when fair use should be allowed even though licensing is possible.<sup>22</sup> For reasons I present in a separate article,<sup>23</sup> I am hesitant to adopt transaction cost minimization as a response to the problem of reciprocity.

Instead, I propose that recognizing reciprocity leads to addressing problems through comparative institutional analysis. As with any idea, there are many variants, but I propose one that asks policymakers to design intellectual property laws not based on claims of right of either owners or users, but on the consequences of institutional design for both owners and users. Although this may seem like a daunting task, I am eschewing what could be called global consequentialism. To put the point concisely, I do not think one has to know everything in order to conclude anything. Instead, comparative institutional analysis calls for a pragmatic approach, one not based on moral conceptions of rights, but on identifying legal entitlements within social, political, and economic contexts.

The roots of comparative institutional analysis can be traced to Coase in his article on social costs. But the approach has fuller expression in

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20. See generally Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965 (2004).

21. See generally 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 (1982).

22. See, e.g., Glynn S. Lunney, Jr., *Reexamining Copyright's Incentives-Access Paradigm*, 49 VAND. L. REV. 483, 576-77 (1996).

23. See Driesen & Ghosh, *supra* note 16, at 64 (suggesting that reducing transaction costs risks reducing the benefits that these costs purchase).

his article on lighthouses.<sup>24</sup> This short article addressed the institutional arrangements surrounding lighthouses in England, particularly the choice of the correct blend of government regulation and private governance.<sup>25</sup> What is important about the article is its approach. Coase asks questions about institutional design and adopts a comparative framework, examining the implications of alternative arrangements for ownership and management of lighthouses. It is that mindset that is instructive for structuring legal entitlements, such as intellectual property.

What I propose seems to place quite a burden on judges, legislators, and other actors in the legal system. I am of course not advocating that every legal dispute involve complex, academic comparisons of alternative institutions and their consequences. Instead, the shift I propose would lend itself to the types of arguments and evidence that the legal decisionmaker can consider in reaching a decision. An approach that would be based on ownership, particularly the value of labor used to create a work, countenances certain pieces of evidence and would find others—perhaps the uses of the work—irrelevant. Comparative institutional analysis expands the domain of arguments and relevant facts and how such arguments and facts are assessed.

A recent example of what I am suggesting is provided by the U.S. Supreme Court's decision in *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*<sup>26</sup> In this case, the Court invalidated a patent on a medical diagnostic method because it was deemed to be a law of nature.<sup>27</sup> Ostensibly, the Court reasoned that the invention at issue was simply a natural law rather than an innovative application of a law.<sup>28</sup> One can argue with the Court's characterization of the invention at issue as a law of nature and whether laws of nature actually exist. Arguably, the characterization served as a convenient hook for the Court to justify its unanimous decision. What may have been more salient to the Court were the consequences of this patent for the practice of medicine. In fact, the Court quite prominently cites the amicus brief from the American Medical Association challenging the patent.<sup>29</sup>

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24. See R. H. COASE, *The Lighthouse in Economics*, in *THE FIRM, THE MARKET, AND THE LAW*, *supra* note 9, at 187.

25. *Id.*

26. *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 132 S. Ct. 1289 (2012).

27. *Id.* at 1294.

28. *See id.*

29. *See id.* at 1304.

Under a purely Lockean justification for patents, the Court's inquiry into the consequences for doctors would be irrelevant. The law of nature inquiry would be relevant to check whether the inventor had taken too much from the commons of knowledge. But that inquiry would still require demarcating some baseline to ascertain what is "too much." Professor Merges's notion of proportionality might be relevant to this point, but that would entail considering consequences for users, as I suggest. I would suggest that what the Court actually did in *Mayo* was a pragmatic application of comparative institutional analysis to determine the consequences of allowing the specific patent for the practice of doctors. The comparative institutional analysis not only makes the effects on medical practitioners relevant but also focuses attention on the relevant consequences of allowing the patent.

What is missing here is an overarching normative framework for analysis. I think Coase was silent on this point, although I read him as a libertarian who would be skeptical of institutions that unduly restricted economic liberty.<sup>30</sup> In my mind, this normative flexibility is the attraction of comparative institutional analysis. The approach allows us to focus on consequences but does not commit us to particular normative ends. The problem becomes one of how to assess consequences. In my view, that assessment will be highly context dependent. In the *Mayo* case, the Court was concerned with the preemptive effect of the invention on medical practice.<sup>31</sup> The invention did not enable anything new while potentially foreclosing traditional practice. This type of pragmatic application and consideration is what makes comparative institutional analysis desirable.

With this description of comparative institutional analysis in hand, I turn next to several objections to my argument. There are four principal objections. First, my argument does not address the *ex nihilo* condition. Second, comparative institutional analysis is inconsistent with commonsense notions of morality and potentially leads to undesirable consequences. Third, the reciprocity conception subsumes the individual into a pure social construction. Fourth, there is a hidden normative agenda to comparative institutional analysis that my pragmatic justifications ignore. After addressing each criticism, I return to the impetus for this inquiry, Professor Merges's dissatisfaction with the

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30. See R. H. COASE, *ESSAYS ON ECONOMICS AND ECONOMISTS* 61–62 (1994) (discussing the role of economics in public policy and pointing to studies on the negative effects of government regulation).

31. See *Mayo*, 132 S. Ct. at 1293–94 (expressing concern with patents that preempt application of a natural law or natural correlation in medical diagnostic and therapeutic contexts).

contemporary sprawl of intellectual property. I conclude by suggesting why the approach I present takes us to the heart of the sprawl without getting us lost in a heart of darkness.

### *B. Global Positioning of the Roadmap: The Objections*

In this subpart, I address four salient objections to my argument that intellectual property entails a conflict over use. Addressing these objections serves to strengthen and develop my arguments, as well as establish some foundational points that will arise in subsequent Parts of the Article. The four objections are: (1) focusing on conflicting use ignores the *ex nihilo* condition; (2) focusing on conflicting use ignores and diminishes moral claims of right; (3) focusing on conflicting use ignores the individual; (4) focusing on use as supporting a plurality of normative positions ignores the hidden normativity of Coase and comparative institutional analysis. I address each point in turn.

#### *1. The Ex Nihilo Condition*

Intellectual property's appeal follows from its goal of creating new works. Whether couched in terms of innovation, progress, creation, invention, or originality, intellectual property is salient precisely because it supports what did not exist before. The strength of intellectual property supports, in many instances, claims by the intellectual property owner to limit or even deny access. The tenor of these claims is as follows. Because the owner brought the works into existence, potential users are not denied anything they otherwise did not have. *A fortiori*, absent any harmful effects from the new product or service, individuals are made better off than they were before. Therefore, to the extent intellectual property promotes new products or services that did not exist before, intellectual property is welfare enhancing.

I have called this type of argument the "reverse precautionary principle."<sup>32</sup> Just as the precautionary effect supports regulation to prevent any potential harm, the reverse precautionary principle supports any intellectual property right as long as there is a potential benefit. I have argued that this principle overstates the case for intellectual property.<sup>33</sup> I would make the same case for the *ex nihilo* condition. Those who

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32. Shubha Ghosh, *Why Intergenerational Equity*, 2011 WIS. L. REV. 103, 104–06.

33. *Id.* at 104.

subscribe to the *ex nihilo* condition, the argument that intellectual property permits that which would otherwise not exist, need to make the case why creating something out of nothing grants owners a trumping claim over users with some possible exceptions. There are three problems with using the *ex nihilo* condition to support the primacy of ownership: (1) the well-studied problem of romantic authorship; (2) the process of creation and invention; and (3) the source of value in intellectual property.

*Ex nihilo* arguments parallel those of the romantic author.<sup>34</sup> The latter is culturally based, grounded in nineteenth-century conceptions of the creative genius or the value-creating and productive entrepreneur. Although the main criticism of the romantic author notion is that authorship is socially constructed and creation and invention are social processes, not just individual ones, the flaw with the *ex nihilo* argument is that producing something out of nothing does not inexorably lead to strong property rights. Discovering new territory, new natural resources, new waterways, a new plant, or a new mathematical concept are each examples of *ex nihilo* creation, but different legal regimes of ownership govern each situation. For new territory, national sovereignty trumps individual discovery. Natural resources and waterways have their own rules for capture and ownership. New plants can be the subjects of intellectual property, but new mathematical concepts are less likely to be granted protection. One should ask why the appeal of newness should lead to strong ownership rights for intellectual property. Follow-on inventions and improvements often relax claims by the intellectual property owner. My suggestion is that some principle other than simply producing something out of nothing must be guiding the definition of property rights.

A potential guiding principle may come from an understanding of the process of creation and invention. One does not have to indulge too deeply in the social construction of authorship and inventorship to ponder whether any work truly is made from nothing. Contemporary mechanical and electronic inventions include the applications of established and newly discovered scientific principles. New machines and processes evolve from old ones through acts, often unpredictable, of

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34. See, e.g., JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 54–57 (1996); ROSEMARY J. COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW 219 (1998); Keith Aoki, *(Intellectual) Property and Sovereignty: Notes Toward a Cultural Geography of Authorship*, 48 STAN. L. REV. 1293, 1322–27 (1996); Peter Jaszi & Martha Woodmansee, *Introduction to THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE* 1, 10–13 (Martha Woodmansee & Peter Jaszi eds., 1994).

human ingenuity. New works build on old, established themes reworked and reshaped through creative energies. These arguments can be readily reduced to saying there is nothing new under the sun. But such a handy shibboleth ignores the deeper point. Of course *The Lord of the Rings* or *To the Lighthouse* are not inherently present in the Roman alphabet and rules of English grammar, nor is it meaningful to say glibly that the iPad existed in weaving looms. It is the energy and the shaping of these previous elements that creates the new item, and the new item in turn serves as raw material for future works. The *ex nihilo* argument glorifies the work and product and deflects our attention from the creative energies that produce them.

Refocusing attention on creative energies is important for the third reason that one should be skeptical of the *ex nihilo* argument. The source of value, both economic and social, comes from the use to which new works and products are put.<sup>35</sup> The new, new thing may wow us, but ultimately if the newness does not translate into concrete benefits, whether realized as gains in productivity, contributions to knowledge, or stimulation of entertainment and pleasure, then it is hard to say whether the new, new thing is really valuable. Of course, proponents of the *ex nihilo* argument will say that these benefits are meaningless and pointless if the creation never occurs. But that misses the point. Nowhere am I suggesting that creation is bad or that it should be discouraged. My contention is that use contributes to value rather than mere ownership. The goal of intellectual property ultimately is to promote use. Of course, ownership is important for that goal, but it would be wrong to say that ownership is primary.

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35. This statement reflects in part the criticism of the coherence of the labor theory of value, which has its roots in Locke. See, e.g., Duncan Kennedy, *The Role of Law in Economic Thought: Essays on the Fetishism of Commodities*, 34 AM. U. L. REV. 939, 955–56 (1985). The labor theory of value was sharply criticized and rejected in the nineteenth and twentieth centuries and replaced with a theory of market exchange as the determination of economic value. See, e.g., ALFRED MARSHALL, *PRINCIPLES OF ECONOMICS* 526 (8th ed. 1920). With the development of technologically-driven markets based on the flow of communication and information, the understanding of markets has shifted to a focus on knowledge creation and exchange. See, e.g., DANIEL BELL, *THE COMING OF POST-INDUSTRIAL SOCIETY: A VENTURE IN SOCIAL FORECASTING*, at xvii (spec. anniversary ed. 1999) (describing a knowledge theory of value in contrast with a labor theory). The importance of use, particularly collaborative use, is now the focus of understanding markets based on networks of information and individuals. See generally YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (2006).

A summary of my criticism of the *ex nihilo* condition reveals the fault lines. I contend that the *ex nihilo* argument creates a false dichotomy between ownership and use. This false dichotomy is false because it leads to ownership trumping use in most instances. The dichotomy leads to the reverse precautionary principle referenced above. Furthermore, I call the dichotomy false because owners are a type of user. The works they create, the innovations they make, entail using the materials for creativity and innovation: scientific principles, linguistic forms, spatial relationships, cultural allusions, which properly reconstituted through individual energy lead to the new, new thing. If owners are recognized as a type of user, not only is the *ex nihilo* condition minimized, but the case for intellectual property under a comparative institutional analysis is also strengthened.

## 2. Immoral?

By reducing all disputes to one of conflict between equally competing claims of use, the approach I endorse seemingly minimizes moral claims. Not only is the moral claim of the owner, whose talents and efforts have borne fruit, minimized, but also the claim of a person whose private information is misappropriated as a violation of any rights of privacy. To take my conception to the logical extreme, rape is simply a matter of convenience with the lust and violence of the rapist seemingly being on the same plane as that of the brutalized. These objections were raised by the attendees at the Law and Philosophy conference in San Diego where I presented a draft of this Article. These objections are a reaction to the seeming nihilism and moral neutrality of the comparative institutional analysis. I believe they overstate the claims of comparative institutional analysis and present all moral claims as absolutes that themselves need not be defended.

To start with the third and most trenchant criticism first, there is nothing about my argument that would support rape or other acts of assault. My argument is about intellectual property. One could just as readily make the contention that Lockean theories of property support treating people as chattel. That leap would entail a category mistake, in my opinion, with the conclusion that *x* is property resting on the assumption that anything is potentially property. More to the point, my argument generalizes to transactional environments. Personal relationships, particularly intimate ones, are not transactional. They are not the product of monetary or even reciprocal gift exchanges. Whether there is a deeper moral basis for claims against physical violence I leave for another inquiry. I do not think anything in my argument would undermine such independent moral bases.

Related to the intellectual property context is the second objection, that my reciprocity of harms approach would ignore values such as protection of privacy. Consider the following example. Suppose someone without permission peers into someone's bedroom window and takes a nude picture of the resident. The nude picture is published on the Internet. Perhaps the nude picture reveals some publicly important information about the resident. Presumably, under my reciprocity of harms approach, any basis for liability would entail an analysis of the consequences for the world if some conduct were allowed as compared to consequences if the conduct were forbidden. Such an analysis, however, would ignore any moral claims that the photographed would have to be free of intrusion. The photographer as user of the information would have a claim to the activity that common decency would view as intrusive and invasive of personal interests. Put another way, any moral claim would be trumped by utilitarian-like claims that the user is creating value and therefore should prevail.

This criticism overstates the claim. A comparative institutional approach does not eschew moral claims. The approach asks that such moral claims be justified. Under the comparative institutional approach, the justification is based on consequences for institutions, within which we must operate. If anyone were allowed to photograph inside someone's residence, then everyone or at least a large majority of people would do so. Such human activities would divert from other, more socially valuable activities and would create incentives for residents to block access to potential paparazzi. The opposite rule forbidding such intrusive photographing may have less costly consequences. A more difficult problem arises with respect to the publication of the photograph once taken. Although the inclination would be to not recognize rights in photographs that were intrusively procured, there is a competing moral claim of the right to know. The moral claims of privacy and freedom of expression would at some level have to be reconciled. Comparative institutional analysis may offer one solution. The point is that morality alone cannot answer tough questions. More importantly, moral claims themselves have to be justified.

The last point is true for the first criticism, that the approach I propose seemingly ignores any moral claims of ownership. Once again, such moral claims would have to be justified, and comparative institutional analysis provides one way. The problem one potentially confronts with my argument is that the approach does not invite stability or

predictability. Tomorrow's analysis might support the most outrageous of institutional arrangements, centralized planning, authoritarianism, or slavery. Comparative institutional analysis, one might argue, makes anything up for grabs and is too contextualized and relative.

Such consequences for comparative institutional analysis seem an overreaction. The point of comparative institutional analysis is to recognize the choices we might make. The approach is pragmatic and empirically based. The actual consequences that are known of centralized planning, authoritarianism, slavery, and other objectionable institutional arrangements are arguments in themselves for not repeating them. They are, as a matter of painful experience, off the table. More to the point, these offensive arrangements were often justified with an unexamined and unquestioned morality. Comparative institutional analysis is not immoral or even amoral, but it does ask us to justify the choices we make based upon moral claims and thereby provides a sure, more conscious recognition of their merits.

### *3. Losing the Individual?*

Ownership has its power in a story of individualism. Property rights reflect respect for the individual as creator, manager, and entrepreneur. By contrast, a comparative institutional approach seemingly places institutions above the individual and reduces individuals to either social constructs or a set of interests that can give way to competing social demands and needs. Consequently, the values of individual autonomy and decisionmaking are swept away.

Once again, this argument proves too much. Some of its prongs appear in my discussion of autonomy as a midlevel principle in Part III. At the outset, one needs to recognize that much intellectual property ownership is collective and not individual. Standard assignment terms in employment contracts transfer intellectual property rights into the hands of the employer, often a business entity like a corporation. Under the "work made for hire" doctrine in copyright law, such contractual transfers are bypassed altogether by vesting ownership in the business entity as employer directly. Equating ownership with individual merit or desert ignores the realities of collective ownership.

Often, intellectual property battles pit individuals against other individuals. The nature of intellectual property litigation is not holding intellectual property ownership at the sufferance of the public, but to the interests of individual users. Admittedly, these individual users may be surrogates for broader public interests, such as universities or libraries. Realities of intellectual property litigation are competing private claims. Comparative institutional analysis confronts these realities. As opposed

to privileging a public claim against that of an owner, comparative institutional analysis seeks to compare competing sets of entitlements to structure institutions within which individual creation and transaction can occur. If anything, comparative institutional analysis would support individualism rather than subvert it.

The problem that leads to this criticism is that I have described users as an undifferentiated entity when in fact the term captures a range of differentiated and diverse interests. To speak of users as a collectivity ignores the individual differences within the designated class. But one needs some term, and the advantage of the term *users* is that it even subsumes owners and provides an avenue for identifying convergent interests in the design of intellectual property law. But that problem of terminology does not subsume the individual into a collectivity. Instead, it asks us to recognize the range of individual interests beyond those of owners that intellectual property affects. If anything, the approach I propose is *hyperindividualistic* by seeing beyond owners as the primary set of individuals that matter for the design of intellectual property law.

#### 4. *Hidden Normativity?*

I have made the claim that comparative institutional analysis may support a range of normative judgments about intellectual property. The criticism is that with its focus on a transactional environment, comparative institutional analysis is really just a disguised form of wealth maximization.<sup>36</sup> This conclusion follows from the approach's roots in Coase, whose work focused on the minimization of transaction costs. The sole goal of minimizing transaction costs is to maximize social wealth. Furthermore, not only is comparative institutional analysis a disguised form of wealth maximization, but it is also antithetical to distributional concerns or issues of justice.

This criticism would reject any claim that comparative institutional analysis is a form of positive analysis, devoid of normative claims. I too would reject a facile separation of positive and normative analysis. All analysis entails judgment in terms of framing that inevitably reflects normative choices. Certainly an application of comparative institutional analysis would also introduce a blend of positive analysis with

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36. See, e.g., Noah Popp, *Wealth Versus Welfare: Correcting for the Marginal Utility of Wealth in Assigning Private Law Entitlements*, 30 QUINNIPIAC L. REV. 69, 78–79 (2011).

normative prescription. Where I would begin to differ is in equating comparative institutional analysis with wealth maximization. Coase himself was critical of wealth maximization. His writings reveal a libertarian streak with an emphasis on maximizing human freedom, particularly the freedom to transact. Other scholars display a range of normative commitments from wealth maximization to questions of distributional justice.<sup>37</sup> The beauty of comparative institutional analysis is that it forces the scholar or policymaker adopting its approach to think critically and analytically about institutional design and its consequences. The relevant consequences are where normative choices enter. Instead of predetermining normative commitments, the approach invites a range of normative commitments and the need for persuasion, communication, and dialogue to choose among them.

Many of the criticisms of comparative institutional analysis will arise in various parts of this Article. For the rest of my discussion, I will focus on the need to understand users' rights with the comparative institutional analysis as the background approach. The discussion that follows in Parts III, IV, and V recenters the user in intellectual property law by using Professor Merges's analytical approach as a foil. This Part provides some background and foundation as context for my broader argument.

### *C. At the Heart of the Sprawl*

Professor Merges's trepidation of intellectual property reveals a paradox. He feels that during his career as an intellectual property scholar, the field has grown into a sprawl and he waxes nostalgic for the good old days. However, intellectual property at its heart is about change. The paradox is that a scholar of change is seemingly troubled by the fruits of change. Progress promised by intellectual property has no set boundaries. Like Darwin's theory of evolution, it is not teleological. Professor Merges's doubts perhaps stem from this lack of teleology. Consequently, he turns from the value-neutral goal of wealth maximization to the moral roots of property as a more certain grounds for structuring intellectual property law. The result is a design of intellectual property institutions that emphasizes ownership with the interests of users recognized as limitations.

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37. See, e.g., NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 4–5 (1994) (critiquing a pure goals-oriented approach of Coasean analysis and suggesting that the method is consistent with many normative goals other than wealth maximization).

I have no anodyne for Professor Merges's concerns with intellectual property's progress. Like many scholars, I am concerned about intellectual property and the progress it promises. I see the sprawl and feel not nostalgia but concerns for the future, not a fictional future of lives not in being, but the future of the living. As a result, I have developed an understanding of intellectual property law and policy that asks policymakers and scholars to focus on consequences for alternative institutional arrangements. My contention is this approach offers a pragmatic solution to managing the intellectual property sprawl. The rest of this Article develops these points by using Professor Merges's argument as a foil to make the case for an intellectual property law centered on users rather than owners.

### III. STATE OF NATURE, VEIL OF IGNORANCE, AND USERS

*Justifying Intellectual Property* is divided into three parts. The first details the most basic principles that provide the foundation for intellectual property. Grounded in the ideas of John Locke, Immanuel Kant, and John Rawls, these principles support—somewhat loosely—four midlevel principles that guide the implementation of intellectual property law. These four principles are proportionality, efficiency, nonremoval, and dignity. Finally, the foundational and midlevel principles have implications for intellectual property policy and practice, specifically for the role of what Professor Merges calls the creative personal, for the use of digital materials, and for the distribution of life-saving pharmaceuticals. In this Article, I follow the broad contours of the book in developing my recentering of the book's thesis on users, rather than what I would describe as the elusive figure of the creative person. This Part addresses the foundational principles, with the midlevel principles and practices being the focus of Parts IV and V, respectively.

#### A. *Stewardship, Not Only Ownership*

At the heart of Professor Merges's justification for intellectual property is a rejection of wealth maximization as an efficiency-based rationale for intellectual property policy. His criticism of wealth

maximization is a standard one. Echoing George Priest,<sup>38</sup> Professor Merges points to the lack of empirical support for intellectual property rules promoting the maximization of wealth. Furthermore, wealth maximization ignores the values captured by moral rights, inherent value in the integrity of the work, and the personality of the author. A related criticism is that wealth maximization is not an adequate filter for choosing among intellectual property policies. Because intellectual property law promotes the creation of new works and products, and new works and products by definition increase wealth, absent negative externalities, the criterion of wealth maximization, uncritically applied, favors the expansion of intellectual property rights at the expense of other values, including the rights of users.

Recognizing the limits of wealth maximization leads to a rights-based, or deontic, justification for intellectual property. Property rights in creative or inventive output vested in creators serve to promote the creation of new works, which benefits society as a whole. As a justification for intellectual property, this rationale has descriptive appeal. Professor Merges argues that it also has normative appeal, providing a means to define the scope of intellectual property rights in order to yield social benefits. In response to critics of intellectual property rights who advocate legal reform in favor of constructing a commons of knowledge and information, Professor Merges's response is more than the clichéd "mend it, don't end it."<sup>39</sup> Instead he develops a sophisticated analysis of property rights grounded in Lockean notions of property, Kantian conceptions of autonomy, and Rawlsian takes on distributive justice. The pieces fit together, but there is an ad hoc quality to the argument. Professor Merges takes ideas and pieces them together into a theory of intellectual property. But, of course, one may disagree with the pieces selected and their arrangement and coordination.

At the outset, I should emphasize that at a very broad level, I agree completely with Professor Merges's argument, particularly his social-justice-oriented conclusions. But there is a bit of wishful thinking in the argument. The foundational principles do not inevitably lead to the conclusions that he suggests. One needs to be wary of their potential weak joints and the vulnerabilities in structuring policy. Merges's starting point is John Locke and his use of the state of nature as the origination story for property rights.<sup>40</sup> According to this story, property

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38. See George L. Priest, *What Economists Can Tell Lawyers About Intellectual Property: Comment on Cheung*, 8 RES. L. & ECON. 19, 19 (1986).

39. See MERGES, *supra* note 1, at 32–33 (examining the "goodness of fit" between Locke and intellectual property law).

40. See *id.*

rights originated during a period before the establishment of civil society when individuals appropriated objects in the external world by applying—or mixing—their labor with the objects in the world. Labor is the source of property rights, which civil society, once established, protects according to several provisos that govern the scope of property rights. These provisos are that of nonspoliation, sufficiency, and charity. I discuss these provisos in the next subpart.<sup>41</sup>

The vulnerability in building on Locke lies in the strength of the origination story. Although closely aligned to a Christian origination story, Locke's position nonetheless might have universal appeal.<sup>42</sup> The problem is that using Christian roots—which may have been a rhetorical ploy—frames the story of property incorrectly. Property rights did not arise from the relationship between a human subject and material objects in a natural state. Such a story assumes that man exists outside of nature or in some intermediate state between the natural and social world. Such a story takes Daniel Defoe's *Robinson Crusoe* as its starting point.<sup>43</sup> Locke's appeal to American intellectuals stems from the story's appeal for the settlement of the New World. Property rights, however, are arguably more appropriate for our understanding of the relationship among people in whatever social organizations and arrangements humans have devised. A more appropriate analogy is not to *Robinson Crusoe* but to Daniel Defoe's *The Fortunes and Misfortunes of the Famous Moll Flanders*, a story about a woman who survives and rises through the social ranks.<sup>44</sup> Property rights are about social relationships, and of course relationships with material objects are part of this broader story.

This distinction as to the origination story matters for the baseline against which we assess and build intellectual property institutions. The

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41. See *infra* Part III.B.

42. See, e.g., Steven Menashi, *Cain as His Brother's Keeper: Property Rights and Christian Doctrine in Locke's Two Treatises of Government*, 42 SETON HALL L. REV. 185, 267 & n.465 (2012) (analyzing the relationship between Locke's theory of property rights and contemporary Christian teachings).

43. See generally DANIEL DEFOE, *ROBINSON CRUSOE* (Thomas Keyner ed., Oxford Univ. Press 2007) (1719) (recounting the fictional title character's years spent marooned on a remote tropical island).

44. See DANIEL DEFOE, *THE FORTUNES AND MISFORTUNES OF THE FAMOUS MOLL FLANDERS* (Bibliophilist Society 1931) (1722). For a cultural understanding of *Moll Flanders* as applied to law, see NICOLA LACEY, *WOMEN, CRIME, AND CHARACTER: FROM MOLL FLANDERS TO TESS OF THE D'URBERVILLES* 52–53 (2008), which examines how autonomy was recognized within social understandings of the feminine and the criminal.

Lockean view is an individualistic one, emphasizing ownership with the interests of nonowners as subsidiary. Although the provisos provide some limit on ownership, for reasons I explain in the following subpart, they do not serve to constrain concentration of ownership or to recognize that the social relationship to material objects is one of use and governance. Although the Lockean view supports proprietary ownership over nature, a social view of property rights would support a model of stewardship and social obligation. In a world that originates from Locke's story, the locus of economic, political, and social decisionmaking is the individual property owner. Under a model of stewardship, the locus is in the political institutions that society creates to determine and structure property rights. The Lockean view posits individual discretion as the basis for decisionmaking; the stewardship model constructs and sharpens mechanisms for governance.

The stewardship view is not inconsistent with property ownership. It is a model, however, that recognizes that some people are not owners and that ownership is not equally allocated. But it is not a model that denies the value of ownership—it places ownership in its proper place within a scheme of social values. The stewardship model is my starting point, and I present it here briefly by way of contrast with Professor Merges's starting premises in his justification of intellectual property. As I systematically work through the ideas in his book, I will be contrasting the alternative stewardship model with what I will refer to as his private ownership model. My goal is to show that with slight shifts in emphasis, the structure of Professor Merges's argument would actually support a view of intellectual property that supports users and not just creators.

### *B. Unlocking Users*

The appeal of Locke is his identification of labor as the basis for property. Labor as a concept has appeal because of its connotation of activity, engagement, and productivity. By contrast, the word *user* sounds negative. A user is a free rider, a squatter, someone who takes without giving, a consumer. Looking beyond the rhetoric that accompanies the words, however, one can see an affinity between labor and use. One who labors makes use of resources and tools to generate something new. A user, analogously, can engage in labor by building on what has already been created and thereby create something new. To that extent, Locke's theory of labor may well account for certain classes of users, as Professor Merges would, I think, acknowledge in his discussion of cumulative innovation or copyright fair use.

The problem is that Locke's grounding of property rights in labor ignores certain normative questions that are critical to property theory in general and intellectual property rights in particular. First, not all labor is treated the same, and the question remains how much labor is sufficient to establish property rights. This question indicates that there is something more than labor as the foundation for property. Second, Locke provides a theory of property but not of markets. This point is an ironic one, especially because Locke is viewed as foundational for capitalism.<sup>45</sup> But markets cannot be reduced to labor, which is just one factor in the success and vitality of markets. Other constituencies, such as consumers, are necessary for the success of markets. These other constituencies broadly constitute the users I have been referring to in this Article. I will turn to each of these points in unlocking the user from within the foundational principles Professor Merges has identified.

How much and what kind of labor is required to obtain property rights? Those, like Professor Merges, who start from a Lockean foundation for property, have a specific normative view of labor. It is productive, value-adding, a mixture of sweat and intellect. Presumably all members of society are equally capable of participating in the mixing of their labor with the world to acquire property. As a historical matter and as a practical one, the picture of mixing is a highly idealized one. Of course, not everyone is capable, but nonetheless labor provides a principle of desert—subject to the provisos—to explain why some have more property than others.

But even with the provisos, the principle of desert is lacking. As a historical matter, much property was acquired by conquest either through warfare or some form of squatting. Settlers mixed with the land to create communities and ownership, often appropriating from previous occupants. In the realm of intellectual property, the sweat of an editor, sound engineer, lab assistant, or experimental designer does not provide a stake in the resulting copyright, patent, or trade secret. Instead, the law requires some degree of creativity or inventiveness for intellectual property rights to attach.<sup>46</sup> These requirements are not simply matters of

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45. See, e.g., ELLEN MEIKSINS WOOD, *THE ORIGIN OF CAPITALISM: A LONGER VIEW* 109–10 (2002).

46. See, e.g., Abraham Drassinower, *Sweat of the Brow, Creativity, and Authorship: On Originality in Copyright Law*, 1 U. OTTAWA L. & TECH. J. 105, 107–08 (2003–2004); Jessica Silbey, *The Mythical Beginnings of Intellectual Property*, 15 GEO. MASON L. REV. 319, 320–21 (2008).

administrative convenience in identifying and enforcing property rights. They represent judgments about what types of labor count for legal protection of rights. They are a social decision, perhaps justified by appeal to the state of nature, but nonetheless with implications for the decisionmaking that informs the management and commercialization of property rights.

A focus on labor as the source of property rights, and hence social and economic value, distorts our understanding of markets. I am not suggesting that property rights are only about market institutions, a point on which I elaborate in Part V. But to the extent property rights facilitate markets and our understanding of markets shape legal rules, like those of intellectual property, our understanding of the source of property rights is critical. It is worth noticing that Professor Merges ends his book with an extensive discussion of transactions as an important curative to some of the dangers of strong property rights. Presumably, these transactions occur in a market context.

The problem, though, is that most contemporary theories of the market reject the labor theory of value, of which Locke provides one example.<sup>47</sup> To be fair, Locke develops a political theory rather than an economic one. Therefore, this criticism is directed at those who rely on Locke for a theory of property rights and free, unregulated markets. Labor is one factor in the marketplace. Market negotiations involve a complex set of transactions among laborers, owners of financial assets, consumers, managers of organizations, and stewards of natural resources. To reduce the value that markets produce to labor is to ignore the role of technologies, finance, taste, pure chance, and a host of other factors. All of these factors shape the scope and influence of property rights either directly or indirectly and consequently affect the transactions that drive markets. Locke offers a powerful myth for property rights that is helpful for shaping modern democracy, but is not insightful at all for what drives market transactions.

What does unify the various actors in the marketplace as they transact over the specific stakes held in different types of property is the concept of use. Like the notion of labor, use is also a highly normative, loaded concept. But the concept of use extends beyond special categories of persons and activities. Modern theories of markets start from the concept of use, whether described as consumption or as production. Users engage in transactions in order to exchange and transfer resources that others find useful according to whatever relevant personal and social value system. Resources, by moving to higher-valued users, create

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47. *See supra* note 35 and accompanying text.

value, often disproportionate to the labor expended to create the resource. Neither users nor laborers ultimately create value, and understanding users is the foundational principle that should guide the construction of property rights.

Admittedly, Locke's theory might be relevant to understanding users. At a conceptual level, Locke's metaphor of mixing is one of use, broadly construed. The shift I am suggesting is away from an idealized assumption of productive labor, the person working the soil turning fallow soil into fruit. Realistically, this ideal ignores that much property was acquired through conquest or through the use of other people's labor: slaves, women, the indentured. Refocusing on use allows us to rethink the normative basis of property. The normative move I am suggesting is that property rights are created with users in mind and that designated owners are just stewards for a broader class of users, which consists of, among others, consumers, future generations, and constituents that rely on property but may not have not a direct ownership stake. Locke might support a stewardship notion of property rights. His three provisos suggest that ownership comes with obligations. But more often than not, Locke is used to justify a private ownership model. What I am suggesting is that understanding labor as a type of use greatly expands the implications of Locke.

Professor Merges paints a very positive and conventional view of Locke that justifies property rights as well as obligations.<sup>48</sup> The problem, though, is his over-idealization of labor as opposed to the broader category of use. But a slight shift in understanding can lead to the stewardship model of intellectual property I am advocating in this Article. Similar shifts are relevant to his reading of Kant and Rawls, which I turn to in the next two subparts.

### *C. Users and Autonomy*

While Locke provides a justification for property rights based on mixing of labor with the material world, Kant provides a foundation for understanding the contours of autonomy of individual property rights owners. Professor Merges turns to Kant as a source of foundational principles, in part to explain that individual rights define autonomy but

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48. See MERGES, *supra* note 1, at 66–67 (concluding that Locke's theories provide a "very good start" to understanding intellectual property).

do not justify unfettered freedom.<sup>49</sup> As Merges distills Kant, the right to do something does not imply the obligation to do it. Instead, individual autonomy is mediated within the norms that govern society. Kant and Locke together identify individual rights tempered by social benefits and limitations as the building block of just legal institutions.

Kant's ideas also serve to develop a comprehensive vision of intellectual property, one consistent with the English tradition of empiricism and individualism and the Continental tradition of rationalism and collective order. Like scholar Adrian Johns and others before him,<sup>50</sup> Merges sees in Kant's brief writings on authorship a basis for a moral rights approach to intellectual property, one that protects the personality of the author as embodied in a creation and not solely the creation as a tradable commodity. Although the basis for this moral rights tradition is somewhat tenuous within Kant's writings, it is arguably consistent with his view of autonomy. Respect for individual autonomy supports protection of a person's private sphere or right to withdraw from the public sphere, as well as control over how the public intrudes into the private. Professor Merges proceeds from autonomy to the public-private distinction to support for the right of publicity under intellectual property law. Although he does not fully discuss the issue of limitations, I am assuming that he would find limits on the right of publicity grounded in right of expression, especially when the former impedes the latter, though I may be extrapolating here from his broader argument.

Professor Merges's discussion of Kant follows the same structure as his discussion of Locke. From each he distills a foundational principle that provides a justification for intellectual property law. From Locke, this principle is labor; from Kant, autonomy. Professor Merges shows how each foundational principle also includes certain limiting principles that reduce the scope of individual ownership and property rights. The problem, however, is too much focus on individual ownership and not enough on the uses to which property can be put.

My criticism of Merges's application of Locke is its reduction of value to labor and its disregard of the range of sources of value that arise from use. Similarly, Kant is applied to support the autonomy of owners, largely ignoring the autonomy of users. This point starts from a more developed concept of autonomy. Individual autonomy makes no sense separate from a conception of society. If society did not exist, then

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49. *See id.* at 90–91 (discussing Kant's universal principle of right and human autonomy).

50. ADRIAN JOHNS, *PIRACY: THE INTELLECTUAL PROPERTY WARS FROM GUTENBERG TO GATES* 54–55 (2009).

autonomy would not be an issue. An individual would be unconstrained and, like Robinson Crusoe, free to roam and build on his own island. Autonomy is necessary only when society arises, and autonomy's contours make sense only against a background of social relationships and roles.<sup>51</sup> When an individual acts in the role of parent, spouse, teacher, student, attorney, client, or any of the number of roles one may occupy, the individual is not acting autonomously but rather within a network of relationships. It is only when one is not in one of these roles that one can be truly deemed autonomous. We can debate whether autonomy is foreground or background, and largely debates about privacy and property are precisely about that debate. My point though is that autonomy is relevant only within a particular understanding of social relationships.

This point is relevant to emphasize that to focus on the autonomy of ownership is a normative choice Professor Merges has made. He makes it for obvious reasons, but one could just as readily begin with the autonomy of users and make that the foreground in understanding the scope of intellectual property rights. To illustrate this point, consider an everyday activity like surfing the Internet. At some level, this is not an autonomous activity. As a surfer, I am implicitly engaging with others within a set of institutions that society has created. My ability to read without being subject to surveillance or to blog without fear of claims of infringement does implicate my autonomy. The question is, should we address the autonomy of the user by taking the autonomy of the owner as the foreground and other rights as subsidiary or should we make the user's autonomy the trump card? Professor Merges assumes the former, perhaps based on a connection between ownership and innovation or other social benefits. But this argument ignores the benefits of the latter alternative.

How do we choose between the autonomy of owners and users? Perhaps other foundational principles can guide us. But working within Kant's ideas, one solution may stem from his categorical imperative. Under this imperative, a person should act according to that maxim which is generalizable to other people. The imperative is an appeal to reciprocity and to fair and equitable treatment. In my example, there are

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51. *See, e.g.*, JULIE E. COHEN, CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE 15–24 (2012) (analyzing how the self and personal autonomy are constructed within technological and social contexts).

two competing imperatives. The first is to defend your property rights because you would want others to defend theirs against you. The second is to allow uses because you would want others to allow you to make similar uses. Which of these imperatives is more rational depends in part on the consequences. The first may lead to strong property rights with energies extended to enforcing rights. The second may lead to a blurring of lines between owner and user. But beyond the predicted consequences is the broader question of which is more generalizable, being an owner or being a user? This question is never addressed by Professor Merges in his analysis of Kant,<sup>52</sup> but I think it is the question that contemporary intellectual property requires us to consider.

In short, autonomy as a concept, like that of labor, is important for justifying intellectual property. But each concept, I would argue, ignores relevant criteria for what we might expect from an intellectual property system. Perhaps one thing that is missing is a sense of social justice with an overemphasis on individualism. Professor Merges recognizes this point because the third source of the foundational principles is distributive justice, as presented by John Rawls. But as I argue in the next subpart, the appeal to Rawls also suffers from ignoring the broader category of users and overemphasizing owners.

#### *D. Maximin and the Difference Between Users and Creators*

Rawls's theory of justice provides the third foundational principle for Professor Merges's justification of intellectual property. Rawls serves two purposes. The first is to justify intellectual property rights as a basic freedom that society should recognize. The second is to justify intellectual property rights under a principle of fairness as providing benefits to the worst-off members of society. As to the first purpose, Merges appeals to intellectual property rights in protecting the liberty of creative professionals, those individuals who produce innovative works that benefit society as a whole. Merges makes the point that intellectual property rights are necessary in order to provide the proper incentives for creative professionals to produce and distribute works. He then makes the point that the worst off in society benefit from these new works because of the entertainment, education, and information they provide. From these Rawlsian criteria of liberty and equity, Merges

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52. See MERGES, *supra* note 1, at 100–01 (discussing right of publicity as consistent with Kantian autonomy but not discussing questions that arise in use of publicity for artistic expression).

devises a multilayer model of intellectual property rights with the private incentive at the core and the social benefits at the periphery.<sup>53</sup>

Professor Merges relies on Rawls to develop a distributive justice rationale for intellectual property rights. Although perhaps implicit in Merges's exposition of Locke and Kant, his invocation of Rawls also introduces a social dimension to the understanding of property rights; I criticized his lack of discussion on this social dimension earlier in this Article. The first part of Merges's argument is largely a standard incentives-based explanation for intellectual property rights. The second part, which directly implicates the argument for distributive justice, is more problematic.

To illustrate the second part of his argument, Professor Merges uses the example of J.K. Rowling, who was able to rise from a state of poverty to one of wealth through her *Harry Potter* series.<sup>54</sup> Copyright played a role in this rise, and Merges points to Rowling's success as an illustration of how intellectual property rights can serve creative professionals and aid in their advancement. Merges uses the example of Rowling to show how intellectual property rights are not a purely private right. Rowling's success was a function not only of her own initiative and talent, but also of the social background and institutions that made her rise possible. Because of this social dimension of the property right, Merges argues that the state has the right to tax Rowling's earnings. Through taxation, society recaptures the social benefits from Rowling's work.

When I first started to read Professor Merges's account of J.K. Rowling as an example of intellectual property rights and distributive justice, I thought the example would end with a discussion of her dispute with a fan who had created an unauthorized *Harry Potter* encyclopedia. The fan was found to be a copyright infringer. Although Professor Merges does not directly address the infringement suit in his book, he did discuss it briefly during workshops at Notre Dame Law School and the University of San Diego School of Law. As I recall, he pointed out that J.K. Rowling is fairly generous in licensing her work. Her practice was an example of how intellectual property owners can waive their rights and engage in transactions to ensure that users have access to protected works. I use the example of the dispute between Rowling and

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53. *Id.* at 121–23.

54. *Id.* at 133–35.

the fan to illustrate how Rawlsian approaches to distributive justice inform the initial entitlements of intellectual property owners with respect to potential users.

Professor Merges distills Rawls's theory of distributive justice down to three principles that have application to intellectual property.<sup>55</sup> The three principles are (1) distribution of liberties; (2) distribution of opportunities; and (3) equal respect for persons.<sup>56</sup> Under the first two principles, intellectual property ownership is available to everyone who meets the legal requirements. The requirements themselves are arguably egalitarian and not exclusionary. Although the first two principles offer relatively straightforward bases for identifying the fairness of intellectual property, the third is more controversial and difficult. I will spend most of my discussion on this third point as a basis for identifying distributive justice in intellectual property law without contesting the first two principles.

Rawls's principle of equal respect for persons is known as the difference principle. Rawls recognizes that rights and resources will be distributed unequally in society.<sup>57</sup> Nonetheless, rights and resources can be distributed in a just manner. The principle of justice he proposes is basing differences on maximizing the least well-off in society. In choosing among alternative social arrangements, society should choose that arrangement which improves the well-being of the worst off in society. Professor Merges adopts the difference principle as assuring the fairness of intellectual property rights.<sup>58</sup> He argues that intellectual property rights ensure not only equal distribution of rights and opportunities, but also the well-being of the worst off. J.K. Rowling serves as his poster child for this last point.<sup>59</sup> Impoverished but creative, Rowling parlayed her creative energies into enormous wealth, made possible by the copyrights in her novels. Intellectual property ownership can maximize the well-being of the poorest in society.

The Rowling example arguably overstates the case for intellectual property ownership. Of course, not all intellectual property owners, or property owners for that matter, are as successful as J.K. Rowling. Legal rights do not guarantee success. But Professor Merges's point is that legal rights do make success possible. Fairly distributed legal rights in turn guarantee equality of opportunity for everyone. The problem is that the Rawlsian argument offers little guidance for the scope of

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55. *Id.* at 104.

56. *See* JOHN RAWLS, A THEORY OF JUSTICE 302 (original ed. 1971).

57. *See id.* at 6–67.

58. *See* MERGES, *supra* note 1, at 120.

59. *Id.* at 133.

intellectual property rights, a question that is critical for distributive justice. If intellectual property owners have strong rights that permit the enjoining of incremental creators or the activities of users, then there is a question of the fairness of the scope of intellectual property rights. If a fan of Rowling wants to create a new work, a website, or a new form of fiction that uses elements of Rowling's works, should the fan be allowed to do this without a license from Rowling? Where do the owner's rights end and the user's rights begin?

To examine the scope issues, consider the fan fiction example in Rawlsian terms. The discussion below is based on an example by John Broome, as discussed by Derek Parfit in his critique of the difference principle.<sup>60</sup> For this example, reduce the possibilities to two possible states of the world, one in which the fan is an infringer and the alternative in which the fan is not an infringer. In State 1, Rowling earns 1,000 units of joy and the fan earns -500 units. In State 2, Rowling earns 750 units and the fan 300 units. These units are used to illustrate the example; if it helps, think of them as ordinal measures of utility. To summarize this information:

State 1 (infringement): Rowling, 1,000 units; Fan, -500 units

State 2 (no infringement): Rowling, 750 units; Fan, 300 units

Which is more desirable from a Rawlsian perspective? The discussion below is also derived from an example by Broome, as discussed by Parfit.<sup>61</sup>

Note first that from an efficiency standpoint, the two states are noncomparable because Rowling is worse off in State 2 while the fan is better off. Assuming that units are nonadditive because they represent subjective weights, it makes no sense to add the units of joy. Therefore, from an efficiency perspective, we cannot compare them without some criterion to compare the two individuals' levels of joy. But the Rawlsian perspective is to make the worst-off group the best-off. That is the meaning behind the "maximin principle"—maximizing the minimum well-being in society. If our choice is between these two states of the world, then State 2 satisfies the Rawlsian criterion for equity. The fan is worse off than Rowling in both states, but is better-off in State 2 than in State 1.

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60. See DEREK PARFIT, REASONS AND PERSONS 491-93 (1984).

61. *Id.* at 492.

I raise this example to show how an argument about intellectual property rights and distributive justice must adequately take into consideration users like the fan in this case. Professor Merges recognizes the social aspect of intellectual property rights but fails, in my opinion, to fully account for all the social uses of intellectual property. My example shows that there is one social use that might justify limited intellectual property rights. It should not be read to mean that intellectual property rights should be limited against all uses.

To see this point, consider another stylized example. Suppose the user just makes unauthorized copies of all of Rowling's works with a scanner. In State 1, the copier is an infringer and enjoys -500 units while Rowling enjoys 1,000 units. In State 2, the copier is not an infringer and enjoys 1,000 units while Rowling enjoys -750 units. The information can be summarized as follows:

State 1 (infringement): Rowling, 1,000 units; Copier, -500 units

State 2 (no infringement): Rowling, -750 units; Copier, 1,000 units

This example is difficult because neither Rowling nor the copier is clearly the worst off. Rowling is the worse off in State 2 and the copier in State 1. The maximin principle states that the goal is to maximize the well-being of the worst off. In this situation, State 1 satisfies Rawls's criterion because the worse off in State 1 is better off than the worse off in State 2, in relative terms.

These stylized examples illustrate Rawls's criteria for distributive justice and the importance of identifying and including use in analyzing the scope of intellectual property rights from a distributive justice perspective. The difference between the two examples is the degree of infringement. In the first example, the fan infringes on the derivative work right only, leaving Rowling several avenues through which to exploit her work. In the second example, the copier is engaging in more intensive infringement, with the copying affecting a range of markets for Rowling's work.

Considerations of use, as these examples show, affect the scope of intellectual property rights. Professor Merges's analysis, by contrast, derives from Rawls a justification for intellectual property ownership without considering users. Admittedly, he concludes that ownership is subject to social interests, but it is not clear from his analysis how such limitations would work. My examples show that the limitations can be quite complex and dependent on context. More importantly, the examples demonstrate how users' rights need to be considered along with ownership rights for the distributive justice analysis.

A criticism of my analysis is that it assumes the work has been created and therefore ignores the incentives and claims of owners who make the original work. In partial response, I incorporate by reference my discussion of the *ex nihilo* condition from Part II above.<sup>62</sup> As explained in Part II, the analysis does not change if one understands these examples in terms of the decision of whether to create a work or to become a fan. The point is not to conclude that there should no property rights in Rowling's work. Rather, my point is that the scope of intellectual property rights is based on considering the interest of potential users of a work. The Rawlsian approach to distributive justice assumes a relative conception of who is the worst off in society. Making this determination more absolute requires an appeal to other criteria such as wants, needs, or capacities. Although many intellectual property scholars are working on what these criteria should be, my point here is that Rawls alone may not be helpful in developing a distributive justice approach to intellectual property. Furthermore, as Professor Merges's analysis implies, relying on Rawls alone may lead to intellectual property law and policy that is more favorable to owners than to users.

#### *E. Summary*

Foundational principles, because they are at such a high level, can be used to justify any position. My argument in this Part has been that Professor Merges's foundational principles for intellectual property rights do not adequately take into consideration the rights of users or the concept of use. Merges presents a deontic argument in favor of the rights of creative people. Although critical of wealth maximization and utilitarianism, his argument in favor of creative people is implicitly a utilitarian one that entails putting greater weights on creators and users. This Part has made the case for users as an important but ignored class of people in Merges's analysis. Why users matter will become clearer as I turn first to Professor Merges's midlevel principles and then to the practice of intellectual property.

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62. See *supra* Part II.B.1; see also SUNDER, *supra* note 8, at 126–44 (discussing the role of intellectual property in helping the poor).

#### IV. MIDDLELEVEL PRINCIPLES AND UBIQUITOUS USERS

Professor Merges's defense of intellectual property is a healthy and pragmatic one in that it brings together many values and perspectives. The thrust of my critique is to shift the emphasis of his multivalent approach. Instead of emphasizing creative people as the beneficiaries of intellectual property law, my emphasis is on users. Instead of building intellectual property law on the foundational principle of labor, I seek to emphasize use, very broadly construed, as the organizing principle for intellectual property law. By focusing on use, I do not mean to shortchange authors and inventors, but to include a wide range of constituencies who benefit from intellectual property law. Creative people, in my view, are a subset of users, whose interests need to be considered along with consumers, public-minded institutions such as libraries and universities, and other groups who are caught in the web of intellectual property policy and practice.

The role of users is particularly important with respect to the midlevel principles that Professor Merges identifies to structure intellectual property institutions and bridge the divide between foundational theories and intellectual property practice. These midlevel principles are, in order discussed: nonremoval, efficiency, dignity, and proportionality. Although these principles are couched in terms of creative people, hidden within each principle is a collection of user interests that need to be disentangled and understood discretely. Like the previous Part, this one brings out the contours of users' interests and attempts to integrate them into a fuller understanding of intellectual property.

Professor Merges, of course, does recognize users' interests in intellectual property policy. Specifically, in the chapters on midlevel principles, Professor Merges analyzes the borderline between users and creative people. He points out that within intellectual property institutions, there are core rights of creative persons and core rights of users. However, he correctly points out that there is also a sphere in which creative persons waive their rights, for example, by giving content away for free or through generous licensing terms. Merges also recognizes a sphere where rights of creative persons do not reach because of technological restrictions. Digital technologies, particularly the Internet, have expanded the sphere of rights waived by creative persons and shrunk the core rights of users. Professor Merges suggests that the core rights of creative persons have also shrunk.

Social and technological changes that arise with new institutions like the Internet certainly affect the balance of rights within intellectual property. My main disagreement with Professor Merges's analysis of the dynamic among users and creators is the lack of specificity in how

this dynamic works. In many ways, the core rights of creators have expanded with the new technologies as they can more effectively lock access through encryption and other technologies. Infringement may be more ubiquitous, but is also easier to detect. As the Internet expands, the zone of private space free from intrusion by intellectual property law contracts. Users have to worry more about access to information, ability to share knowledge, and ownership over content. The need to focus on the interests of users becomes more salient. Hence, the orientation of this critique from creator-centric to user-centric.<sup>63</sup>

As with the previous Part, I look at each of the midlevel principles individually and then conclude with an integrated focus on users' rights.

#### A. *Nonremoval*

The nonremoval principle states that once work is in the public domain, free of intellectual property rights, the work will not be removed from the public domain.<sup>64</sup> The principle reflects the working principle that intellectual property is of limited duration and defaults to the public upon the termination of the rights. Professor Merges lists the principle, but it is of lesser importance than the other three. His treatment of the principle is consistent with his creator-focused view of intellectual property rights.

Professor Merges's book and his argument preceded the Supreme Court's decision in *Golan v. Holder*, which was announced in January 2012.<sup>65</sup> In that decision, the Court upheld Congress's rights to restore copyrights in non-U.S. works that had not secured U.S. copyrights because of failure to comply with legal formalities.<sup>66</sup> Because U.S. copyright law had imposed formalities that other nations did not, Congress implemented the restoration as a condition for the United States acceding to international intellectual property treaties. Some commentators expected the Court to uphold the statute despite a challenge based on the Copyright Clause and the First Amendment. This expectation was based on the Court's 2003 decision in *Eldred v. Ashcroft*, which upheld Congress's power to extend the copyright term

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63. See, e.g., Cohen, *supra* note 8, at 352.

64. See MERGES, *supra* note 1, at 141–42.

65. See *Golan v. Holder*, 132 S. Ct. 873, 873 (2012).

66. *Id.* at 878.

retroactively by twenty years.<sup>67</sup> What may have been surprising was the breadth of the Court's opinion in *Golan*. The Court stated that neither the Copyright Clause nor the First Amendment limit Congress's power to remove works from the public domain. The breadth of the Court's ruling is in conflict with any reasonable interpretation of the nonremoval principle.

Perhaps Professor Merges de-emphasizes the nonremoval principle because it is seemingly less important than the other three principles. A decision like *Golan*, however, is a reminder of how important the principle is. The Court in *Golan* recognized quite a broad power in Congress to take things out of the public domain. Combined with its ruling in *Eldred*, the Court sees Congress as having broad powers to limit the entry of works into the public domain through expiration of the copyright term. Nonremoval is violated both directly through *Golan* and indirectly through *Eldred*.

We can only speculate how Professor Merges would respond to the *Golan* decision. Perhaps the response would rest in one of the other principles, such as proportionality. Certainly, nonremoval would not be a trump on all congressional legislation that shifts the line between proprietary and public domain. For example, in the *Golan* case, the Court could have upheld the statute on very narrow grounds such as a condition for international negotiations or as compensation for past creators who had been denied copyright. As with any principle, the nonremoval principle is a negotiable one. The challenging question is determining on what terms the principle can be sacrificed and what interest and rights are being traded off in the process. The Court's decision in *Golan*, by positing congressional power in such broad terms, seemingly concedes that there is very little given up through copyright restoration.

Even more telling is the way in which the Court construes the public interest affected by Congress's legislation. As the Court frames it, the public had no vested rights in the public domain works whose copyrights were restored. The archaic language of vested rights demonstrates that the Court sees copyright solely in ownership terms. Because by definition works in the public domain are not owned by anyone, there could be no vested rights.<sup>68</sup> But there may be interests other than ones of ownership. The Court pays little attention to reliance interests of users. Admittedly, the challenged statute did protect the interests of derivative

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67. *Eldred v. Ashcroft*, 537 U.S. 186, 192–94 (2003).

68. *See Golan*, 132 S. Ct. at 892.

rights creators. But the interests of teachers and conductors like Golan are given no weight in the Court's analysis.

The *Golan* decision reflects our poverty as policymakers in adequately accounting for the interests of users in shaping intellectual property and policy. The Court's use of the vested rights language indicates that they see intellectual property rights in terms of owners and nonowners, with scant consideration for the range of use to which works can be put. A more detailed and careful understanding and respect for users may not help to avoid decisions like *Golan*, but can at least enrich our justification for intellectual property law and support a more practical and robust nonremoval principle.<sup>69</sup> It is decisions like *Golan* that make me critical of a creator-centered intellectual property law.

### *B. Efficiency, Dignity, and Proportionality*

I will discuss the remaining three midlevel principles together because they share certain features and taken together show the problem of ignoring users' interests in a justification for intellectual property. Professor Merges views proportionality as the most important of all four midlevel principles. His discussion of nonremoval is directed at public-domain-centered scholars. His discussion of efficiency and dignity highlights the dual role of both utilitarian and moral rights views of intellectual property, even though they are sometimes seen as mutually exclusive. Finally, the proportionality principle directs the attention of policymakers and scholars to gauging the proper scope of intellectual property rights and therefore is the most powerful of the four principles, in Professor Merges's account.

These three midlevel principles also point to the importance of users' interests in intellectual property rights. For example, efficiency requires a weighing of competing benefits and costs associated with intellectual property rights, whether gauged in wealth-maximizing or consequentialist terms. In determining whether intellectual property law is wealth maximizing or has desirable consequences, a policymaker has to consider the effect of the law on the uses to which copyrighted, patented, and trademarked works are put. These uses include follow-on creation and cumulative innovation as well as the effects on

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69. See Cohen, *supra* note 8, at 347–48 (discussing minimal role of users' interests in defining intellectual property law).

consumers of products embodying intellectual property. Focusing solely on consequences to creative persons or on the wealth of this group without also considering the benefits to users would be an incomplete efficiency analysis.

As Professor Merges would admit, considerations of efficiency demonstrate that his approach to intellectual property law is not purely a deontic one. Utilitarianism, perhaps invariably, creeps back in. But efficiency in his analysis is a midlevel principle, a pragmatic means of bridging foundational principles and the applications of intellectual property to practice. Dignity is also a critical midlevel principle highlighting the deontic aspects of his approach. A criticism of Merges's justification is that it attempts to blend the incompatible ends of utilitarianism and moral rights, the first seeking to maximize the wealth generated by intellectual property and the second, the personal rights of the creator. But, as Professor Merges develops the arguments, efficiency and dignity are compatible in protecting the autonomy of creative individuals with the first supporting economic interests and the second noneconomic ones.<sup>70</sup>

But dignity, like efficiency, also implicates the interests of groups other than creators, groups that I have been referring to in broad terms as users. If the dignity principle recognizes an autonomous sphere to which legal rights attach, then the autonomy of a user is as important as that of a creator. This autonomous sphere, for example, would include the right to enjoy a work quietly in the private sphere. The dignity of a user would include the right to engage in private home copying, studying, or research. It would include the dignity of a patient to be subject to treatment without the intrusion of a medical patent and the dignity of a medical practitioner to appropriately treat a patient within the sphere of professional judgment. A complete and consistent application of the dignity principle would require recognizing the interests of users.

These points underscore the fourth, and most important, of Professor Merges's midlevel principles, proportionality. Merges invokes this pragmatic principle as a means to avoid the holdup problem that arises in many areas of the law. A holdup occurs when an individual rights holder can block a project and thereby extract much of the benefit from the public benefits following from the project. Professor Merges gives the example of a bridge project stopped by property owners near the water.<sup>71</sup> Law has many ways to deal with these holdups. Intellectual property

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70. See MERGES, *supra* note 1, at 156–58 (presenting dignity as a midlevel principle and as sharing features with other principles); see also SUNDER, *supra* note 8, at 173–99 (demonstrating the implications of intellectual property for matters of life and death).

71. MERGES, *supra* note 1, at 162–65.

law deals with the holdup problem through doctrines such as limitations on injunctive relief, implementation of compulsory licenses, and doctrines such as fair use or implied license. These legal regimes are based on the proportionality principle, which states that the return to the property owner has to be proportional to the benefit provided by the owner. This principle is different from that of efficiency, which applies to the total benefits and costs of a legal regime. Proportionality is targeted to the scope of the rights holder's entitlement. What is at issue under this fourth principle is a comparison of the benefit to the rights holder and the benefit to society.

How is proportionality to be gauged? In practice, courts look to the value of enjoining the defendant's infringing conduct under the traditional common law approach to injunctive relief.<sup>72</sup> Damage measures also serve as proxies for proportionality. But these are rough heuristics at best. Applying the proportionality principle more rigorously requires an assessment of what users gain from access and lose from infringement. Implicit in the principle is an acknowledgement of users and their interests. This acknowledgement means that in some situations the interests of users will trump those of creators. But for this principle to have practical effect, the interests of users need to be better understood. As with other midlevel principles, users need to be considered to make the principle complete and effective in guiding intellectual property law and policy.

### C. Midlevel Principles and Users

Professor Merges's focus on creative persons has a certain visceral appeal. Creative persons create something new and bring works into the world *ex nihilo*. Consequently, their efforts should be encouraged. But that argument proves too much. At some level, all social actors create *ex nihilo*. Real estate developers build malls where none existed. City resource managers produce parks and recreational facilities that did not previously exist. Contract attorneys make deals that did not exist before. No one would seriously use these novel creations as a basis for intellectual property rights in these areas. What ultimately justifies

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72. See, e.g., *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 390 (2006); see also Peter Lee, *The Accession Insight and Patent Infringement Remedies*, 110 MICH. L. REV. 175, 194 (2011) (discussing equitable framework prescribed by the Court to determine whether to grant injunctive relief against a patent infringer).

intellectual property is the use to which such new works will be put. This formulation is not merely instrumentalism. The uses may reflect basic human needs such as health care or education. They may reflect pure enjoyment or aesthetic pleasure. They may be industrial or they may be noncommercial. As I have argued, Professor Merges's justification for intellectual property, although creator-centered, hinges implicitly on these often unrecognized users' interests. In the next and penultimate Part, I show the implications users have on the implementation and practice of property rights.

## V. PROPERTY RIGHTS IN PRACTICE: STABILITY, MANAGEMENT, AND AUTONOMY

Professor Merges concludes his justification with three lengthy and detailed examples that illustrate how his identified foundational and midlevel principles would apply in practice. His three examples are of the growth in the creative professional class, the growth of digital works and rights, and the market for life-saving pharmaceuticals.<sup>73</sup> These examples illustrate his creator-centered justification based on the principles discussed above. In this Part, I will not address Professor Merges's examples directly. Instead, I will focus on the social benefits of property rights systems in general. I identify three social benefits: stability, management, and autonomy. I will show how each of these benefits shape the legal regime of real property and contrast the role of these benefits in shaping intellectual property. This contrast highlights the practical aspects of intellectual property law and the principles underlying the law. The contrast will elaborate on the theme of this Article, that users need to be considered in designing intellectual property systems.

### A. *Stability*

Property law provides a means to ensure stability in human lives. This statement is true of all legal rules to a certain extent. Contract law shapes stability of transactional planning. Tort law provides some degree of stability in risk management. But a key practical aspect of a working and robust regime of property law is to promote stability of ownership and of identity that serves as the foundation for other areas of law.<sup>74</sup> For example, real property law provides stability with respect to

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73. See MERGES, *supra* note 1, at 195–287.

74. See Carol M. Rose, *The Moral Subject of Property*, 48 WM. & MARY L. REV. 1897, 1899–900 (2007).

land. This stability gives owners assurances that allow them to build on and improve parcels and market them. Stability of land ownership provides assurances for most human interactions. As simple an institution as an address system is made possible by the stability of real property law. An address system in turn makes it possible to trace individuals and identify them for purposes of contract enforcement, debt collection, imposition of criminal or tort liability, enforcement of marital and other social obligations, and so on. I am not suggesting that real property is either necessary or sufficient for stability. The point is that a practical implication of a real property system is stability, which can be the basis for transactions and human interactions in a wide range of contexts.

Stability is a consequence of the foundational and midlevel principles highlighted by Professor Merges. For a Lockean theory of property rights to work, a person must be assured that the application of labor to the world will be respected by others and that the fruits of labor will not be immediately expropriated. By creating stability, real property law reinforces the types of investment of labor Locke claims are the basis for property rights. Similarly, stability is a consequence of the midlevel principle of efficiency. An efficient, wealth-maximizing system of property is reinforced by stable property relationships, and in turn efficient arrangements can support stability. As a practical value, stability follows from foundational and midlevel principles and reinforces them.

By analogy to real property systems, intellectual property also benefits from the practical value of stability. Identifying owners of intellectual property interests facilitates transactions. Stable ownership systems benefit users by allowing them to identify the source of works and to engage in transactions guided by branded products and services and identified creators and inventors. Professor Merges's justification for intellectual property parallels the logic of real property law by identifying the similarities. One important similarity is the practical value of stability.

But what often matters are the differences, not the similarities. Although stability is perhaps a virtue in intellectual property systems, intellectual property itself is about change. Promoting progress, to echo the U.S. Constitution, may have many meanings, but one implication is that of disruption.<sup>75</sup> Stability as a practical value is in tension with the

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75. For a business management perspective on progress and disruption, see David J. Teece et al., *Dynamic Capabilities and Strategic Management*, 18 STRATEGIC MGMT. J. 509 (1997). For a legal, historical, and linguistic analysis of the meaning of *progress*, see Malla Pollack, *What Is Congress Supposed To Promote?: Defining "Progress" in Article*

change that intellectual property law is supposed to promote. This tension is apparent throughout intellectual property case law and throughout intellectual property history. New technologies challenge traditional business practices, to which intellectual property owners respond using copyrights or patents as a sword to prevent change. At the same time, innovators develop technologies and use intellectual property rights to license and transfer new devices and methods. The resolution of this tension may reside outside of intellectual property law, perhaps in the evolution of the marketplace, in social norms, in human behavior that emerges out of the shadow of the law. Nonetheless, to emphasize stability through analogy to real property ignores the reality of the disruption, both positive and negative, created by intellectual property. Rights owners seek stability to counter change that destabilizes existing social arrangements and expectations.

If one accepts stability as a practical value for a system of property, then how does one reconcile the dual status of stability within intellectual property law? How can stability be a virtue that does not undermine the important goal of change? One way to do so and be consistent with the foundational and midlevel principles we have discussed is to find stability within intellectual property law in the manner in which change occurs. Stability within intellectual property is not about fixed addresses or relationships between owner and object. Instead, stability is found in the process through which these addresses and relationships change. That is the contested question.

Some may argue that the process should be through licensing and market transactions.<sup>76</sup> Others may argue that the process is the modes of creation and invention that intellectual property law makes possible.<sup>77</sup> The reality is that the process of change is a multidimensional one, captured perhaps metaphorically by the image of labor mixing with the world. But such a quaint image belies the range of human interactions and activities that add up to change. I have called humans engaged in these interactions and activities “users” in this Article. To understand the practical value of stability in intellectual property law, it is important

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*I, Section 8, Clause 8 of the United States Constitution, or Introducing the Progress Clause*, 80 NEB. L. REV. 754 (2001).

76. See, e.g., MERGES, *supra* note 1, at 309–10.

77. See, e.g., Roberta R. Kwall, *The Lessons of Living Gardens and Jewish Process Theology for Authorship and Moral Rights*, 14 VAND. J. ENT. & TECH. L. 889 (2012) (emphasizing the importance of authorship); Mark P. McKenna, Introduction, *Creativity and the Law*, 86 NOTRE DAME L. REV. 1819 (2011) (introducing a symposium focusing on intellectual property law’s promotion of creativity).

for us to more fully appreciate how users of intellectual property operate. And as I have emphasized, these users are not only or always owners.<sup>78</sup>

### *B. Management*

Stability is a practical value arising from property, but is in tension with intellectual property's goal of promoting change. I have suggested how the tension can be resolved by attention to questions of use rather than solely on ownership. A similar point arises from the second practical role of property, to facilitate management. Recognizing property as a legal matter provides incentives and creates assurances for managing the item owned. Absent property rights, individuals would have incentives to abandon an item once it became too costly to maintain or once its economic returns became negative. With property rights, individuals can transfer ownership to a more valued use or invest more intensively into developing the item owned. Management might often be for personal gain, but given the incentives, management can also occur for public benefit such as might occur for shared resources like water or a park. Stability allows for planning and supports the management of property.

As for intellectual property, management is an important practical value. But often it is framed solely in questions of individual returns and private gains. This framing, I would argue, flows from a sterile view of the goals and purpose of intellectual property. This view sees intellectual property solely as a private reward or a private incentive. Management within this frame is about extracting as many rents as possible from the licensing and sale of the intellectual property. However, management also entails protecting public benefits. The owner of intellectual property is a temporary one, with the protected work eventually going back to the public. An intellectual property owner is a steward. The challenging question is reconciling this stewardship role with self-interest. Doctrines that create limitations and exceptions to intellectual property rights can go only so far. At some point rules external to intellectual property need to come into play to promote the stewardship role of the temporary intellectual property owner. To properly attend to these institutions, we need to better

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78. *See supra* Part III.A.

understand the uses of intellectual property and the interest of users, not just those of owners.

An even more challenging question is the management of the public domain. An ownership model would predict that public domain works would be unprofitable and would be unused. That prediction is inconsistent with empirical studies that show public domain works are marketed, often over copyrighted works.<sup>79</sup> At some level, there is a logical explanation for that empirical observation. Public domain works are free and so as a costless resource for those who need to market creative content, the public domain is there to be mined absent property rights. At the same time, one might expect a different market and social dynamic shaping the public domain for patented works than that for copyrighted works. Inventions whose patents have expired are the previous generation's technology, less effective presumably than what is new. However, the patent public domain contains knowledge on which future technologies can be built and so is not simply a rubbish bin of technological development. My point is that management principles apply as much to the public domain as to the proprietary realm of intellectual property.

To appreciate that point, we need to be better tuned to users and their needs with respect to intellectual property. Professor Merges does acknowledge the existence of users' rights, although he does not clearly state their content and scope. Instead, he sees them as part of the negative space of what the owner is not given under intellectual property laws and what is waived because of high enforcement costs.<sup>80</sup> Merges's argument seems to be that even if owners are given a wide scope of rights under intellectual property laws, users are protected because enforcement costs keep these strong rights from being enforced. There is, however, little consideration of what the substance of users' rights should be and whether intellectual property law grants too broad a set of rights to owners.

Management as a practical value derives from the foundational and midlevel principles identified by Professor Merges. The mixing of labor as described by Locke implies managing the object appropriated. Kantian autonomy is guided by personal management. Even the Rawlsian veil may mandate the value of management in order to ensure

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79. See, e.g., Christopher J. Buccafusco & Paul J. Heald, *Do Bad Things Happen When Works Enter the Public Domain?: Empirical Tests of Copyright Term Extension*, BERKELEY TECH. L.J. (forthcoming 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2130008](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2130008).

80. See MERGES, *supra* note 1, at 148–49 (presenting users' rights as residual of owners' rights and waiver).

that benefits flow to the worst off in society. Nonremoval, efficiency, dignity, and proportionality each subsume management to realize the value of property. My concern is that these principles, too narrowly focused on owners and without a more complete regard to users, may be self-defeating when used to justify intellectual property. Justifying intellectual property entails recognizing that owners are only temporary and serve, in part, as stewards over what will constitute the public domain.

### *C. Autonomy*

Autonomy is a practical value that informs property law. I discussed autonomy above in the context of Kant and the foundational principles underlying intellectual property. In this Part, the focus is on autonomy as a value that informs property law in practice. As a practical value, autonomy refers to an individual's sense of place within which he or she can plan and develop one's life and one's set of relationships. The notion of what is mine shapes and is shaped by one's sense of identity. The ability to cultivate one's life and relationships is of course related to the values of stability and management. Autonomy as a practical value recognizes the sanctity of one's home as a stable locus that is a zone of the owner's managerial discretion but also a realm of autonomy.

For intellectual property, autonomy as a practical value supports a set of legal rights that allows the owner to develop a work without interference from unauthorized users. This set of legal rights sanctions the discretion of the owner and promotes the development of the personality and the cultivation of a personal vision. Within copyright law, autonomy as a practical value nurtures Anglo-American-style copyright as well as moral rights. Within patent law, where the autonomous self has play as an inventor engaged in the creation of utilitarian works, autonomy as a practical value allows for the free play of research and experimentation to build on prior art to develop nonobvious inventions that can inform and teach the relevant art. While real property envisions autonomy in spatial terms, intellectual property aids the autonomy of the mind whether engaged in art, science, or many disciplines.

Support for autonomy as a practical value is found in the foundational and midlevel principles Professor Merges presents. Locke's primacy of labor, Kant's notion of the rational self, and Rawls's defense of distributive justice reinforce autonomy in defining the practice of intellectual property. The midlevel principles also are connected to

autonomy. Nonremoval assumes a sphere of the private that is distinct from the public domain. Efficiency entails the balancing of private benefits and costs to enable wealth maximization from intellectual property. Dignity is tied to a notion of autonomous self, free from public intrusion. Finally, the goal of proportionality is to balance rights among selves so that each is benefitted in proportion to what is given on to others. Intellectual property law derives from foundational and midlevel autonomy as one of its practical ends.

But what was stated about autonomy as a foundational principle applies to autonomy as a practical value. It is meaningless to talk about the autonomous self as independent of society. This observation is true in part because the self is often defined by the needs of social interaction and relationships. It is equally true because these social interactions and relationships shape the self and its aspirations and its yardsticks for fulfillment. In defining property rights, whether real or intellectual, the scope of legal protection will depend on whether the property is commercial or noncommercial, educational or for entertainment. Although trespass is proposed as the canonical model for property enforcement, nuisance may be more apt. Often legal conflicts are not about invasion or intrusion, but about conflicting uses which need to be mediated through balancing of principles and flexible remedies. Once again, autonomy, like the other practical values of property, is gauged not solely in terms of ownership, but also in terms of use. Focusing solely on the autonomy of creators as owners ignores the autonomy of users.

Autonomy both as foundational and as practice value assumes the natural person. But a category conflict arises when ownership can be in the hands of a corporate entity. To speak of the autonomy of a corporation, a legal fiction designed to allocate risk and manage wealth, is to confuse and blur over values that are human and personal. When intellectual property is held by business entities, to what extent is autonomy a value that the law should recognize? Unfortunately, this is a question that Professor Merges does not adequately address. He seems to view owners as creative professionals and assume business entities that acquire intellectual property do so by compensating the professionals fully.<sup>81</sup> Autonomy values in intellectual property are meaningful even when a corporate entity is the owner because the creative professional has been compensated in the transaction of transferring rights. This is how I construe the implicit argument, and I disagree with it. Not only is adequate compensation unlikely, but rights used by corporate entities

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81. *See id.* at 217–18.

may also be very different from rights held by natural persons.<sup>82</sup> They operate in different spheres and on different terms. Once again, focusing solely on ownership and not on its context, particularly the interests of users, leaves out much in the analysis. Autonomy is an important principle and practical value, but it should be understood in broad terms rather than in narrow ones of ownership.

#### *D. Contrasts and Implications*

In this Part, I introduce three practical values that are often associated with property. These three practical values—stability, management, and autonomy—are used to contrast real property and intellectual property as well as to underscore my argument about users' interests. Professor Merges ends his book with three practical examples as well. They are detailed discussions of creative professionals, digital rights, and pharmaceuticals. I touched on his discussion of creative professionals above in my exploration of autonomy as a practical value. I conclude this Part by briefly turning to Professor Merges's practical examples to illustrate my understanding of his justification and my criticism that it needs to more adequately take into consideration the interests of users.

Professor Merges has a relatively straightforward, and in my opinion unassailable, point about intellectual property rights in the digital environment. He expresses skepticism about weak property rights that would support a culture of community creative and cooperative ownership. I find this point unassailable, but also a bit of a straw man argument. I think the point rests on a caricature. It also rests on a focus on ownership by creative professionals that does not adequately examine the interests of users. My argument is that users provide the missing piece of the intellectual property policy puzzle and their needs, varied across industries and fields of activities, must be more thoroughly understood before we can feel confident about the direction of intellectual property policy. Professor Merges correctly points to the low contracting costs made possible by the digital environment. These low contracting costs, Professor Merges argues, allow owners and users to strike necessary deals, obviating the need for weaker intellectual property rights.

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82. See CATHERINE L. FISK, *WORKING KNOWLEDGE: EMPLOYEE INNOVATION AND THE RISE OF CORPORATE INTELLECTUAL PROPERTY, 1800–1930*, at 240–41 (2009) (tracing shift from employee ownership to corporate ownership of knowledge).

I am agnostic about whether the lowered transaction costs will yield the desired results. While costs of communication have undoubtedly fallen with digital technologies, the costs of information processing and management have probably gone up. The amount of content has increased, and users need to more carefully parse information on the Internet partly because there is so much of it. Orphan works, and the resulting problem of identifying owners, are just one example of how costs may have increased or remain unchanged. Certainly digital technologies may evolve in order to reduce these costs as well, but that depends on whether this evolution adequately accounts for the needs and values of users. An owner-centric perspective may not provide a full account or guide for policy.

Professor Merges ends his book by turning to pharmaceutical patents and access to medicines to treat life-threatening diseases.<sup>83</sup> This chapter is perhaps the first one in which Professor Merges fully confronts what I have been referring to broadly as users' interests. The context of access to medicines allows Professor Merges to demonstrate the power of his foundational and midlevel principles in balancing the interests of owners against those of users. Professor Merges recommends various limitations on pharmaceutical patents grounded in his principles of distributive justice and proportionality. This chapter illustrates how Professor Merges's justification differs from traditional pro-property rights arguments, in the vein of Robert Nozick. He shows the limits of libertarian theories of intellectual property and demonstrates how property can be recognized while still respecting human values. Furthermore, Professor Merges's consideration of patients, one class of what I call users, is a model for the type of user-focused intellectual property policy that I have been advocating in this Article. His analysis suggests to me that his justification, with a shift towards users and away from creators, might hold promise for a more robust justification of intellectual property, one that might engage the interests of users as well as owners.

## VI. BUILDING ON THE SHOULDERS OF MERGES

Professor Merges begins his book on a cautionary note, expressing bewilderment at the sprawl of intellectual property law and policy. He takes us through an odyssey, engaging with critical thinkers and ideas that shape politics, economics, and law. The odyssey ends on an optimistic note with the moorings of intellectual property restored in a defense of intellectual property ownership tempered by transactions and waiver. Merges's soul-searching, a term I use in a positive way, results

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83. MERGES, *supra* note 1, at 270–87.

in a justification for intellectual property law as he knows it. Law and policy can go on as usual it appears.

There is a nostalgic quality to Professor Merges's writing. He seems to be missing something that has become lost in contemporary intellectual property scholarship. I am not sure what he is longing for, but I find nostalgic feelings worth noting in the field of intellectual property with its emphasis on progress. Merges's book seeks the old, old thing, the core or heart of intellectual property. But this longing reveals a loss of faith in progress. I cannot pretend to understand these feelings because I am less skeptical that progress occurs. However, I may just envision it differently from Professor Merges. Consequently, my justification for intellectual property will be fundamentally distinct from his, even though in application there may be areas of overlap.

Intellectual property is in need of justification, at least as Professor Merges explains, because its moorings seem to be cut loose. Merges's justification is not only an explanation for intellectual property, but also a correction, as with justifying or aligning text. His goal is scholarly and reform-minded. The range of reading and thought makes the book a truly scholarly one. However, as I demonstrated in this Article, I am skeptical about the book's prescriptions. Professor Merges does offer much to digest and build on, and his ideas serve as a foil to develop a user-focused intellectual property law.

In strengthening the moorings of intellectual property, there is superficial attractiveness in tying rights to the interests of creative professionals as owners. There is a certain democratic appeal in the concept of creativity, especially if one believes that it is not tied to accident of birth and is somewhat equally distributed in society. The problem is that intellectual property as it is embodied in products and services permeates society, not in a hegemonic or monopolistic way, but in a way that affects a range of interests beyond those of owners. Therefore, these interests need to be taken into consideration.

Professor Merges, of course, is attuned to these points, but he sees these interests as secondary to those of owners. He sees users' interests being protected by waiver of rights. In some ways, users must rely on the kindness of owners. Intellectual property licensing also saves users. As he states in the concluding chapter, as long as transactions can occur, the owner will utilize contract law and the market to distribute the

benefits of intellectual property to users.<sup>84</sup> His coda is that we need to better understand intellectual property transactions. I would concur, but we also need to understand that transactions are not a panacea and markets do not spontaneously arise. In fact, the legal regime may inhibit healthy and beneficial transactions. Intellectual property law consequently needs to incorporate the interests of users, not simply through a balance with owners' interest, but through affirmative protections for users. Intellectual property is about both owners' rights and users' rights, but because owners are, as I have argued, a type of user, the perspective of users as a whole would be the unifying policy of intellectual property law.

Looking forward, the response to the sprawl may be simply better management of intellectual property, perhaps along the lines Professor Merges suggests, perhaps along the lines of my proposed alternative. In the twentieth century, as the focus turned to managed rather than unregulated markets, real property law spun off the field of land use, with its emphasis on public and private mechanisms to manage the urban sprawl. The twenty-first century may be the age of intellectual property management and correspondingly the field of intellectual property use. Such development may simply make the times more interesting and more confusing in Professor Merges's eyes. But such development represents progress in our discipline and in the incorporation of the vast set of interests that inform intellectual property beyond those of owners. When we progress in that direction, intellectual property may need no justification at all.

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84. *See id.* at 290.