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Introduction

HELENA R. HOWE AND JONATHAN GRIFFITHS

This book comprises a collection of essays that reflect on one of the most fascinating aspects of intellectual property law, namely the interaction between intellectual property and broader notions of property in law. As a primary mechanism for organising the allocation of valuable resources, 'property' matters. From its ideological basis to the content of the rules governing the existence and exercise of proprietary rights, the choices we make about property play a huge role in shaping social and individual welfare. Interpretations of 'property' in the context of intellectual property are similarly critical. Whilst not perhaps of the same order as land and water for instance, the subject matter of intellectual property law – creative works, inventions, commercially significant signs and trade secrets – is nonetheless essential for social and economic development. The meanings ascribed to property in this context will help determine the contours of the rights in a range of intangible assets of substantial cultural, scientific and economic value. The need for sustained enquiry into the relationship between intellectual property and broader, or more traditional, concepts of property, might seem obvious. However, it is only relatively recently that real interest in this relationship has grown, as intellectual property has increasingly been treated as 'property' by right-holders, legislators, courts and commentators.

For the last couple of decades intellectual property law has faced the challenge of balancing the interests of right-holder and user in a world of rapidly changing technology and inequalities of development and access to information resources. At the same time, intellectual property has become a huge source of wealth for some economies and corporations, in many instances overshadowing tangible proprietary assets in significance. This rise in economic importance, coupled with uncertainty over the justifiable scope of intellectual property rights in the light of technological change and various global crises relating to health, environmental protection and so forth, has given rise to a resurgence of 'property' talk

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in intellectual property. It is unsurprising that, in seeking to legitimate intellectual property and to stabilise the notion of rights in intangibles, reference has been made to the well-established category of property in 'things'. Nor is this a new phenomenon. The 'battle of the booksellers' in eighteenth-century England saw attempts to gain support for perpetual copyright protection through the presentation of literary property as analogous to real property.[1] The advocates of such protection presented the author's interest as 'an absolute right of property, a freehold, grounded in labour and invention'[2] and sought to benefit from the association with real property because, as Blackstone (counsel in *Tonson* v. *Collins*[3]) would famously observe, there is 'nothing which so generally strikes the imagination and engages the affections of mankind, as the right to property'.[4] Recent years have again seen attempts by those in favour of strong intellectual property rights to present intellectual property as analogous to the home or the castle of the landowner, and thus to present the copyright or patent owner as the legitimate recipient of far-reaching rights to control the use of their property.[5] Moreover, the rhetoric appears to have been successful as, in many respects, intellectual property has increasingly come to exhibit features of the tangible property to which it has been compared.

However, such analogies are problematic and the relationship between intellectual property and tangible property concepts is far more complex than it may, at first sight, appear to be. Many commentators have challenged the use of traditional property rhetoric, highlighting the conceptual and normative ambivalence of the 'property' label and questioning its application to intellectual property.[6] Notions of property that are suitable for land or chattels may be wholly inappropriate for the non-

[1] For example, *Tonson* v. *Collins* 96 Eng. Rep. 169 (KB) (1761).
[2] Mark Rose, *Authors and Owners: The Invention of Copyright* (Cambridge, Massachusetts: Harvard University Press, 1993).
[3] 96 Eng. Rep. 169 (KB) (1761).
[4] William Blackstone, *Commentaries on the Laws Of England* (first published 1765), (Chicago and London: University of Chicago Press, 1979), vol. II, p. 2.
[5] See, for example, the many examples given in the context of copyright by Michael Carrier in his chapter 'Limiting Copyright Through Property' in this collection.
[6] See, for example, L. Ray Patterson, 'Free Speech, Copyright and Fair Use' (1987) 40 *Vanderbilt Law Review* 1; Margaret J. Radin, 'Property Evolving in Cyberspace' (1996) 15 *Journal of Law & Commerce* 509; Mark A. Lemley, 'Romantic Authorship and the Rhetoric of Property' (1997) 75 *Texas Law Review* 873; James Boyle, *Shamans, Software and Spleens: Law and the Construction of the Information Society* (Cambridge, Massachusetts: Harvard University Press, 1996); Jessica Litman, 'Information Privacy/Information Property' (2000) 52 *Stanford Law Review* 1283; Robert Burrell and Allison Coleman, *Copyright Exceptions: The Digital Impact* (Cambridge University Press, 2005); Lionel Bently

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rivalrous subject matter of intellectual property law. In fact, as many have pointed out, property rights constructed on such a basis have the potential to undermine one of intellectual property's chief functions by stifling future creation and innovation.[7] The relationship between intellectual property and property is extremely complex and a substantial body of literature has emerged, considering the issue from a range of perspectives. For some, a 'full value model' of intellectual property,[8] closer to the traditional model of property in land, may often be appropriate for intellectual property law.[9] Others have continued to focus on the fundamental question of whether 'property' paradigms developed for tangible resources can ever be appropriate for the intangible assets governed by intellectual property law.[10] For some, the relevant concern has been

and Brad Sherman, *Intellectual Property* (Oxford University Press, 2009); Ronan Deazley, *Rethinking Copyright History, Theory, Language* (Cheltenham and Northampton, MA: Edward Elgar, 2006); Neil W. Netanel, *Copyright's Paradox* (Oxford University Press, 2008); Shyamkrishna Balganesh, 'Debunking Blackstonian Copyright' (2009) 118 *Yale Law Journal* 1126.

[7] Dan Hunter, 'Cyberspace as Place and the Tragedy of the Digital Anti-Commons' (2003) 91 *California Law Review* 439; Michael A. Heller, 'The Tragedy of the Anti-Commons: Property in Transition from Marx to Markets' (1998) 111 *Harvard Law Review* 621; Michael A. Heller and Rebecca S. Eisenberg, 'Can Patents Deter Innovation? The Anti-Commons in Biomedical Research' (1998) 280 *Science* 698; Boyle, *Shamans, Software and Spleens: Law & the Construction of the Information Society* (Harvard University Press, 1996); Mark A. Lemley, 'Property, Intellectual Property and Free Riding' (2005) 83 *Texas Law Review* 1031; Lawrence Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World* (New York: Vintage Books, 2001).

[8] To use Lemley's term. See Lemley, 'Property, Intellectual Property and Free Riding'.

[9] Including Frank H. Easterbrook, 'Intellectual Property is Still Property' (1990) 13 *Harvard Journal of Law & Public Policy* 108; William Landes and Robert Posner, 'An Economic Analysis of Copyright Law' (1989) 18 *Journal of Legal Studies* 325; Robert P. Merges, 'A Transactional View of Property Rights' (2005) 20 *Berkeley Journal of Law and Technology* 1477; David Friedman, 'In Defense of Private Orderings: Comments on Julie Cohen's "Copyright and the Jurisprudence of Self- Help"' (1998) 13 *Berkeley Technology Law Journal* 1151.

[10] In addition to the literature already noted see, for example, Henry E. Smith, 'Intellectual Property as Property: Delineating Entitlements in Information' (2007) 116 *Yale Law Journal* 1742; Stewart E. Sterk, 'Intellectualizing Property: The Tenuous Connection between Land and Copyright' (2005) 83 *Washington University Law Quarterly* 417; Brett M. Frischmann and Mark A. Lemley, 'Spillovers' (2007) 107 *Columbia Law Review* 257; Peter S. Menell, 'The Property Rights Movement's Embrace of Intellectual Property: True Love or Doomed Relationship?' (2007) 34 *Ecology Law Quarterly* 713; Séverine Dusollier, 'Tipping the Scale in Favour of the Right Holders: The European Anti-Circumvention Provisions' in Eberhard Becker *et al.* (eds.), *Digital Rights Management. Technological, Economic, Legal and Political Aspects* (Berlin: Springer-Verlag, 2003); Thomas Dreier, 'Balancing Proprietary and Public Domain Interests: Inside or Outside of Proprietary Rights?' in Rochelle C. Dreyfuss, Diane L. Zimmerman and Harry First (eds.), *Expanding*

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the role of different property traditions in the protection of traditional knowledge and culture,[11] others have explored property analogies in historical perspective[12] or (re)considered the philosophical justifications for property and their application to intellectual property.[13] Yet others have assessed the impact on intellectual property of protecting property as a fundamental human right.[14] Whilst many have seen the attempts to align intellectual property with more traditional notions of property as being problematic in terms of clarity and the desire to restrain the expansion of intellectual property rights, others have at least recognised that 'property' need not always entail extensive private rights to exclude[15] and some

the Boundaries of Intellectual Property Innovation Policy for the Knowledge Society (Oxford University Press, 2001); Hugh Breakey, 'Two Concepts of Property: Property in Things and Ownership of Activities' (2011) 42 *The Philosphical Forum* 239; Andreas Rahmatian, *Copyright and Creativity: The Making of Property Rights in Creative Works* (Cheltenham: Edward Elgar, 2011).

[11] Including Kristen Carpenter, Sonia Katyal and Angela Riley, 'In Defense of Property' (2009) 118 *Yale Law Journal* 1022.

[12] Including Jennifer Davis, 'European Trade Mark Law and the Enclosure of the Commons' [2002] *Intellectual Property Quarterly* 342; James Boyle, 'The Second Enclosure Movement and the Construction of the Public Domain' (2003) 66 *Law and Contemporary Problems* 33; Yochi Benkler, 'Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain' (1999) 74 *New York University Law Review* 345; Brett Frischmann and Katherine J. Strandberg, 'Constructing Commons in the Cultural Environment' (2010) 95 *Cornell Law Review* 657.

[13] Including Wendy Gordon, 'A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property' (1993) 102 *Yale Law Journal* 1533; Peter Drahos, *A Philosophy of Intellectual Property* (Aldershot: Dartmouth Publishing, 1996); Alfred Yen, 'Restoring the Natural Law: Copyright as Labour and Possession' (1990) 51 *Ohio State Law Journal* 517; Benjamin G. Damstedt, 'Limiting Locke: A Natural Law Justification for the Fair Use Doctrine' (2003) 112 *Yale Law Journal* 1179; Carys J. Craig, 'Locke, Labour and Limiting the Author's Right: A Warning Against the Lockean Approach to Copyright' (2002) 28 *Queens Law Journal* 1; David Lametti, 'How Virtue Ethics Might Help Erase C-32's Conceptual Incoherence' in Michael Geist (ed.), *From "Radical Extremism" to "Balanced Copyright": Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law, 2010); Hugh Breakey, 'Natural Intellectual Property Rights and the Public Domain' (2010) 73 *Modern Law Review* 208.

[14] Laurence R. Helfer, 'The New Innovation Frontier? Intellectual Property and the European Court of Human Rights' (2008) 49 *Harvard International Law Journal* 1; Jonathan Griffiths and Luke McDonagh, 'Fundamental rights and European IP law' in Christophe Geiger (ed.), *Constructing European Intellectual Property* (Cheltenham: Edward Elgar, 2012).

[15] Including Elinor Ostrom and Charlotte Hess, 'Ideas, Facilities, and Artifacts: Information as a Common-Pool Resource' (2003) 66 *Law and Contemporary Problems* 111; Carol Rose, 'The Comedy of the Commons: Custom, Commerce and Inherently Public Property' (1986) 53 *University of Chicago Law Review* 711; Carol M. Rose, 'The Several Futures of Property: Of Cyberspace, Folk Tales, Emission Trades and Eco Systems' (1998) 83 *Minnesota Law Review* 129; James Boyle, *The Public Domain: Enclosing the Commons of*

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have seen the potential for re-balancing intellectual property in that very 'propertisation'.[16]

The main aim of this collection is to provide new insights into the relationship between intellectual property and property. The intention, in particular, is to further our understanding of the ways in which concepts of property can inform the development of intellectual property laws that are both conceptually coherent and serve the public interest. Two main themes run through the chapters in this collection. The first theme, explored in Part I, is the extent to which intellectual property can be seen as 'property' and the implications of this analysis for the scope of intellectual property rights. The chapters within this theme consider the nature of the property in various aspects of intellectual property. They ask, for instance, whether intellectual property is property at all and whether the rights granted can, and should, be seen as analogous to those in the ownership bundle of more traditional forms of property. Other chapters in this Part explore the challenges of formulating identifiable subject matter in intellectual property and analyse the methods by which the boundaries of the subject matter and the rights in respect of it are drawn by courts and policy-makers. The second theme of the collection, explored in Part II, is whether concepts developed in the sphere of tangible property – whether theoretical or substantive – can be employed to support the reformulation or reinterpretation of intellectual property laws in order to ensure an appropriate balance between the interests of right-holders and potential

the Mind (New Haven: Yale University Press, 2008); James Boyle, 'A Politics of Intellectual Property: Environmentalism for the Net?' (1997) 47 *Duke Law Journal* 87; Maureen Ryan, 'Cyberspace as Public Space: A Public Trust Paradigm for Copyright in the Digital World' (2000) 79 *Oregon Law Review* 647; Molly S. Van Houweling, 'Cultivating Open Information Platforms: A Land Trust Model (2002) 1 *Journal of Telecommunications & High Technology Law* 309; Christine D. Galbraith, 'A Panoptic Approach to Information Policy: Utilizing a More Balanced Theory of Property in Order to Ensure the Existence of a Prodigious Public Domain' (2007) 15 *Journal of Intellectual Property Law* 1; Geertrui Van Overwalle (ed.), *Gene Patents and Collaborative Licensing Models. Patent Pools, Clearinghouses, Open Source Models and Liability Regimes* (Cambridge University Press, 2009); Lior Zemer, 'Moral Rights: Limited Edition' (2011) 91 *Boston University Law Review* 1519; Helena R. Howe, 'Copyright Limitations and the Stewardship Model of Property' (2011) *Intellectual Property Quarterly* 183.

[16] Including Michael A. Carrier, 'Cabining Intellectual Property through a Property Paradigm' (2004) 54 *Duke Law Journal* 1; Jacqueline Lipton, 'Information Property: Rights and Responsibilities' (2004) 56 *Florida Law Review* 135; Constance E. Bagley and Gavin Clarkson, 'Adverse Possession for Intellectual Property: Adapting an Ancient Concept to Resolve Conflicts Between Antitrust and Intellectual Property in the Information Age' (2003) 16 *Harvard Journal of Law and Technology* 327.

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users of intellectual property. These broad themes reflect the central concerns of much of the developing literature and formed the framework for a workshop where many of the chapters were discussed in the summer of 2011.

Alain Pottage and Brad Sherman begin Part I of the collection by exploring the tensions inherent in constituting the 'invention' as the subject matter of property comprising both intangible and tangible aspects. These are tensions that, they suggest, go to the heart of the conception of the patent as a form of property and that illustrate the surprisingly materialist nature of patent law. This is followed in Chapter 2 by Dev Gangjee's analysis of the strategies used by courts and administrative officials to determine the boundaries of the property in brands and to reify the fluctuating 'conversation' between manufacturer and consumer. With the aim of contributing to the debate about the extent to which property in brands is desirable, Gangjee challenges the approach of the Court of Justice of the European Union, arguing that it does not take account of relevant interdisciplinary scholarship suggesting an alternative approach. In Chapter 3 Lionel Bently pushes this theme to its boundary, exploring the question of whether trade secrets are to be considered as property at all and the implications for intellectual property law more generally of confidential information being treated as 'intellectual property' but not 'property'. This is followed by Alastair Hudson's chapter, in which he draws attention to the way in which property is understood very differently by specialists in different fields, specifically by reference to the very different conceptual understandings of breach of confidence in equity and in intellectual property law. In particular, he argues that equity uses conscience-based proprietary rights to achieve desirable outcomes in individual cases, especially in relation to constructive trusts and confidential information, by contrast to the comparatively formalistic conceptions of property rights in intellectual property law.

In Chapter 5 Thomas Dreier presents a valuable civil law perspective on the extent to which intellectual property – and copyright in particular – can be regarded as property. The focus here is on Germany, which, as is suggested, provides a paradigm example of the difficulties in satisfactorily describing the property in intangibles by reference to the incidents of traditional, tangible property. In the following chapter, Hugh Breakey provides a sustained theoretical consideration of the application of the right to exclude in copyright law. Beginning with a Hohfeldian framework and drawing on the works of Penner, Waldron and Singer,

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amongst others, Breakey analyses the extent to which different notions of exclusion fit with copyright law. Whilst Breakey's focus is on the right to exclude, the chapter by Shyamkrishna Balganesh provides an in-depth analysis of the significance of the right to alienate as an incident of property in the context of US copyright law. Like Breakey, he provides insights into the copyright–property relationship that have structural and normative consequences in terms of the scope of the entitlement and its limitations.

The chapters in Part II explore the extent to which concepts of property associated with tangible property might enable intellectual property to achieve a balance between the interests of the right-holder and user. To this end, in Chapter 8, Michael Carrier presents a very clear challenge to the notion that the 'propertisation' of intellectual property necessarily entails expansion. Whilst providing a range of illustrations of the recent tendency for copyright to be presented as analogous to real or moveable property, he claims that, in reality, such property rights are limited and argues for analogous limits in copyright law. Abandonment of property is the focus of Chapter 9, in which Robert Burrell and Emily Hudson advocate the adoption of a rule that would enable an owner to abandon copyright in the European Union, in the same way as one can abandon other forms of property. In so doing, they demonstrate that the Court of Justice's harmonisation agenda may have potentially far-reaching consequences for any attempts to use broader property concepts to restrain intellectual property rights. In Chapter 10, David Lametti challenges the value of the anticommons concept as applied to intellectual property and suggests that the notion of an anticommons is unnecessary, lacks clarity and contributes to the perpetuation of false notions regarding the scope of proprietary rights.

The final two contributions in Part II explore the idea that the liberal concept of private property, characterised by extensive rights to exclude, is by no means the only available model of property. One alternative is provided by forms of common-property regime and, in Chapter 11, Séverine Dusollier presents an analysis of the development and features of different types of commons in intellectual property law, including the 'copyleft' licence. Her examination includes assessment of the relationship between these different forms of commons and property and she argues for a greater role for 'inclusivity' in intellectual property rights. In the final chapter, Helena Howe recognises the importance of patent law reform if patent law is to make an effective contribution to the promotion of sustainability goals and the mitigation of climate change in particular.

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However, she suggests that proposals to bolster patent exceptions are undermined by the model of property dominating patent law and that an alternative ‘stewardship’ model of property, increasingly recognised in the context of property in land, would be more compatible with the sustainability agenda.

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PART I

Intellectual property as property?

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