

On Cowbells in Rock Anthems (and Property in IP): A Review of *Justifying Intellectual Property*

ERIC R. CLAEYS*

TABLE OF CONTENTS

I.	INTRODUCTION	1034
II.	THE <i>EBAY</i> ISSUE	1038
III.	REMEDY DOCTRINES IN PROPERTY TORTS.....	1040
IV.	FOUNDATIONS: LABOR THEORY	1044
V.	MIDLEVEL PRINCIPLES I: CORRECTIVE JUSTICE.....	1047
VI.	MIDLEVEL PRINCIPLES II: <i>JUSTIFYING INTELLECTUAL PROPERTY'S CANDIDATES</i>	1049
	A. <i>Nonremoval</i>	1049
	B. <i>Efficiency</i>	1052
	C. <i>Dignity and Proportionality</i>	1053
VII.	MIDLEVEL PRINCIPLES III: MORE PROPERTY.....	1054
VIII.	<i>EBAY</i> RECONSIDERED (WHILE REALLY EXPLORING THE SPACE OF PROPERTY CONCEPTS)	1058
IX.	THE STRENGTHS AND LIMITATIONS OF <i>JUSTIFYING INTELLECTUAL PROPERTY</i>	1063
X.	CONCLUSION	1067

* Copyright © 2012 Eric R. Claeys. Professor of Law, George Mason University. This Article was *not* presented at the 2012 conference on the Philosophical Foundations of Intellectual Property hosted at the University of San Diego School of Law. I am grateful to the editors of the *San Diego Law Review* for accepting this Article into this symposium issue anyway. This Article benefited from discussions at a Roundtable on ROBERT P. MERGES, *JUSTIFYING INTELLECTUAL PROPERTY* (2011), hosted April 2012 at Notre Dame Law School, and comments and criticisms received at the September 2012 Mid-Atlantic Works-in-Progress conference hosted at American University Washington College of Law.

I. INTRODUCTION

I am going to start this Article with two confessions. First, when I was fourteen, my favorite rock song was *(Don't Fear) The Reaper*, by Blue Oyster Cult.¹ Second, one of my favorite *Saturday Night Live* (*SNL*) sketches is from the 2000 season, “Behind the Music: Blue Oyster Cult.”² The sketch is a tribute in memory of Gene Frenkle, the member of Blue Oyster Cult who played the cowbell on *(Don't Fear) The Reaper*. The *SNL* sketch purports to explain how the cowbell made it onto the studio recording. In the sketch, members of the regular *SNL* cast pretend to be Blue Oyster Cult, *SNL* regular Will Ferrell pretends to be Frenkle, and guest host Christopher Walken pretends to be Bruce Dickinson, a famous record producer.³ Over and over, Bruce Dickinson stops recordings of *(Don't Fear) The Reaper* because he “could've used a little more cowbell.”⁴ He encourages Frenkle to “[r]eally explore the studio space” with the cowbell, tells the band “you're gonna want that cowbell on the track,” and pleads “I gotta have more cowbell!”⁵ Even when the lead guitarist disagrees and picks a fight with Frenkle, Dickinson insists, “Guess what? I got a fever! And the only prescription . . . is more cowbell!”⁶

I make these confessions to explain my general reaction to intellectual property (IP) law and scholarship. I am a property scholar, and when I look at intellectual property I see it shot through with property concepts and policies.⁷ When he heard *(Don't Fear) The Reaper*, Bruce Dickinson had to have more cowbell; when I read IP scholarship, I gotta have more property (P).

Given my fever for property, I was extremely gratified that Robert Merges published *Justifying Intellectual Property*. Merges makes two major contributions. One shows why it would be bad to take the P out

1. BLUE OYSTER CULT, *(Don't Fear) The Reaper*, on AGENTS OF FORTUNE (Sony Music Entm't 1976).

2. See *Behind the Music: Blue Oyster Cult*, SATURDAY NIGHT LIVE TRANSCRIPTS (April 8, 2000), <http://snltranscripts.jt.org/99/99pcowbell.phtml> (last visited Nov. 25, 2012). Some of the sketch is available for online viewing at *Will Ferrell's 10 Best SNL Skits Ever*, HULU BLOG (May 11, 2012), <http://blog.hulu.com/2012/05/11/will-ferrells-10-best-snl-skits-ever/>.

3. “By the way, my name is Bruce Dickinson. Yes, *the* Bruce Dickinson. . . . I put my pants on just like the rest of you—one leg at a time. Except, once my pants are on, I make gold records.” *Behind the Music: Blue Oyster Cult*, *supra* note 2.

4. *Id.*

5. *Id.*

6. *Id.*

7. Cf. Richard A. Epstein, *Intellectual Property: Old Boundaries and New Frontiers*, 76 IND. L.J. 803 (2001) (contending that lawyers can learn about modern intellectual property law by studying real property law).

of IP. In Merges's words, "there is a basic logic to the law of property, and . . . it applies to intangibles as well as physical things."⁸ Merges anticipates "a lot of resistance" to this thesis "from various quarters."⁹ I am nowhere near as diplomatic as Merges, so I will translate. Although many IP scholars avoid taking sides, two small but noisy contingents focus intensely on the relationship between P and IP. I call one such contingent "P skeptics." P skeptics may respect the policies associated with IP—the encouragement of technological innovation, the encouragement of artistic creation, and inventors' and creators' rightful priorities over what they have invented or created. Yet P skeptics insist that "IP is not P," they complain that "this truth is lost on us,"¹⁰ and they are skeptical that P concepts can help institute sensible IP policies. By contrast, "P essentialists" understand IP as a sensible and specialized application of P. If IP scholars object to the P in IP, it is not because IP and P are different but because P skeptics are Is. P skeptics often assert that legal P is "a government backed monopoly."¹¹ Yet this assertion is uncharitable if P is understood sensibly. The assertion is best understood not as a scholarly argument but as an effort to shape popular opinion—to delegitimize P-based IP, and to legitimize instead a regime in which Is use I expertise to administer disputes about I works.

In *Justifying Intellectual Property*, Merges sets himself against the P skeptics and with the P essentialists. Merges defends vigorously the patent system, the copyright system, and the worthiness of the creative professionals who use both to produce intellectual works of general value. Merges's account supplies the best defense of which I am aware in recent scholarship why inventors and artists deserve property in their intellectual works.¹²

I would have been happy simply with Merges's first thesis, but for me the second was even better—maybe like a secret bonus track. Most IP scholars tend, as William Landes and Richard Posner put it, to be "skeptical that . . . noneconomic theories of intellectual property have much explanatory power or normative significance."¹³ Merges earned

8. MERGES, *supra* note *, at 4.

9. *Id.*

10. Lawrence Lessig, *The Architecture of Innovation*, 51 DUKE L.J. 1783, 1798 (2002).

11. *Id.*

12. See MERGES, *supra* note *, at 195–236.

13. WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 5 (2003).

his (deserved) preeminence in IP scholarship within these conventional parameters, as an *economic* scholar of law.¹⁴ Yet in *Justifying Intellectual Property*, Merges claims to have “come to see” that “[m]aximizing utility . . . is not a serviceable first-order principle of the IP system. It is just not what IP is really all about at the deepest level.”¹⁵ Instead, Merges argues that property claims in IP law depend vitally on noneconomic theories of rights, especially Lockean labor theory, Kantian theories of autonomy, and Rawlsian theories of distributive justice.¹⁶ I am not well versed in the latter two theories, but I do know enough about Lockean labor theory¹⁷ to say that Merges’s treatment of it is quite good.¹⁸

And yet . . . I could have used a little more property. Although *Justifying Intellectual Property* is insightful in many respects, in a few respects its arguments do not sufficiently connect rights-based property theory to contemporary IP law and scholarship. To be clear, these gaps are not grave defects in the book. Most American IP scholars, like most American legal scholars generally, have little feel for how legal doctrine implements moral theories of rights. Merges is therefore calling attention to scholarly questions that IP scholars will need to explore after they have absorbed the book’s primary claims and contributions. Yet these questions do exist, and they could lead likely skeptics or critics of *Justifying Intellectual Property* unwarrantedly to dismiss the book’s main intentions and accomplishments.

14. See ROBERT P. MERGES ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* (5th ed. 2010); 1 *ECONOMICS OF INTELLECTUAL PROPERTY LAW* (Robert P. Merges ed., 2007); 2 *ECONOMICS OF INTELLECTUAL PROPERTY LAW* (Robert P. Merges ed., 2007); Robert P. Merges, *Autonomy and Independence: The Normative Face of Transaction Costs*, 53 *ARIZ. L. REV.* 145 (2011); Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 *CALIF. L. REV.* 1293 (1996).

15. MERGES, *supra* note *, at 3.

16. See *id.* at 9–23.

17. See Eric R. Claeys, *Jefferson Meets Coase: Land-Use Torts, Law and Economics, and Natural Property Rights*, 85 *NOTRE DAME L. REV.* 1379, 1398–430 (2010); Eric R. Claeys, *Productive Use in Acquisition, Accession, and Labor Theory*, in *THE PHILOSOPHICAL FOUNDATIONS OF PROPERTY LAW* (James E. Penner & Henry E. Smith eds., forthcoming) [hereinafter Claeys, *Productive Use in Accession*], available at <http://ssrn.com/abstract=2066166>; Eric R. Claeys, *The Private Society and the Liberal Public Good in John Locke’s Thought*, in *FREEDOM OF ASSOCIATION 201* (Ellen Frankel Paul et al. eds., 2008).

18. Accord Gordon Hull, *Robert Merges: Justifying Intellectual Property*, 14 *ETHICS & INFO. TECH.* 169, 169 (2012) (book review) (“[A]nybody who cares about how our normative ethical and political commitments should be reflected in IP law ought to read [Merges’s book].”).

Merges is convincing when he argues that Lockean labor theory can supply a normative foundation for IP rights.¹⁹ He is also convincing when he presents the relation between property theory and IP practice as a three-layer cake.²⁰ In this cake metaphor, normative theory or theories supply a foundational layer.²¹ In the middle layer, “midlevel principles” convert rights-based foundations into general presumptions or working principles.²² On the top layer, “specific practices” specify how midlevel presumptions or ideals apply to particular repeat-act situations in a single field of law.²³ The least satisfying part of Merges’s argument is the step where he gives an account of IP’s midlevel principles. This step is the place where legal doctrine starts to implement prescriptions from rights-based theory. Here, I suggest, Merges is gonna want more property.

When IP scholars search for relevant midlevel principles, I suspect, the most important principles will be *property* principles. Merges identifies one of those principles, “nonremoval,” or the ideal that, other things being equal, information already in the public domain should not be removed and converted to private property.²⁴ Yet the other three (nonproperty) midlevel principles Merges proposes have little explanatory or justificatory potential. And Merges does not consider other property-based midlevel principles that, I suspect, have more explanatory and justificatory potential.

There are two possible ways in which I could substantiate my praises and concerns. The long way would be for me to write my own book explaining what I regard as the right relation between property foundations and midlevel principles in IP. I am not in a position to do so now,²⁵ I may never be, and in any case this symposium would not be the proper venue to publish what is a book-length claim. So here, I will take

19. MERGES, *supra* note *, at 31–67.

20. *See id.* at 14 fig.1.1.

21. *Id.*

22. *Id.*

23. *See id.*; *see also id.* at 5–23 (describing the relationship between Merges’s three layers of IP theory).

24. *See id.* at 141–43.

25. For articles in which I discuss related issues, see Eric R. Claeys, *Private Law Theory and Corrective Justice in Trade Secrecy*, 4 J. TORT L., Oct. 2011, art. 2 [hereinafter Claeys, *Private Law Theory*], available at <http://ssrn.com/abstract=1799554>; and Eric R. Claeys, *Intellectual Usufructs: Trade Secrets, Hot News, and the Usufructuary Paradigm at Common Law*, in INTELLECTUAL PROPERTY AND THE COMMON LAW (Shyam Balganeshe ed., forthcoming) [hereinafter Claeys, *Intellectual Usufructs*], available at <http://ssrn.com/abstract=1889231>.

the short way—a close critique of one representative point of contact between Merges’s approach and mine.

That point of contact is the remedy question litigated in *eBay Inc. v. MercExchange, L.L.C.*²⁶ The *eBay* case illustrates a debate that pervades discussions of remedies for property torts: If a property owner (in *eBay*, a patent holder) suffers repeat invasions of property rights (in *eBay*, ongoing patent infringement),²⁷ is the owner entitled to an injunction against the invasion more or less as a matter of course, or must the owner prove he deserves an injunction *prima facie* more or less as he must prove liability *prima facie*?²⁸ Utilitarian IP scholars debate the trade-offs between these two positions using terminology associated with property rules and liability rules: the presumptive-injunction position is the “property rule” position, and the no-presumption position is the “liability rule” position.²⁹ Applying Lockean labor theory and the midlevel proportionality principle, Merges concludes that patent owners should often be limited to a damage remedy, that is, a liability rule.³⁰

II. THE EBAY ISSUE

Let me first briefly recount the *eBay* case, explain the doctrinal choices it raises, and recount how Merges applies his framework to those choices. *eBay* runs an auction website, and it was found liable for infringing business method patents held by *MercExchange*.³¹ If *MercExchange* had been awarded equitable relief, it was at least possible that such relief would have shut down *eBay*’s operations and wreaked financial hardship on *eBay*. The district court denied *MercExchange*’s motion for a permanent injunction.³² It did not make specific findings about the hardship to *eBay*; instead, it found relevant to the hardships that *MercExchange* “exists solely to license its patents or sue to enforce its patents, and not to develop or commercialize them.”³³ The Federal Circuit reversed, applying a “general rule that courts will issue permanent injunctions against patent infringement absent exceptional circumstances.”³⁴

26. 547 U.S. 388 (2006).

27. *Id.* at 390–94.

28. See F. SCOTT KIEFF ET AL., PRINCIPLES OF PATENT LAW 1349–74 (4th ed. 2008).

29. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1106–10 (1972).

30. See MERGES, *supra* note *, at 166–67.

31. See *eBay Inc.*, 547 U.S. at 390–91. An *eBay* subsidiary, which I will disregard in text, was also found liable. *Id.*

32. *MercExchange, L.L.C. v. eBay, Inc.*, 275 F. Supp. 2d 695, 715 (E.D. Va. 2003), *aff’d in part and rev’d in part*, 401 F.3d 1323 (Fed. Cir. 2005), *rev’d*, 547 U.S. 388.

33. *Id.* at 714.

34. *MercExchange, L.L.C.*, 401 F.3d at 1339.

The Supreme Court granted certiorari to review the Federal Circuit's so-called general rule, and it reversed the Federal Circuit's judgment.³⁵ Recounting "well-established principles of equity," the Court reasoned that all litigants seeking an injunction must satisfy a four-part test covering irreparable injury, the inadequacy of ordinary legal remedies, the balance of hardships, and the public interest.³⁶ Unanimously, the Court criticized the Federal Circuit for "articulat[ing] a 'general rule,' unique to patent disputes," and insisted that parties follow the four-factor test as it applies wherever equitable relief is available.³⁷

Since this holding was so spare, two concurring opinions tried to construe the Court opinion to teach two conflicting lessons. Chief Justice Roberts, joined by Justices Scalia and Ginsburg, encouraged the Federal Circuit and other lower courts to apply the four factors presumptively favoring property rules. Specifically, Roberts explained,

courts have granted injunctive relief upon a finding of infringement in the vast majority of patent cases . . . given the difficulty of protecting a right to *exclude* through monetary remedies that allow an infringer to *use* an invention against the patentee's wishes—a difficulty that often implicates the first two factors of the traditional four-factor test.³⁸

Yet Justice Kennedy encouraged lower courts to avoid favoring property rules or liability rules. Joined by Justices Stevens, Souter, and Breyer, Kennedy argued that the historical practice recounted by Roberts was not obviously relevant to contemporary practice.³⁹ In some fields, Kennedy warned, patent holders use the threat of "an injunction, and the potentially serious sanctions arising from its violation . . . as a bargaining tool to charge exorbitant fees to companies that seek to buy licenses to practice the patent."⁴⁰ "When the patented invention is but a small component of the product the companies seek to produce and the threat of an injunction is employed simply for undue leverage in negotiations," Kennedy warned, "legal damages may well be sufficient to compensate for the infringement."⁴¹

35. *eBay Inc.*, 547 U.S. at 390–91.

36. *Id.* at 391.

37. *Id.* at 393–94.

38. *Id.* at 395 (Roberts, C.J., concurring).

39. *See id.* at 396 (Kennedy, J., concurring).

40. *Id.*

41. *Id.*

In *Justifying Intellectual Property*, Merges interprets the *eBay* case as a practical illustration for one of his midlevel principles: proportionality.⁴² As Merges defines the principle, an IP right “must not confer on its holder leverage or power that is grossly disproportionate to what is deserved in the situation.”⁴³ Merges illustrates with a folksy analogy to a bridge dispute. He asks the reader to imagine that bridge builders accidentally trespass on the land of a riparian named Al, who then holds out for most of the value of the bridge.⁴⁴ As Al gouges the bridge builders, so patentees gouge idea users. Merges finds the Federal Circuit’s pre-*eBay* approach “quite unfair,” for it enabled patentees to use “excessive leverage” to extract wealth from parties assembling ideas under many different patents into a new and useful product.⁴⁵ Merges finds Justice Kennedy’s approach consistent with the proportionality principle because the approach scales a patentee’s remedies to the patent’s “intrinsic value.”⁴⁶ Because neither Al nor the holder of the bit-part patent “incur[s] significant investments for a socially constructive purpose,” both have “done little in the way of work, risk, or investment to deserve” the leverage an injunction provides.⁴⁷

III. REMEDY DOCTRINES IN PROPERTY TORTS

The issue raised by *eBay* is a difficult one to settle, for it is a lightning rod for two different normative worldviews about property regulation. Theories of justice may be sorted by whether they promote strong conceptions of individual rights or strong demands of community. Theories of economics may be sorted by whether they focus primarily on “the problem of order” or on “the maximization of welfare.”⁴⁸ In general, normative theories may be sorted by whether they assume “constrained” or “unconstrained” views of human knowledge and perfectibility.⁴⁹ Lawyers who find agreeable the latter alternative in each of those three pairings are by definition predisposed to the no-presumption position; those who prefer the former alternative are similarly predisposed to the presumptive-injunction position.

42. See MERGES, *supra* note *, at 165–66.

43. *Id.* at 162.

44. *Id.* at 162–65.

45. *Id.* at 161.

46. *Id.* at 166.

47. *Id.* at 167.

48. Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 398 (2001).

49. See THOMAS SOWELL, *A CONFLICT OF VISIONS: IDEOLOGICAL ORIGINS OF POLITICAL STRUGGLES* 9–33 (2002).

Before explaining how this conflict of visions informs the relevant philosophical questions, let me start by showing how it informs the relevant doctrine. Justice Kennedy's opinion in *eBay* inclines toward the more unconstrained view. Yet prominent legal authorities validate the constrained approach as well.⁵⁰ Let me start in the field of real property, with Merges's bridge example.⁵¹ In the law regulating real property disputes,⁵² many authorities presume that a property owner deserves an injunction against an ongoing trespass unless the owner disentitles himself by unclean hands or some other inequitable conduct of his own.⁵³ Under these authorities, Al presumptively deserves an injunction.

But would that injunction encourage Al to gouge the bridge builders? Not necessarily, for at least two reasons. The Supreme Judicial Court of Massachusetts identified one:

The protection by injunction of property rights against continuing trespasses by encroaching structures has sometimes been based upon the danger that a continuance of the wrong may ripen into title by adverse possession or a right of prescription. . . . But the basic reason lies deeper. It is the same reason "which lies at the foundation of the jurisdiction for decreeing specific performance of contracts for the sale of real estate. A particular piece of real estate cannot be replaced by any sum of money, however large; and one who wants a particular estate for a specific use, if deprived of his rights, cannot be said to receive an exact equivalent or complete indemnity by the payment of a sum of money. A title to real estate, therefore, will be protected in a court of equity by a decree which will preserve to the owner the property itself, instead of a sum of money which represents its value."⁵⁴

In commonsensical terms, in the bridge dispute, a damages-only remedy avoids the error of commission; it protects the court from being complicit in efforts by Al to hold out for a disproportionate share of a project that he did not assemble. Yet the injunction avoids the error of omission. Because Al has "property" in his land, it seems "odd to claim that [Al's] right is protected when [the bridge builders are] permitted to

50. See, e.g., Richard A. Epstein et al., *The FTC, IP, and SSOs: Government Hold-Up Replacing Private Coordination*, 8 J. COMPETITION L. & ECON. 1, 1, 5–8 (2012) (arguing that government regulatory approaches "upset the current set of well-functioning private coordination activities in the IP marketplace that are needed to accomplish the commercialization of new technologies").

51. See *supra* note 44 and accompanying text.

52. I mean "law" here such that it encompasses the principles of common law that regulate the issuance of injunctions and other equitable relief.

53. See, e.g., *Baker v. Howard Cnty. Hunt*, 188 A. 223, 229–30 (Md. 1936).

54. *Geragosian v. Union Realty Co.*, 193 N.E. 726, 727–28 (Mass. 1935) (citations omitted) (quoting *Lynch v. Union Inst. for Sav.*, 34 N.E. 364, 364–65 (Mass. 1893)).

force a transfer at a price set by third parties.”⁵⁵ The presumptive-injunction rule prevents that oddity. It declares that the rights to determine whether to sell, on what terms, and at what price all inhere presumptively in Al’s “property.”

Separately, although equity can consider the hardship on an enjoined encroacher, it does so only if the encroacher encroaches more or less blamelessly. As the Colorado Supreme Court put it:

Where the encroachment is deliberate and constitutes a willful and intentional taking of another’s land, equity may well require its restoration regardless of the expense of removal as compared with damage suffered therefrom; but where the encroachment was in good faith, we think the court should weigh the circumstances so that it shall not act oppressively. . . . While the mere balance of convenience is not the proper test, yet relative hardship may properly be considered and the court should not become a party to extortion.⁵⁶

Here, the court respects not only Merges’s proportionality principle but also the desire “not [to] become a party to extortion.” Yet as applied to the bridge dispute, the court would not indulge that desire without first investigating whether the bridge builders’ encroachment was “deliberate,” “willful,” or “intentional.” If it were, Al’s plea for an injunction would not count as “extortion” but as a legitimate response to a “taking.”

This debate recurs in IP law and scholarship. Many if not most IP scholars probably approve of Justice Kennedy’s argument that permanent damages—liability rules—provide the right remedies for patentees who do not commercialize their patents.⁵⁷ Yet other academic commentators insist that injunctions—property rules—are as appropriate in patent law as they are elsewhere in property law.⁵⁸ Their views and Chief Justice Roberts’s views have considerable support in relevant remedy case law. In particular, in the *Continental Paper Bag* case, the Court held that a patentee deserved an injunction over the infringer’s

55. Jules Coleman & Jody Kraus, *Rethinking the Theory of Legal Rights*, 95 YALE L.J. 1335, 1338 (1986).

56. *Golden Press, Inc. v. Rylands*, 235 P.2d 592, 595 (Colo. 1951) (en banc) (citations omitted).

57. See, e.g., Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 TEX. L. REV. 1991, 2036 (2007) (“We think that one circumstance in which courts should consider denying an injunction—or at a minimum delaying it—is when the product that would be enjoined contains multiple components, of which only one is the subject of patent suit.”); Mark A. Lemley & Philip J. Weiser, *Should Property or Liability Rules Govern Information?*, 85 TEX. L. REV. 783, 841 (2007) (“As an initial matter, we believe that courts should recognize that there are core cases where they can and should superintend liability rules effectively.”).

58. See, e.g., Epstein et al., *supra* note 50, at 1–5, 19 (rejecting damages as sufficient to protect rights of patentees); Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 YALE L.J. 1742, 1781–82 (2007) (“[T]he presumption for injunctions should be stronger than that suggested by the traditional realist wisdom . . .”).

argument that the patentee had not used the patent.⁵⁹ The Court dismissed the infringer's argument by reasoning from the basic structure of the patent.⁶⁰ According to the Court:

The patent law is the execution of a policy having its first expression in the Constitution, and it may be supposed that all that was deemed necessary to accomplish and safeguard it must have been studied and provided for. It is worthy of note that all that has been deemed necessary for that purpose, through the experience of years, has been to provide for an exclusive right to inventors to make, use and vend their inventions. In other words, the language of complete monopoly has been employed, and though at first only a remedy at law was given for a violation of the right, a remedy in equity was given as early as 1819.⁶¹

In short, when the patentee has justifiable property in a patent, the patentee's legal "property" consists of a "complete monopoly." From that "monopoly" follows a right to decide whether and on what terms to commercialize the invention under patent, and—at least ordinarily—even a nonusing patentee deserves the benefit of these presumptions.

The tension between these two views of patent remedies creates significant problems for *Justifying Intellectual Property*. When Merges insists that efficiency is not "what IP is really all about at the deepest level,"⁶² implicitly, he suggests that rights- and fairness-based approaches do get at what IP is "all about." Other things being equal, the book's account of proportionality and *eBay* should be able to explain not only Justice Kennedy's opinion in *eBay* but also the *Continental Paper Bag* case,⁶³ Chief Justice Roberts's opinion in *eBay*,⁶⁴ and the principles of equity from real property law.⁶⁵ Merges's failures to do so detract from *Justifying Intellectual Property*'s explanatory ambitions. Normatively, since these presumptive-injunction authorities are well established, perhaps they embody principles which *Justifying Intellectual Property* did not adequately consider. Yet assume that Merges had justified Chief Justice Roberts's approach in *eBay*. That approach supports construing

59. *Cont'l Paper Bag Co. v. E. Paper Bag Co.*, 210 U.S. 405, 429–30 (1908).

60. *Id.* at 423–24.

61. *Id.*

62. MERGES, *supra* note *, at 3.

63. See *supra* notes 59–61 and accompanying text.

64. See *supra* note 38 and accompanying text.

65. In philosophical jargon, a consilient explanation is preferable to an explanation that is not consilient, and Merges's explanation is not consilient if it cannot explain the presumptive-injunction principles recounted in this Part. See JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY* 41–42 (2001).

a patent as the *Continental Paper Bag* case does—as a “complete monopoly.”⁶⁶ I suspect that construction would have reinforced the suspicions of P skeptics that property concepts are inapplicable to and pernicious in IP. In any case, because the issue litigated in *eBay* is so important and accessible, if *Justifying Intellectual Property* cannot account for important aspects of that doctrine, I worry that readers may dismiss the book out of hand.

IV. FOUNDATIONS: LABOR THEORY

As I stated in the introduction, I believe that Merges’s general approach is extremely insightful if it is qualified in a few ways. In the rest of this Article, I will suggest how I would amend that general approach to deal with the objections I lodged in the last Part. I will reconsider the issues raised by *eBay*, working from the bottom layer of Merges’s cake up to the icing. Following Merges, I will start with foundations, consider a range of midlevel principles that might be edifying, and close by focusing on the practice of remedies in patent infringement. In this Part, I begin by explaining why Merges’s account of labor theory is so rich and insightful.⁶⁷

Merges is absolutely right to suggest that labor theory can ground IP rights in patents. Locke argued that people have within themselves “*the great Foundation of Property . . . by being . . . Proprietor[s] of [their] own Person[s], and the Actions or Labour of*” those persons.⁶⁸ This labor, Locke argued, “made up the great part of what [man] applied to the Support or Comfort of his being.”⁶⁹ Although “[m]en, at first, for the most part, contented themselves with what un-assisted Nature offered to their Necessities,”⁷⁰ some greatly expanded the range of “*things really useful to the Life of Man*” by discovering and then applying “*Invention and Arts.*”⁷¹ Such invention and practical arts constitute labor—intellectual labor. Iron, wood, leather, bark, stone, clay, coal, and lime may contribute modestly to man’s survival in a world of “un-assisted nature,” but when a group of people have the collective know-how to assemble those materials into a sailing vessel, they increase the intrinsic

66. *Cont’l Paper Bag*, 210 U.S. at 423.

67. By focusing on his treatment of Locke, I do not mean to denigrate Merges’s treatments of Kant or Rawls. We only need one foundation to suffice in order to explore the relevant midlevel principles, and I happen to know Lockean labor theory best.

68. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* bk. II, § 44, at 298 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

69. *Id.* at 299.

70. *Id.* § 45, at 299.

71. *Id.* §§ 44, 46, at 299. Here, “arts” refer not to the fine arts but the practical arts.

value of the raw materials to the life of man by a metaphorical factor of 1,000.⁷²

To be sure, the know-how that goes into making a ship could be disseminated as common social knowledge—part of the public domain. Yet when a discoverer discovers an invention or practical art not already in that domain, she may justifiably claim property in it if she satisfies all the moral criteria associated with labor. The Supreme Court assumed as much in *Continental Paper Bag*. Quoting from *United States v. American Bell Telegraph Co.*, the Court considered an argument whereby

one who has made an invention and thereupon applies for a patent therefor occupies, as it were, the position of a *quasi*-trustee for the public; that he is under a sort of moral obligation to see that the public acquires the right to the free use of that invention as soon as is conveniently possible. We dissent entirely from the thought thus urged. The inventor is one who has discovered something of value. It is his absolute property. He may withhold a knowledge of it from the public, and he may insist upon all the advantages and benefits which the statute promises to him who discloses to the public his invention.⁷³

IP scholars resist this line of thought for many reasons, most of which I cannot recount here.⁷⁴ Let me take just one common response: Labor cannot make the sense I just asserted because labor includes worthless “sweat of the brow.” If labor includes sweat of the brow and it seems silly to award IP in low-grade activities like compiling names into a phone directory, then labor theory fails to supply a helpful theory of IP.⁷⁵ When understood charitably, however, labor means not mere effort but “rational (or purposeful), value-creating activity. Labor is not any exercise of energy on objects in the world—acts of destruction or mere amusement certainly do not qualify—but those actions directed towards the preservation or comfort of our being.”⁷⁶

72. *See id.* § 43, at 298.

73. *Cont'l Paper Bag Co. v. E. Paper Bag Co.*, 210 U.S. 405, 424 (1908) (quoting *United States v. Am. Bell Tel. Co.*, 167 U.S. 224, 250 (1897)).

74. For a compilation of many such criticisms, see Edwin C. Hettinger, *Justifying Intellectual Property*, 18 PHIL. & PUB. AFF. 31 (1989).

75. *See, e.g., Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 352–54, 362 (1991) (rejecting the “sweat of the brow” doctrine as “ha[ving] numerous flaws, the most glaring being that it extended copyright protection in a compilation beyond selection and arrangement—the compiler’s original contributions—to the facts themselves” and holding that copyright protection does not extend to a telephone number listing not selected or arranged in any original way).

76. STEPHEN BUCKLE, *NATURAL LAW AND THE THEORY OF PROPERTY: GROTIUS TO HUME* 151 (1991).

One of Merges's great accomplishments is to start the project of reteaching labor theory to IP scholars.⁷⁷ As Merges puts it, morally legitimate labor is the "application of labor to unowned resources for highly practical purposes—survival, or more generally, human flourishing."⁷⁸ Thus, an engineer contributes greatly toward the preservation or comfort of his and others' beings by developing a blueprint for building a new and reliable sailing ship. The ship expands passengers' freedom to travel and customers' access to goods imported by the ship. There is a small amount of moral worth in assembling names and phone numbers into a directory. There is none in rediscovering the basic idea of a phone directory when that idea has already been in common circulation for a century or more.

Because the justification for labor inherently limits its scope, labor claims are qualified by several limiting conditions. These conditions remain to be elaborated even after *Justifying Intellectual Property*; let me briefly sketch them here. First, as already described, one does not "labor" justifiably by discovering an intellectual work unless the work generates "*things really useful to the Life of Man.*"⁷⁹ Second, as a corollary to that first principle, one does not perform intellectual labor by reinventing the wheel; intellectual labor deserves proprietary protection only if it "does not lessen but increase the common stock of mankind."⁸⁰ In IP, inventive effort does not justify a claim of property rights unless the effort expands the useful intellectual resources available to the community.

Finally, intellectual labor must be performed in such a manner that it declares the laborer's claim of property. IP scholars often mistakenly assume that the "property" category enables an owner unilaterally to impose a dominant relation over the owned thing to the exclusion of the rest of the world. This view comes out when P skeptics intone ominously about the "absolutist" or "Blackstonian" character of the property category.⁸¹ When labor theory is understood charitably, it does not portray property as a despotic unilateral relation. In social practice, property is a social relation, and labor theory justifies it as a social

77. Similar work is being done by Adam Mossoff. See, e.g., Adam Mossoff, *Saving Locke from Marx: The Labor Theory of Value in Intellectual Property Theory*, SOC. PHIL. & POL'Y, July 2012, at 283.

78. MERGES, *supra* note *, at 47.

79. LOCKE, *supra* note 68, bk. II, § 46, at 299.

80. *Id.* § 37, at 294.

81. See, e.g., Peter S. Menell, *Intellectual Property and the Property Rights Movement*, REGULATION, Fall 2007, at 36, 38 ("Indeed, the various modes of intellectual property protection diverge significantly from Blackstone's model of absolute rights—perpetual, exclusive, and inviolate.").

relation. Because all people stand naturally in a “*State . . . of Equality*, wherein all the Power and Jurisdiction is reciprocal,”⁸² all the members of a common political community have equal moral rights to appropriate unowned things in the community’s stock, each “to make use of [them] to the best advantage of Life, and convenience.”⁸³ The worth of labor and human equality create two different prescriptions. When a person annexes a thing with labor, the labor “excludes the common right of other Men” and “put[s] a distinction between [the thing] and common.”⁸⁴ By the same token, the person must “labor” in a manner that other members of the community can understand as appropriating the resources being labored on. If one farms a field, the farming appropriates it. If one fences the field, the fencing declares an intention to farm soon. However, if one merely flies over the field, the fly-over is not a clear or serious enough declaration of intention to appropriate any particular plot such that the flyer appropriates the field.⁸⁵

In IP, there are two basic ways to satisfy this claim-declaring requirement. IP common law deploys the nonconventional route: the discoverer keeps his intellectual work secret from everyone else except those who have pledged to use it for his chosen ends.⁸⁶ Alternately, legislators may institute conventions declaring intellectual works to be distinct property—like patent numbers or the copyright or trademark symbols.⁸⁷

V. MIDDLELEVEL PRINCIPLES I: CORRECTIVE JUSTICE

Although labor theory can ground IP rights, Merges is absolutely correct that the foundations it supplies are two levels removed from the practice of IP.⁸⁸ As Locke puts it, members of a political community “by Laws within themselves, regulate[] the Properties of the private Men of their Society, and so, *by Compact and Agreement, settle[] the*

82. LOCKE, *supra* note 68, bk. II, § 4, at 269.

83. *Id.* § 26, at 286.

84. *Id.* §§ 27–28, at 288.

85. See Claeys, *Productive Use in Accession*, *supra* note 17 (manuscript at 38–39).

86. Claeys, *Intellectual Usufructs*, *supra* note 25 (manuscript at 16). On secrecy at common law, see *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 663–65 (1834); *Donaldson v. Beckett*, (1774) 1 Eng. Rep. 837 (H.L.) 847; and *Millar v. Taylor*, (1769) 98 Eng. Rep. 201 (K.B.) 230; 4 Burr. 2302, 2356.

87. Claeys, *Intellectual Usufructs*, *supra* note 25 (manuscript at 16).

88. See *supra* notes 20–24 and accompanying text.

Property which Labour and Industry began.”⁸⁹ I wholly agree with Merges that midlevel principles play a role in this process of settlement, implementation, or—my preferred term here—determination;⁹⁰ I disagree with him about what the applicable midlevel principles are.

Let me start with one midlevel principle that is partially relevant to *eBay*—and covered, albeit briefly, by Merges—corrective justice. Merges attributes the idea of midlevel principles to Jules Coleman.⁹¹ According to Coleman, “Corrective justice claims that when someone has wronged another to whom he owes a duty of care, he thereby incurs a duty of repair.”⁹² For Coleman, corrective justice is a midlevel principle because it simultaneously is accessible in and makes sense of the practice of tort law.⁹³

Merges could have said more about corrective justice. Patent, copyright, trademark, trade secret, and hot-news doctrine all appeal to corrective justice; each institutes a cause of action for—note the terms—“infringement” or “misappropriation” of a property interest. Like the more paradigmatic torts that interest Coleman, all of these torts presume that IP owners stand in normative social relations to nonowners. When nonowners use, copy, disclose, or otherwise infringe on owners’ legitimate decisional authority over the IP in dispute, they inflict wrongs on the owners. Corrective justice works in IP, as elsewhere throughout private law, to impose a duty on nonowners to repair their wrongs to the owners’ rights.

Corrective justice reinforces the same reparative relations in remedies law—the issues litigated in *eBay*.⁹⁴ Assume MercExchange’s patent rights entitled it to decide whether, at what price, and on what conditions to alienate the use of its patented invention. If so, equity accomplishes corrective justice by enjoining eBay from taking the property MercExchange enjoys in these rights of use and disposition. Assume, however, that MercExchange’s property in its patents does not entitle it to make such decisions given eBay’s sunk costs in its website. In that scenario, MercExchange still suffered a wrong by eBay’s having infringed its patents. Yet an injunction would supply MercExchange not only with repair but also with a windfall. Corrective justice would then

89. LOCKE, *supra* note 68, bk. II, § 45, at 299.

90. MERGES, *supra* note *, at 139–43.

91. *See id.* at 139–40 (quoting COLEMAN, *supra* note 65, at 5–6, 54–55).

92. COLEMAN, *supra* note 65, at 32. Philosophical scholars of torts quibble about the precise meaning and content of corrective justice; I disregard these debates and assume that Coleman’s definition is good enough here.

93. *See id.* at 54–55.

94. *See* Coleman & Kraus, *supra* note 55, at 1353; *see also supra* notes 31–41 and accompanying text.

entitle MercExchange only to compensation from eBay for the patent rights it wrongly took.⁹⁵

All the same, Merges was right not to dwell overlong on corrective justice. Corrective justice is not the only midlevel principle at work in a dispute like *Continental Paper Bag* or *eBay*—and it is probably not the most important principle. As Coleman explains:

[C]orrective justice is an account of the second-order duty of repair. *Someone* does not incur a second-order duty of repair unless he has failed to discharge some first-order duty. However, the relevant first-order duties are not themselves duties of corrective justice. Thus, while corrective justice presupposes some account of what the relevant first-order duties are, it does not pretend to provide an account of them.⁹⁶

To a practicing lawyer, the policy issue raised in *eBay* presents a “first-order” question of property law and policy. What rights of disposition and commercialization does a patent holder deserve as part of the property he enjoys in the patent? Once property law supplies an answer to that question, the law of remedies can implement the answer, in the course of imposing a “second-order” duty of repair. Because the corrective duty is logically subsidiary to the first-order prescriptions from property law and policy, however, I thought Merges was gonna want more property.

VI. MIDLEVEL PRINCIPLES II: *JUSTIFYING INTELLECTUAL PROPERTY’S CANDIDATES*

A. *Nonremoval*

Justifying Intellectual Property supplies as one midlevel property principle, the “nonremoval principle.”⁹⁷ Nonremoval is cumbersome shorthand for a norm that information belonging in the public domain should not be removed from the public domain. As Merges notices, “[n]ot all information can be protected with IP rights,” for copyright excludes factual information, patent excludes math formulas and laws of nature, and trademark law excludes generic words or phrases.⁹⁸ As Merges also observes, “Other legal rules limit the duration of IP

95. I explain the general relation between corrective justice and the law of remedies using trade secrecy in Claeys, *Private Law Theory*, *supra* note 25, at 24–27, 57–59.

96. COLEMAN, *supra* note 65, at 32.

97. MERGES, *supra* note *, at 141–42.

98. *Id.* at 142.

rights.”⁹⁹ Copyrights and patents are subject to statutory term limits,¹⁰⁰ and trade secrets have built-in duration limits keyed to the length of time it would take a reasonably competent competitor to discover the substance of the secret independently.¹⁰¹ And Merges describes IP insightfully when he speaks of the “implicit zone of expansion surrounding all freely available works.”¹⁰² This zone is embodied in the “originality” requirement for copyright; the “novelty,” “prior art,” and “nonobviousness” doctrines in patent;¹⁰³ and trade secrecy’s requirement that a secret be minimally novel or nonascertainable.¹⁰⁴ Taking all of these legal requirements together, Merges concludes that the nonremoval principle aims “to prevent appropriation of that which is already possessed by people working in a field.”¹⁰⁵

Here, I think Merges has identified a valid midlevel principle relevant to IP. I suspect nonremovability could be justified on several different overlapping foundations. Although I cannot cover all the possible foundations here, let me explain why labor theory justifies nonremovability.

Contrary to P skeptics, neither Lockean labor theory nor property law is designed to institute a monopoly over every external asset that could conceivably be owned.¹⁰⁶ Locke himself assumed that the ocean was and should remain “that great and still remaining Common of Mankind.”¹⁰⁷ The ocean lends itself to common uses—as a pool for fishing and a public way for navigation. Thus, in the case of the ocean, common-property treatment encourages free and concurrent labor more effectively than privatization would.

Similarly, in the realm of IP, the law secures and encourages concurrent labor by equal citizens when it *prevents* the propertization of information already commonly available. Private property secures and encourages labor only when individuals discover and create intellectual works not already commonly known. That insight generates a general carve-out running throughout the IP law for intellectual works¹⁰⁸:

99. *Id.*

100. *See* 17 U.S.C. § 302(a) (2006); 35 U.S.C. § 154(a)(2) (2006).

101. *See* *Research Equip. Co. v. Galloway*, 485 S.W.2d 953, 956–57 (Tex. Civ. App. 1972).

102. MERGES, *supra* note *, at 142.

103. *Id.* at 142–43.

104. *See, e.g.,* *Buffets, Inc. v. Klinke*, 73 F.3d 965, 968 (9th Cir. 1996) (applying a novelty requirement in trade secrecy); UNIF. TRADE SECRETS ACT § 1(4) (amended 1985), 14 U.L.A. 538 (2005) (requiring that a trade secret “not be[] readily ascertainable by proper means”).

105. MERGES, *supra* note *, at 143.

106. *See supra* Part IV, notes 10–12 and accompanying text.

107. LOCKE, *supra* note 68, bk. II, § 30, at 289.

108. Here, the law of “intellectual works” focuses on patent, copyright, trade secrecy, and—with significant qualifications too lengthy to explain here—hot news. The category of

creators cannot claim property in works already in common knowledge. In a similar spirit, when a math formula helps facilitate a myriad different particular practical applications but does not automatically lead to any one of those applications, better that patent law keep the formula out of IP and make property available only for the application¹⁰⁹—the “process, machine, manufacture, or composition of matter.”¹¹⁰ So too with facts in relation to works of authorship.

With only slight modifications, one can also induce from Merges’s nonremoval principle the “implicit zone of expansion” requirement and a duration requirement for intellectual works. Both of these requirements embody labor theory’s requirement that information “not lessen but increase the common stock of mankind.”¹¹¹ The implicit zone of expansion limits IP rights on the front end, so that a work is propertized only after the laborer creates or discovers it. The duration requirement limits the property on the back end, so that the owner ceases to hold property after it is reasonably likely that many individuals will have developed rough substitutes for the work. When many such substitutes are reasonably likely to have been created or discovered, the work is likely to percolate throughout the society and become part of the public domain. At that moment, the justification for private property again ceases.¹¹²

Nevertheless, although the nonremoval principle is important in IP practice, it is not relevant to the remedy issue raised in *eBay*.¹¹³ Because that issue focuses on remedies, we must assume that MercExchange had a valid patent and that the patent had been infringed. By assumption, the invention at issue did not belong in the public domain by operation of nonremoval or any specific elaboration of that norm. Can any other midlevel principle connect labor foundations to the relevant remedy questions? Here, I could have used a little more property.

intellectual works excludes trademarks because for a trademark, the property lies not in the exclusive use of an idea created but rather a symbol associated with a good or service in commerce.

109. See, e.g., *Gottschalk v. Benson*, 409 U.S. 63, 71–73 (1972).

110. 35 U.S.C. § 101 (2006).

111. LOCKE, *supra* note 68, bk. II, § 37, at 294.

112. See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 182 (1974).

113. See *supra* Part II.

B. Efficiency

Merges's second midlevel principle is efficiency—"getting things done as cheaply as possible."¹¹⁴ This principle is the least satisfying of Merges's proposed principles, for reasons explained by Jules Coleman. Coleman argues that economic efficiency is not an appropriate principle for explaining the internal content or structure of tort law.¹¹⁵ Because Merges relies heavily on Coleman's conception of midlevel principles,¹¹⁶ if Merges means to argue that efficiency counts as such a principle, it is reasonable to expect him to consider and explain away Coleman's arguments why economic efficiency cannot satisfy the criteria for such principles.

Although I cannot restate or elaborate on Coleman's critique at length, let me at least restate the basic problems and illustrate how they might apply in IP.¹¹⁷ First, economic analysis is reductive because it purports to explain private law in abstracting from the normative claims about value and rights that are central to private law.¹¹⁸ If patent law is "really all about" labor, autonomy, or some other criterion of justice "at the deepest level,"¹¹⁹ economic analysis is unsatisfying to the extent it avoids those criteria.

Next, because economic efficiency states a social goal, it cannot explain the normative structure of private lawsuits. Such lawsuits focus on the rights-claims of individuals. They are bilateral, to tie a victim to the tortfeasor who wronged her.¹²⁰ For example, in *eBay*, the infringement suit was structured to make central the fact that eBay had wronged the rights MercExchange deserved to the exclusive use of its patents.¹²¹ If patent law were a means to promote efficient investment, it could dispense with the "rights" and "wrongs" talk and promote efficiency differently, by subsidizing innovation with public money or by administrative processes.

Last, assume that a certain balancing of equities in remedies disputes happens to encourage efficient levels of investment into invention, but also that competitors judge the patent system by how well it rewards

114. MERGES, *supra* note *, at 151.

115. COLEMAN, *supra* note 65, at 11–24.

116. See *supra* notes 91–93 and accompanying text.

117. I have developed this critique at greater length in relation to economic analyses of trade secrecy in Claeys, *Private Law Theory*, *supra* note 25, at 17–20.

118. See COLEMAN, *supra* note 65, at 23.

119. MERGES, *supra* note *, at 3.

120. See COLEMAN, *supra* note 65, at 13–21. Or, an alleged victim, an alleged tortfeasor, and an alleged wrong.

121. *MercExchange, L.L.C. v. eBay, Inc.*, 275 F. Supp. 2d 695, 711 (E.D. Va. 2003), *aff'd in part and rev'd in part*, 401 F.3d 1323 (Fed. Cir. 2005), *rev'd*, 547 U.S. 388 (2006).

their labor and secures their rights. Economic analysis cannot explain what motivates IP stakeholders and regulators to follow rules that are coincidentally efficient—at least, not without arguing that the parties are all in the grip of a rights-based “ideological illusion.”¹²²

Justifying Intellectual Property does not consider these criticisms of efficiency. Until such objections are considered thoroughly, I doubt efficiency can qualify as a midlevel principle. Here, Merges and other rights-based theorists are gonna want more property on their track.

C. Dignity and Proportionality

Merges’s last two principles are proportionality—discussed at length in relation to *eBay*—and dignity.¹²³ I suspect these principles are too indeterminate to serve the functions one would expect of midlevel principles. I have many doubts; let me voice just two. Each of the terms seems indeterminate on its own. Stated abstractly, what is MercExchange entitled to as a matter of “dignity”? If MercExchange’s patent rights should be limited in proportion to their merits, what factors inform the merits and shape the “proportions”?

Separately, as they inform law, I suspect that dignity and proportionality are better understood as conclusions, not analytical tools. Take *eBay* again. Assume that MercExchange seems entitled to an injunction, notwithstanding that the injunction may inflict severe hardship on eBay. One way of describing that situation is to say that MercExchange’s dignity entitles it to an injunction irrespective of the consequences to eBay. Now assume that the hardships to eBay or the public seem severe enough that MercExchange is *not* entitled to the injunction. That situation could be described by saying that the injunction is a remedy disproportionate to the affront to MercExchange’s dignity. Both descriptions beg crucial questions about why labor, or some other similar foundation, gives a patentee dignity in the exclusive commercial use of its invention in some situations but not others. And to settle those questions, I have a fever, and the only cure is more property.

122. COLEMAN, *supra* note 65, at 25; *see also id.* at 25–29. For an *eBay*-related work embodying all the instrumentalist tendencies I criticize in this section, see Ted M. Sichelman, *Purging Patent Law of ‘Private Law’ Remedies* (Univ. of San Diego Sch. of Law Legal Studies Research Paper Series, Paper No. 11-077, 2011), available at <http://ssrn.com/abstract=1932834>, which proposes to recast patent remedy law to focus primarily on promoting efficient innovation within a public law framework.

123. MERGES, *supra* note *, at 8–9, 165–66.

VII. MIDDLELEVEL PRINCIPLES III: MORE PROPERTY

As substitutes for dignity and proportionality, I propose more midlevel property principles. Different IP problems may raise different principles; I offer here three that seem especially relevant to the remedy questions raised by *eBay*.

First is the principle of accession.¹²⁴ Accession problems arise when an existing object of property generates goods that may or may not be classified as part of the original object—for example, when a cow delivers a calf. Such problems also arise when two existing objects are merged into a new entity—such as when copper and tin ingots are fused into bronze ingots. Merges’s bridge example presents an accession problem.¹²⁵ Before the bridge was built, Al and the builders had separate assets—respectively, land and bridge materials. After construction, as a matter of fact, the land and materials are fused. Legally, a judge might hold that Al owned the bridge—as a fixture and accessory to the land. Alternatively, if the judge decided that the bridge builders deserved to keep the bridge and acquire the land, the judge would be holding that the land had become an accessory to the bridge. Although different doctrines treat accession differently depending on context, at the level of policy, accession focuses on: (1) whether the objects at issue are more likely to be used productively as separate entities or as a single package entity; and (2) whether observers are likely to perceive the objects as one “thing” or multiple “things.”¹²⁶

The other two principles state two rival paradigms; I call them here “use rights” and “control rights.” Use rights are shorthand for legal usufructs, while control rights are shorthand for legal rights of exclusive control, use, possession, and disposition. As a paradigm, a usufruct is a legal entitlement to appropriate an asset for ongoing uses.¹²⁷ A usufruct lasts only as long as the ongoing uses, and it does not entitle the user to veto, blockade, or otherwise exclude others from using the asset for their own beneficial uses comparable to the user’s uses.¹²⁸ Oversimplified slightly, control rights make all the changes needed to a “user’s” property rights to make that user an “owner.” An owner with control

124. See Christopher M. Newman, *Transformation in Property and Copyright*, 56 VILL. L. REV. 251, 259–88 (2011). See generally Thomas W. Merrill, *Accession and Original Ownership*, 1 J. LEGAL ANALYSIS 459 (2010), available at <http://jla.oxfordjournals.org/content/1/2/459.full.pdf>.

125. See MERGES, *supra* note *, at 162–65.

126. See Claeys, *Productive Use in Accession*, *supra* note 17 (manuscript at 30–32).

127. See Claeys, *Intellectual Usufructs*, *supra* note 25 (manuscript at 1).

128. See *id.* (manuscript at 2).

rights may blockade others from engaging with the asset without her consent, even if they are presently using it beneficially and she is not.¹²⁹

Property law makes both use rights and control rights available because each advances property policies in different situations. Because I am assuming labor foundations here, let me explain in terms of those foundations. In labor theory, all property rights are justified in relation to moral use rights. If every denizen of the world has “reason to make use of [the world] to the best advantage of Life, and convenience,”¹³⁰ in strict principle no one can have “any *Property* . . . exclusive of all the rest of” mankind.¹³¹ And, in many situations, legal use rights effectively and appropriately secure to community members their moral use rights. Locke suggests examples in the *Two Treatises*: in aboriginal communities, in which there is little specialized use of property, each member deserves the right to consume whatever fruits, nuts, or animals he catches and to drink as much water as he stores.¹³² However, for many resources, control rights may help owners labor to produce far more goods beneficial to human flourishing. Locke illustrates with farms, ranches, and the sailing ship already mentioned.¹³³ Oversimplified slightly, control rights make sense when several of a cluster of factors apply: whether it takes long and expensive investment to extract benefit from the asset; whether the asset can be put to a variety of specialized uses; and whether the asset’s value is best extracted when coordinated with labor and other assets.

IP law deploys both control rights and use rights. The simplest way to illustrate is to contrast trade secrecy with patent law. A trade secret entitles its holder to use rights over the secret. On one hand, the holder enjoys the exclusive use of the secret for as long as it remains secret and not ascertained by others.¹³⁴ When grounded in labor theory, the entitlement to secrecy and exclusive use protects the labor the discoverer expended to discover the intellectual work underlying the secret and to reduce it to practical use. On the other hand, the owner of a trade secret cannot stop others from using the secret, not if they discover or reverse engineer the secret’s intellectual substance honestly, without stealing,

129. *See id.* (manuscript at 4–8).

130. LOCKE, *supra* note 68, bk. II, § 26, at 286.

131. *Id.* § 25, at 286.

132. *Id.* §§ 28–31, at 288–90.

133. *Id.* §§ 38, 43–48, at 295–96, 298–301.

134. *See* UNIF. TRADE SECRETS ACT § 1(4) (amended 1985), 14 U.L.A. 538 (2005).

bribing, or eavesdropping to acquire its substance.¹³⁵ These qualifications embody and protect the labor interests of competitors, who have equal rights to labor to discover and to make “enough[] and as good”¹³⁶ use of that intellectual substance for their own ends.¹³⁷

By contrast, patent law entitles a patentee to the exclusive use of the patented invention, by entitling him to an action against anyone who “uses, offers to sell, or sells” the invention while it is under patent.¹³⁸ Chancellor James Kent described patent law as granting control rights—not the “exclusive enjoyment” (or use rights) associated with trade secrets but rather “the right to the exclusive use and profit of . . . productions and discoveries.”¹³⁹ And he justified patent in relation to labor on the ground that “[i]t is just that [inventors] should enjoy the pecuniary profits resulting from mental as well as bodily labour.”¹⁴⁰ Now, neither Kent, nor Merges, nor any other source of which I am aware has explained specifically how labor foundations can justify rights like patent’s control rights. The suggestion that labor theory can supply such a justification is quite controversial, and will remain so even after *Justifying Intellectual Property*.¹⁴¹ Let me outline the justification, understanding that it needs to be elaborated and specified considerably elsewhere.

If an intellectual work makes a substantial advance over the existing prior art, the law may secure and enlarge the labor interests of all interested parties paradoxically, by giving the inventor a temporary right to exclude others from using it in any manner without her consent. Obviously, this monopoly uses (in Kent’s words) “the hope of profit” to encourage inventors to engage in research and development that might

135. See *Hammock v. Hoffmann-Laroche, Inc.*, 662 A.2d 546, 560 (N.J. 1995).

136. LOCKE, *supra* note 68, bk. II, § 27, at 288.

137. See Claeys, *Private Law Theory*, *supra* note 25, at 32–34; Claeys, *Intellectual Usufructs*, *supra* note 25 (manuscript at 10–18).

138. 35 U.S.C. § 271(a) (2006).

139. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 298–99 (1827); see also Claeys, *Intellectual Usufructs*, *supra* note 25, at 20 (explaining Kent’s analysis of trade secret versus patent protection).

140. 2 KENT, *supra* note 139, at 299.

141. For scholarly works resisting this suggestion root and branch, see Tom W. Bell, *Indelicate Balancing in Copyright and Patent Law*, in COPY FIGHTS: THE FUTURE OF INTELLECTUAL PROPERTY IN THE INFORMATION AGE 1 (Adam Thierer & Clyde Wayne Crews eds., 2002); Hettinger, *supra* note 74; and Tom G. Palmer, *Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects*, in COPY FIGHTS, *supra*, at 43. For scholarly works suggesting that labor principles require conventional property rights considerably weaker than provided in current patent law, see Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533 (1993); and Seana Valentine Shiffrin, *Lockean Arguments for Private Intellectual Property*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 138 (Stephen R. Munzer ed., 2001).

seem unjustifiable if trade secrets were IP's only way to protect practical inventions.¹⁴² When intellectual laborers invent inventions that would not be discovered but for the patent system, the products that follow from the inventions increase the opportunities for consumers to labor. Of course, because all citizens have equal rights to labor, patent law must respect the labor-based interests of competitors in conducting their own research and development. Yet if the invention leaps far enough beyond the prior art, it is practically unlikely that any competitor would have discovered the invention during the patent's term anyway. In addition, the patent system requires patentees to file a patent application and accompanying specifications or drawings,¹⁴³ all of which are publicly available. By expanding the technical knowledge available to competitors, the patent system widens their opportunities to experiment, research, develop—and labor productively.¹⁴⁴

The accession principle and the choice between use and control rights are much more specific than Merges's principles for efficiency, proportionality, and dignity. Why do I prefer that my principles be so specific? I admit, I am not certain whether Merges's principles violate or whether my principles satisfy whatever criteria Coleman had in mind when he used the words *midlevel* and *principle* to explain the role of corrective justice.¹⁴⁵ In any case, the notion of a midlevel principle is a heuristic device and should be judged by how well it clarifies and justifies law as it is practiced by participants in the IP system. The principles I have identified are certainly apparent in the practice of IP and the law of real property. In addition, in my opinion, my principles strike the right balance of generality and specificity to count as *midlevel* principles. Since labor—or autonomy or fairness—already supplies an adequate guiding norm for IP, I doubt that efficiency, proportionality, or dignity help focus or implement IP's foundations. Tort and remedies can invoke a single unifying principle, corrective justice. Yet they may do so primarily because their content is parasitic on norms coming from property or other substantive, rights-declaring fields of law.

By contrast, in fields like property, I suspect midlevel principles are most often paradigms or working principles, which take a first cut at

142. 2 KENT, *supra* note 139, at 299.

143. See 35 U.S.C. §§ 111–113 (2006).

144. Cf. *Cont'l Paper Bag Co. v. E. Paper Bag Co.*, 210 U.S. 405, 424 (1908) (discussing the benefit to the public of an inventor disclosing an invention to gain a patent).

145. See COLEMAN, *supra* note 65, at 54.

implementing the general prescriptions that come from the field's foundational normative commitments. Locke gets at this relation by speaking of “an *establish'd*, settled, known *Law*, received and allowed by common consent to be the Standard of Right and Wrong.”¹⁴⁶ Merges's nonremovability principle nicely illustrates the level of generality at which a midlevel principle operates in property law. The general principle it states generates four more specific doctrinal concepts, each of which recurs in trade secrecy, copyright, and patent. Accession and the choice between control and use rights capture the same combination of generality and specificity. Accession issues run throughout specific property doctrines, and the choice between control and use rights matters hugely in structuring IP torts for infringement or misappropriation, affirmative defenses, and the scope of equitable relief. The accession principle and the control-rights and use-rights paradigms come with standard eligibility criteria, which determine whether their categories apply. When they apply, they generate legal forms—legal presumptions, which may be refined further or made rebuttable. Yet even as these principles and paradigms institute formal rules, lawmakers and citizens judge the forms teleologically, by the extent to which “established laws of liberty . . . secure protection and encouragement to the honest industry of Mankind.”¹⁴⁷

VIII. *EBAY* RECONSIDERED (WHILE REALLY EXPLORING THE SPACE OF PROPERTY CONCEPTS)

The accession principle and the justification for control rights just sketched certainly do not determine or settle the *eBay* question in any definitive way. But these two principles do help focus the law on the policy questions that most lawyers would intuit to be the relevant questions.

On one hand, both the accession principle and the control and use paradigms ground Merges's arguments for the no-presumption rule for which Justice Kennedy and Merges both argue. As a matter of labor-based accession policy, when a person owns a plot of riparian land, the law should secure his rights to labor on that land—but not the right to extract value attributable to assembly on property beyond that land.

The contrast between the control and use paradigms homes in on the same problem. Many prominent property rights are hybrids; they endow owners with broad rights of control qualified to leave nonowners with a few uses that are valuable to nonowners and not threatening to owners.

146. LOCKE, *supra* note 68, bk. II, § 124, at 351.

147. *Id.* § 42, at 298.

Although real property law generally structures land rights to preserve to owners exclusive control, it allows exceptions that entitle nonowners to use or access land in ways that encourage their beneficial labor without undermining owner control. On that basis, the prima facie case for trespass to land makes any unconsented entry a trespass, but defenses may then excuse roaming cattle, grazing rights,¹⁴⁸ or airplane overflights.¹⁴⁹ In IP, copyright and patent infringement are both defined in fairly hard-edged, trespassory terms,¹⁵⁰ but copyright excuses fair uses,¹⁵¹ and the federal patent statutes have been read to excuse experimental uses.¹⁵² The limitations on equitable relief recounted in Parts II and III implement a similar hybrid strategy. Assume property law employs control rights over an asset, that a title owner is not using that asset, and that a nonowner *is* using the asset in a way that commingles the asset with the nonowner's own meritorious labor. Under the right conditions, the law enlarges the labor interests of all owners by denying to them the right to enjoin encroachments or infringements in such cases.¹⁵³ Given such conditions, each owner stands to have more labor protected in cases in which he is a mistaken high-value encroacher or infringer on someone else's asset than he stands to lose from being required to suffer a permanent encroachment or infringement on his own asset.

On the other hand, the accession principle and the control and use paradigms require public officials to consider two countervailing problems. One is that the very notions of "property" and "control" entitle owners to substantial latitude in determining whether to use something, how to do so, or in what conditions to alienate their things. Again, control rights are justified for land, works of authorship, and

148. See RESTATEMENT (SECOND) OF TORTS § 504 (1977).

149. See, e.g., *United States v. Causby*, 328 U.S. 256, 261 (1946).

150. See 17 U.S.C. § 106 (2006) (establishing the exclusive rights of a copyright owner); *id.* § 501 (defining copyright infringement); 35 U.S.C. § 271(a) (2006) (defining patent infringement).

151. See 17 U.S.C. § 107 (2006).

152. See *Madey v. Duke Univ.*, 307 F.3d 1351, 1361 (Fed. Cir. 2002); *Sawin v. Guild*, 21 F. Cas. 554, 555 (C.C.D. Mass. 1813) (No. 12,391); *Whittemore v. Cutter*, 29 F. Cas. 1120, 1121 (C.C.D. Mass. 1813) (No. 17,600) ("[I]t could never have been the intention of the legislature to punish a man, who constructed . . . a machine merely for philosophical experiments . . .").

153. See Rachel M. Janutis, *The Supreme Court's Unremarkable Decision in eBay Inc. v. MercExchange, L.L.C.*, 14 LEWIS & CLARK L. REV. 597, 613 (2010) ("[T]he [Supreme] Court generally has recognized that district courts retain the discretion to deny injunctions in light of equitable considerations in statutory cases.").

patented inventions largely because people have the greatest incentive and capacity to labor productively on these assets when one “owner” enjoys near total control to invest in them, specialize uses of them, coordinate uses of them, or dispose of them commercially. By definition, ordinarily, owners of such assets are better situated than nonowners to know such assets’ highest and best uses—at least, for those owners’ particular life plans. In Locke’s epistemology, human knowledge is limited by “Men being biassed by their Interest” and by many other complications.¹⁵⁴ “Rights” acknowledge and accommodate these limitations; if each person is a worse judge of others’ interests than her own, then all people deserve individually the greatest rights practicable “to order their Actions, and dispose of their Possessions, and Persons as they think fit.”¹⁵⁵ In legal practice, then, property law should institute a robust presumption in favor of an owner’s retaining control over the use and disposition of his asset. What nonowners perceive to be nonuses or low value uses may in reality be productive uses; the nonowners may undervalue owner uses because they are biased by their desire to own or use the owner’s property. This possibility is one of several reasons justifying the presumption, in real property remedial law, that “one who wants a particular estate for a specific use, if deprived of his rights, cannot be said to receive an exact equivalent or complete indemnity by the payment of a sum of money.”¹⁵⁶

This presumption makes considerable sense in patent law as well. In the *Continental Paper Bag* case, the Court distinguished between mere nonuse and nonuse “only explainable upon the hypothesis of a purpose to abnormally force trade into unnatural channels.”¹⁵⁷ The latter might disentitle a patentee from getting an injunction as a matter of course, but mere nonuse would not because “[t]here are many reasons for non-use which, upon explanation, are cogent.”¹⁵⁸ Ordinarily, control rights entitle owners to decide how to use assets—and to what personal values they wish to subordinate those uses. On that basic principle, ordinarily, the law should strongly discourage legal second-guessing of what seems

154. LOCKE, *supra* note 68, bk. II, § 124, at 351.

155. *Id.* § 4, at 269. Here, labor theory and midlevel property principles implementing it embody a principle comparable to economic notions of owner subjective value. See Richard A. Epstein, *A Clear View of The Cathedral: The Dominance of Property Rules*, 106 YALE L.J. 2091, 2091–93 (1997); Christopher M. Newman, *Patent Infringement as Nuisance*, 59 CATH. U. L. REV. 61, 93 (2009).

156. *Geragosian v. Union Realty Co.*, 193 N.E. 726, 727–28 (Mass. 1935) (quoting *Lynch v. Union Inst. for Sav.*, 34 N.E. 364, 364–65 (Mass. 1893)).

157. *Cont’l Paper Bag Co. v. E. Paper Bag Co.*, 210 U.S. 405, 427 (1908) (quoting *Cont’l Paper Bag Co. v. E. Paper Bag Co.*, 150 F. 741, 745 (1st Cir. 1906) (Aldrich, J., dissenting)), *aff’d*, 210 U.S. 405).

158. *Id.* (quoting *Cont’l Paper Bag*, 150 F. at 745 (Aldrich, J., dissenting)).

to be nonuse. Here, the *Continental Paper Bag* Court appreciated insights lost on the district court in *eBay*. When the district court believed that MercExchange did not deserve equitable relief, it cited “the evidence of the plaintiff’s willingness to license its patents, its lack of commercial activity in practicing the patents,” the fact that “the plaintiff exists solely to license its patents or sue to enforce its patents,” and the court’s own belief that money damages supplied an adequate remedy.¹⁵⁹ Yet an owner uses an asset beneficially if he gives the asset to someone who needs it, and in a community with a market economy he uses it just as effectively by trading it for money or some other medium of value.¹⁶⁰ According to labor theory and *Continental Paper Bag*’s conceptions of property and use, MercExchange’s licensing constituted beneficial use. And the district court erred again when it assumed that it could guess the right dollar value for MercExchange’s lost license royalties.¹⁶¹ The district court also denied injunctive relief because it thought it would be too time-consuming and fractious to supervise a continuing injunction.¹⁶² Yet all the factors that would have made a continuing injunction unmanageable would have made a license valuation proceeding worse.

Separately, the accession principle and the control and use paradigms focus attention on another issue—the relation between property rights and socialization. Labor theory distinguishes between “the use of the Industrious and Rational” and “the Fancy or Covetousness of the Quarrelsome and Contentious.”¹⁶³ When A improves for human benefit a thing “already improved by [B’s] Labour,” A’s work counts not as labor but rather as conduct motivated by a “desire[for] the benefit of another’s Pains.”¹⁶⁴ The equitable principles recounted in Part III institute this distinction in remedy doctrine.¹⁶⁵ Accession principles bring this principle into focus. It may be just to treat B’s tin as an accessory to the bronze A made from A’s copper and A’s labor—but not if A converted

159. *MercExchange, L.L.C. v. eBay, Inc.*, 275 F. Supp. 2d 695, 712–14 (E.D. Va. 2003), *aff’d in part and rev’d in part*, 401 F.3d 1323 (Fed. Cir. 2005), *rev’d*, 547 U.S. 388 (2006).

160. LOCKE, *supra* note 68, bk. II, § 46, at 300 (“If he gave away a part to any body else, so that it perished not uselessly in his Possession, these he also made use of.”).

161. *See MercExchange, L.L.C.*, 275 F. Supp. 2d at 713.

162. *See id.* at 714. For an analysis of *Continental Paper Bag* much more skeptical than the one offered in text, see Oskar Liivak & Eduardo M. Peñalver, *The Right Not To Use in Property and Patent Law* (Cornell Law Sch. Legal Studies Research Paper Series, Paper No. 12-62, 2012), available at <http://ssrn.com/abstract=2162667>.

163. LOCKE, *supra* note 68, bk. II, § 34, at 291.

164. *Id.*

165. *See supra* note 56 and accompanying text.

B's tin deliberately. In the latter case, if the law limits *B*'s remedy to damages only, it rewards *A* for disregarding *B*'s particular plans for his tin and for gambling that he could pay *B* money damages and pocket the profit left over after the damage payment.¹⁶⁶ Remedy doctrine is also informed by the control-versus-use paradigm.¹⁶⁷ Property law allows rights of access in situations in which nonowners are likely to enter owners' land in ways that do not threaten owners' core uses or manifest an intent to trespass. But if a nonowner's trespass is deliberate or severe, a state-sanctioned use right socializes citizens to wonder whether trespassing and paying damages "is not more profitable than obeying the law."¹⁶⁸

These considerations do not automatically make compelling or conclusive the approach favored in *Continental Paper Bag* and by Chief Justice Roberts in *eBay*. But they do make that approach seem much more legitimate and practical. The considerations entitle patentees to some presumption in favor of injunctive relief. Even if a patentee is not using a patent in an active and immediate sense in a particular case, these considerations supply indirect consequentialist reasons why the patentee might deserve an injunction anyway. Permanent-damage valuation proceedings may not value patentees' likely future uses accurately; they may instead discourage private licensing in competitive markets.

This process of presumption, rebuttal, and refinement illustrates how foundations and midlevel principles inform the specifics of legal practice. Neither labor theory nor the relevant midlevel principles require a specific result. Yet they do strengthen considerably the case for one general range of results. They supply working presumptions on which public decisionmakers may rely to narrow and focus their decisions in practice. At the same time, labor foundations and the relevant principles also leave considerable room for legislators and judges to disagree about important subsidiary doctrinal questions not settled by the presumptions.

For example, there must be some line where really egregious nonuse disentitles a patentee from recovering equitable relief for infringement. Should that line be drawn broadly at any "mere" licensing, at the lack of any licensing or use, or, most narrowly, only at nonuse motivated by

166. See 2 KENT, *supra* note 139, at 296–97.

167. See Newman, *supra* note 124, at 90–93.

168. *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 161 (Wis. 1997). In *Jacque*, the Supreme Court of Wisconsin awarded not injunctive relief but punitive damages for a harmless but deliberate trespass. *Id.* Yet the rationale for punitive damages is identical to the rationale for imposing injunctive relief whenever a trespass is deliberate or accidental but motivated by a turn-a-blind-eye disposition.

intent to monopolize a market? Labor foundations and the relevant midlevel principles point toward the middle or—especially—the last choice, but public decisionmakers may reasonably consider all three options in light of the available concrete evidence.

Separately, how much of an economic impact must an injunction have on the noninfringing parts of an infringer's assembly before the balance of hardships becomes inequitable to the infringer? Labor foundations and the relevant midlevel principles require that the ratio be stacked in favor of the patentee,¹⁶⁹ but decisionmakers are left with latitude to settle the order of magnitude for the ratio: 10:1, 100:1, or 1,000:1.

Finally, how innocent must an infringer be for it to be appropriate to refrain from entering an injunction—ignorant of any actual or mistaken infringement after a duly-diligent search of existing patents? The relevant foundations and midlevel principles make strict liability or inquiry notice seem reasonable alternatives. Yet public officials may consider alternatives if relevant evidence in practice justifies doing so, and they must choose between these two candidates if there is no relevant evidence for other alternatives.

IX. THE STRENGTHS AND LIMITATIONS OF *JUSTIFYING* *INTELLECTUAL PROPERTY*

Granted, because it does not settle questions like these, labor-based IP remains somewhat indeterminate, even when it is revised and supplemented as I have suggested here. Here, however, no one should expect any more determinacy from rights-based theory than Merges promises with his metaphorical three-layer cake.¹⁷⁰ There is quite a bit of play in the move from foundations to midlevel principles. There is even more in the move from the middle level to practice. As a result, labor theory creates a justificatory structure within which public officials may disagree reasonably about how to implement general policies in doctrine.

Separately, however, the account of equity I have proposed in this and the last Part is more satisfying than Merges's corresponding account. Merges can explain one half of a tension in the doctrine—the no-presumption arguments offered by Justice Kennedy in *eBay*.¹⁷¹ Yet his

169. See *supra* notes 68–72, 139–44, and accompanying text.

170. See *supra* notes 20–23 and accompanying text.

171. See *supra* notes 39–41 and accompanying text.

proportionality-based account neither explains nor justifies the other half of the tension—or why the tension exists.

In addition, the sketch developed in this and the last Part confirms my suspicions about Merges's nonproperty midlevel principles. One could describe the relevant equity doctrines on efficiency grounds. Yet the foregoing sketch gets to the same result using moral phraseology. Equity *orders* how competitors exercise their concurrent rights to labor in close cases, where the infringer is not very culpable, the connection between a property holder's legal property and the labor interest underlying that interest is attenuated, and the infringer's labor interest seems strong. "Labor" states a moral interest that appeals to the parties, binds them socially, and supplies normative force to doctrine, in terms of concepts internal to doctrine. By contrast, like utility, efficiency is neither a "serviceable first-order principle of the IP system" nor a serviceable second-order principle, at least not without piggybacking on labor theory or some other rights-based account of the parties' legitimate rights and normative interests.¹⁷²

Separately, dignity and proportionality seem not organizing principles but conclusions. When a decisionmaker thinks it appropriate to protect a patentee's right to control the commercial use of his invention, the decisionmaker will speak of "property" in dignity-laden terms—as a right to a domain of choice that "cannot be replaced by any sum of money, however large."¹⁷³ But when the infringer does not act with a culpable scienter and an injunction threatens to blockade plans involving legitimate labor through noninfringing activities, then the injunction seems disproportionate to the control the patentee deserves to protect the freedom to labor associated with his patent.

Yet, notwithstanding my criticisms, I hope that the foregoing sketch illustrates how rich and generative Merges's general framework is. My differences with Merges pale in comparison with the differences we share as P essentialists against P skeptics. For example, Merges's colleague Peter Menell has warned against exporting "Locke's natural rights conception of property" to IP.¹⁷⁴ Menell makes two arguments for this warning, one historical and one normative. The historical argument is that patent and copyright have been shaped by utilitarian imperatives, not natural-rights ones; the normative one holds that it would be bad to

172. MERGES, *supra* note *, at 3; *see also* Eric R. Claeys, *Exclusion and Private Law Theory: A Comment on Property As the Law of Things*, 125 HARV. L. REV. F. 133, 140, 146–47 (2012) (describing the limits of the economic method for justifying property rights).

173. *Geragosian v. Union Realty Co.*, 193 N.E. 726, 727 (Mass. 1935) (quoting *Lynch v. Union Inst. for Sav.*, 34 N.E. 364, 364 (Mass. 1893)).

174. Menell, *supra* note 81, at 38.

apply property principles to IP because such principles are tethered to the law of real property and are in that context “absolutist.”¹⁷⁵ Menell’s historical assertions contradict not only Kent’s *Commentaries*,¹⁷⁶ but also careful historical scholarship to the contrary;¹⁷⁷ those assertions need not be considered at length here. I hope my friendly criticisms and amendments here help scholars appreciate how *Justifying Intellectual Property* responds to Menell’s normative argument, which reflects views widely shared by many IP scholars.¹⁷⁸

It is inaccurate to say, as Menell does, that Lockean labor theory necessarily requires an “absolutist” account of IP. One of Merges’s great accomplishments is to show, in the context of IP, how Locke’s theory of labor “provide[s] both a powerful theory of original acquisition of property *and* a robust set of limitations on that right,” grounded in the labor claims of nonowners.¹⁷⁹ Merges illustrates concretely with claims by the residents of developing countries on lifesaving drug patents.¹⁸⁰ More generally, Merges also accommodates the normative interests of owners and nonowners with a structure in which “core” IP rights embody the claims of inventors and authors, and these rights are qualified at the “periphery” for components of an intellectual work whose value is largely attributable to social factors.¹⁸¹ As the last two Parts of this Article suggested, I would conceive of and justify the patent “bargain”—and the corresponding bargain for copyright—somewhat differently. Nevertheless, Merges and I both agree that patent and copyright property rights are limited by social obligations correlative with the foundational rights that justify IP.

In contrast, Menell cites the experimental use defense and the *eBay* case as knock-down proof that property rights are utilitarian and are not perfectly exclusive.¹⁸² Neither doctrine supports Menell’s argument.

175. *Id.*

176. *See supra* notes 139–40 and accompanying text.

177. *See* Adam Mossoff, *Rethinking the Development of Patents: An Intellectual History, 1550-1800*, 52 HASTINGS L.J. 1255 (2001); Adam Mossoff, *Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent “Privilege” in Historical Context*, 92 CORNELL L. REV. 953, 953–57 (2007).

178. *See, e.g.*, JANICE M. MUELLER, PATENT LAW 29 (3d ed. 2009) (“Natural rights theory does not address the central question of balancing proprietary rights against enhancement of the public domain.”).

179. MERGES, *supra* note *, at 273.

180. *See id.* at 272–76.

181. *See id.* at 121–33.

182. *See* Menell, *supra* note 81, at 40, 42.

Utilitarian theories are not the only theories that can justify use-based qualifications on patent's general control-rights structure. As the last two Parts showed, labor theory can justify both the experimental use defense and the *eBay* exception. Moreover, Menell sets up a straw man when he assumes that labor-based property rights are perfectly exclusive. The prima facie case for patent infringement is exclusive, but the substance of patent control rights are hemmed in by defenses, limitations on equitable relief, and the eligibility criteria for getting a patent.¹⁸³ The defenses and the limitations on equitable relief are not set in stone, either. If policymakers or scholars think that patent rights do not give enough due to the labor claims of nonpatentees, they may expand the defenses or constrict the remedies available in infringement litigation. More importantly, the rights of exclusive control a patentee gets as a matter of law are justified by and limited consistent with a moral labor theory in which no person has a moral labor interest higher than or exclusive of any other person's concurrent interest.

By the same token, Merges's account and mine here clarify the problems with another common P-skeptic argument: IP is bad because it consists of a state-granted monopoly.¹⁸⁴ To begin with, the simplest IP rights—common law trade secrets—do not create monopolies, for they embody use rights. Patents and copyrights do create legal monopolies, but by itself that fact is not necessarily bad.¹⁸⁵ Land rights are legal monopolies, too, but no one worries because land is plentiful and most lots are fungible. Equally important, in IP law as justified by labor theory, the monopolies are designed to apply only when they advance and accord with the labor interests of all the moral stakeholders—not only IP owners. The many different applications of Merges's nonremovability principle all make control rights inappropriate over intellectual works already in or soon to be in the public domain.¹⁸⁶ Patents and copyrights give competitors implicit in-kind compensation for having restricted their opportunities to labor by requiring the disclosure of the intellectual works created. Both also advance the labor interests of consumers and competitors by incentivizing IP creators to create works with which the public and competitors can engage.

To be sure, in practice, it can be argued that one or many of the relevant IP doctrines grants too much monopoly. If Merges and I are correct, however, P doctrine provides enough doctrinal vehicles to

183. See *supra* Part II and notes 150–52 and accompanying text.

184. See *supra* note 11 and accompanying text.

185. See Edmund W. Kitch, *Elementary and Persistent Errors in the Economic Analysis of Intellectual Property*, 53 VAND. L. REV. 1727, 1729–38 (2000).

186. See *supra* note 24 and accompanying text.

calibrate the monopoly in IP to the right level. *Justifying Intellectual Property* highlights all the doctrines that regulate the interface between IP and the public domain. As this Article has suggested, accession principles and use-based exceptions serve similar goals. These and other similar principles and doctrines adequately let policymakers reconcile legal property rights with the foundational moral rights of competitors, consumers, and other idea users.

X. CONCLUSION

In music, too much cowbell usually spoils a song; in legal theory, normative concepts become cliché when applied where they do not fit. But in at least one song, the cowbell propelled a solid track into a rock anthem. And in IP, scholars should remember that the *P* in IP stands for *property*. So if scholars want to study IP law using philosophical methods, they probably should demand property concepts as single-mindedly as Christopher Walken's Bruce Dickinson demanded cowbell in *(Don't Fear) The Reaper*.

Justifying Intellectual Property does at least as much as any other contemporary scholarly work to rejuvenate interest in rights- and property-based theories of IP. The book makes a huge contribution by defending the property rights of idea creators in terms of labor and other similar moral foundations. It makes another huge contribution by showing how rights-based theories of IP are compatible with the public domain. I think the book's arguments could be pressed further by showing how accession, the control and use paradigms, and other similar midlevel property principles channel moral rights-claims into specific legal doctrinal questions. Even here, however, Merges has still performed a huge academic service by focusing IP scholars' attention on private law conceptual theory and its implications for IP. I hope this Article has made accessible the accomplishments, the generative aspects, and the unfinished work of *Justifying Intellectual Property*.

