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The Genius of Common Law Intellectual Property

Shyamkrishna Balganesht[†]

ABSTRACT

Among Richard Epstein's influential contributions to legal scholarship over the years is his writing on common law intellectual property. In it, we see Epstein's attempt to meld the innate logic of the common law's conceptual structure with the realities of the modern information economy. Common law intellectual property refers to different judge made causes of action that create forms of exclusive rights and privileges in intangibles, interferences with which are then rendered enforceable through private liability. In this Essay, I examine Epstein's writing on two such doctrines: "hot news misappropriation" and "cybertrespass", which embraces several important ideas that modern discussions of intellectual property would do well to pay greater attention to: (1) the private law nature of intellectual property claims, (2) the interconnectedness of intellectual property and other basic areas of law, (3) the compatibility of instrumental and non-instrumental considerations, and (4) the valorization of judicial creativity in rule development.

1. INTRODUCTION

Richard Epstein is an unabashed champion of the common law. Its time worn rules and principles, its method of incremental rule development, and its ability to adapt to changing circumstances are features that Epstein has routinely extolled over the course of his career. In this regard, his faith in the common law is closest to that of Edward Levi and Harry Kalven, Jr., the latter of who was well-known for believing that the common law always "work[s] itself pure." (Epstein 2003, p. 73).

Purity, of course, is in the hands of its purveyor. Epstein belongs to a long tradition of legal luminaries who see in the common law not just a residual, second-best approach to law-making and rule development, but instead a mechanism that captures and cultivates the law's central commitments to principle and reason. Sadly though, this form of thinking has been on the decline in the legal academy over the last several decades. Post-World War II, American legal thinking has been captivated by an ever-growing commitment to separation of powers and with it the belief that judicial law-making—the hallmark of the common law—ought to take a definitive backseat to legislation and executive fiat for reasons of democratic legitimacy and connected concerns.¹

While this shift in mindset has indeed occurred in a variety of substantive areas, it is most pronounced in domains that are politically fraught and/or characterized by well-defined interest groups who see in the legislative and executive—rather than judicial—process of law-making, an opportunity for bargain and compromise that better serves their ends. Intellectual property law, or

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¹ For accounts of this transformation, see Purcell (1973). Much of the transformation can be attributed to the enormous influence of the Legal Process school of jurisprudence, developed by Hart and Sacks (1958). On the influence of Legal Process, see Eskridge and Frickey (1994, pp. 2045-55).

the law relating to the delineation and enforcement of rights and privileges in informational resources, remains a prominent example here. Patent, copyright and trademark law in the U.S. are today seen as statutory areas that Congress alone is authorized to modify. Together with the complex rules of federal preemption, they purport to dominate the landscape of American intellectual property law.

Yet, hidden away in the interstices of these statutory areas is a rather robust body of law that applies common law ideas, methods and principles to various informational resources without running afoul of preemption concerns. “Common law intellectual property,” as it is often referred to, represents a set of legal causes of action that create various rights, duties, and enforceable liabilities for otherwise non-rival and non-excludable assets.² Its hallmark lies in its common law origins, having been developed and adapted by judges in individual cases through the deployment of the common law’s core concepts and principles.

Given his affection for all things common law, it should come as no surprise that Epstein has for years now been a vociferous defender of common law intellectual property, which he sees as adapting the core precepts of the common law for the area. My objective in this Essay is not to describe, critique, or respond to Epstein’s substantive defense of these doctrines, given our prior exchanges doing just that.³ It is instead to unbundle a few unstated but important assumptions about the connection between the common law and intellectual property that have formed a common theme in his writing on the topic, and which I argue, are worthy of serious and independent attention on their own.

To this end, my focus will be on two areas of common law intellectual property that Epstein has written about separately: hot news misappropriation (or the misappropriation doctrine), and cybertrespass. I choose these two areas not only because they represent Epstein’s most systematic treatment of the connection between common law and intellectual property, but also because his writing on the subject continues to influence debate around the doctrines. As I discuss further below, Epstein’s arguments in the two areas do indeed vary; yet they reveal four crucial structural ideas about common law intellectual property (and intellectual property more generally) that are insufficiently acknowledged.

Part I begins with a basic overview of the two common law intellectual property doctrines being discussed and focuses on Epstein’s writing thereon. Part II then unbundles four important lessons that are implicit in Epstein’s treatment of the doctrines, and extols their extension to other areas of intellectual property law.

2. EPSTEIN ON COMMON LAW INTELLECTUAL PROPERTY

“Common law intellectual property” refers to a set of mostly state law doctrines that employ common law ideas and principles to recognize variously tailored rights, privileges and

² The earliest scholarly use of the term is by Douglas Baird (Baird 1983). For an analytical account of the area and its many virtues, see Balganes (2010).

³ Epstein and I have debated and disagreed on various aspects of common law intellectual property and intellectual property law more generally. See Balganes (2009); Epstein (2010); Balganes (2011); Epstein (2011); Balganes (2012); Epstein (2012). In all fairness and despite appearances to the contrary, there is significant commonality in our overall approaches to the subject.

liabilities around different informational assets (Balganesh 2010). Almost entirely the creation of courts, these doctrines employ and adapt foundational ideas from the common law areas of tort, property, contract and unjust enrichment to new resources. Areas (or causes of action) that are routinely captured by this term include: trade secrets, misappropriation, idea protection, publicity rights, and common law copyright.

While each of these areas is operationally robust in itself, intellectual property thinking and scholarship has given little systematic thought to the functioning of these regimes and their structural virtues. Consequently, they continue to exist at the margins of the overall intellectual property system. A significant part of the criticism that is routinely leveled against common law intellectual property is structural, deriving from the belief that “courts are ill-equipped” to make the kinds of trade-offs needed to generate property-like interests in intangibles, and that regulatory intervention by a legislature remains a far more desirable avenue to attain the same result.⁴ Over the years, scholars and judges have continued to voice these concerns over common law intellectual property (see Baird 1983, pp. 415-23; Posner 2003, pp. 626-29); and while it has done little to dampen the working of existing regimes, it has nevertheless succeeded in attenuating the proliferation of new forms of common law intellectual property.

Of the various areas of common law intellectual property in existence today, hot news misappropriation and cybertrespass together offer an interesting study in contrast. Misappropriation was created by the Supreme Court as a matter of federal law prior to *Erie*, absorbed into state law over time, and resurrected in the last decade or so with the advent of new forms of information dissemination.⁵ While criticized by some for its overbreadth, it in many ways epitomizes the working of common law intellectual property and has continued to morph over time, in order to keep up with changing needs. Cybertrespass on the other hand was a fairly recent, and short-lived, common law intellectual property doctrine. Created to render certain kinds of internet-related behavior actionable, it eventually failed to find its footing in state common law. Courts eventually buried the doctrine and refused to embrace the judicial creativity needed to sustain its functioning.

Very interestingly, Epstein’s approach to both doctrines is similar—despite their divergent fates. It is this similarity that is worth unpacking further, since it showcases Epstein’s commitment to the working of the common law even in the face of a court’s unwillingness to embrace its law-making role in the common law.

2.1 Epstein on Misappropriation

The misappropriation doctrine was formulated by the U.S. Supreme Court in the celebrated case of *International News v. Associated Press*. As stipulated by the Court, the facts of the case

⁴ The quoted phrase originates in Justice Brandeis’s powerful dissent in the landmark Supreme Court case of *International New Service v. Associated Press* (248 U.S 215 [1918]).

⁵ For an account of the doctrine’s life-cycle, see Balganesh (2011, pp. 422-25).

involved two competing news-gathering collectives: the International News Service (INS) and the Associated Press (AP). Members of the INS were barred from the war-front during World War I, as a result of which they resorted to lifting the news from the printed newspapers of the AP's members. Despite efforts by the AP to prevent this through various methods, INS continued its practice, prompting AP to commence an action in equity seeking an injunction against INS (*INS*, 248 U.S. at 229).

In a well-crafted opinion for the majority, Justice Mahlon Pitney sided with AP. His logic was fairly novel: newsgatherers had a time-sensitive "quasi-property" right against direct competitors that allowed them to prevent the lifting (and copying) of the news that they had collected for such time as the news retained commercial (i.e., newsworthy) value (*INS*, 248 U.S. at 236). As he put it:

Regarding the news, therefore, as but the material out of which both parties are seeking to make profits at the same time and in the same field, we hardly can fail to recognize that for this purpose, and as between them, it must be regarded as *quasi* property, irrespective of the rights of either as against the public.

It was far from apparent from the factual record that the plaintiff had endured any financial hardship as a result of the defendant's copying. Accordingly, Justice Pitney framed his rationale for the holding in overtly moral terms, as sounding in "unfair competition" and premised on the logic that the defendant was reaping where it had not sown (*INS*, 248 U.S. at 235).

Justice Pitney's opinion was unquestionably creative. With no relevant precedent to apply, he relied on an amalgamation of principles drawn from different areas of the common law for his formulation: misrepresentation, passing off, property, unjust enrichment, and indeed the law of trusts. The creativity of his formulation sparked a powerfully worded dissent from Justice Brandeis, who saw in it a usurpation of the legislative prerogative to create property rights in intangibles. Noting that "[c]ourts are ill-equipped" to structure exclusive rights, the dissent admonished the majority's common law formulation for circumventing the established principle that intangibles were for the most part "free as the air to common use" (*INS*, 248 U.S. at 267).

According to Epstein, Justice Pitney got it just right. Describing him as the "most underrated Justice in the history of the Court," Epstein sees in the Court's majority opinion an effort to replicate the working of competitive customary norms within the news gathering industry (Epstein 1992, p. 92 n.20). Observing how industry norms prior to the case forbade newspapers from lifting each other's reporting, while nonetheless allowing for the use of such reporting as "tips", he argues that the majority opinion recognized the need to achieve a tradeoff between preserving the incentive needed to gather the news and the social value of its use and dissemination. Justice Pitney, in this reading, is seen as having approached the case in avowedly instrumental terms, attempting to engage in a "social utilitarian calculus" (Epstein 1992, p. 125).

In Epstein's reading of the case, the Court effectively replicated industry custom through its regime of quasi-property, but without expressly referencing such custom. Its objectives were clearly utilitarian. One might have therefore decided the case by either relying on industry custom and converting it into binding law, or by reliance on first principles (of natural law) that achieve

the same. While both are in a sense permitted by the common law, he is equivocal on which of the two is preferable (Epstein 1992, p. 125):

There is peril in both these courses of action. To use the social utilitarian calculus is a risky thing, and the failure to take into account certain relevant effects may lead to the adoption of the wrong legal rule. ... As a result, the relative desirability of the two methodologies depends upon the comparative magnitude of their imperfections.

A few things are noteworthy about Epstein's account of the case. First, regardless of whether the court had adopted a custom-driven approach or a direct cost-benefit analysis, Epstein sees it as having formulated a two-tiered property system. In this, Justice Pitney's reasoning is therefore seen as showing fidelity to standard common law concepts and ideas, albeit with important contextual modification. Second, Epstein underplays the obvious moral rhetoric in Justice Pitney's opinions. Courts since have acknowledged the seemingly moralistic tone underlying the "reaping without sowing" logic of the quasi-property formulation; yet Epstein acknowledges Pitney's use of the idea but instead of connecting it to desert and/or wrongdoing, treats it as a proposition about ex ante incentives (Epstein 1992, p. 115). Third, Epstein seemingly buries the question of institutional competence, which had so occupied Justice Brandeis in his dissent and which has since undermined Justice Pitney's magisterial formulation in the majority opinion. I use the word "seemingly" quite consciously because in his exegesis, Epstein implicitly acknowledges the need for the Court (and indeed the lower courts) to have developed a novel, situation-specific solution to the free-riding that was at issue in the case. Unlike some who worry that courts might be confused about choosing an appropriate analogy in the creation of a novel solution (see Baird 1983, pp. 428-29). Epstein is perfectly sanguine about letting courts work their way to the right solution and sees the *International News* case as an "enduring monument of the common law" (Epstein 1992, p. 115). I shall return to these points later.

2.2 Epstein on Cybertrespass

The genesis of the cybertrespass doctrine is quite different from that of misappropriation, given its emergence as a solution to a particular technological problem. The origins of cybertrespass are commonly traced back to the 2000 case of *eBay, Inc. v. Bidder's Edge LLC*, (100 F. Supp. 2d 1058 [N.D. Cal., 2000]) wherein eBay, the well-known auction website sought an injunction against a bid aggregator, Bidder's Edge (BE). BE had deployed electronic bots to collect information from various auction websites, thereby allowing consumers to avoid directly visiting auction websites. Aggrieved by this, eBay commenced an action alleging "trespass" by BE, among other claims. While recognizing the difficulties inherent in treating cyberspace as real property, the court nevertheless concluded that websites were more akin to land than chattels and issued an injunction treating the defendant's actions as an ongoing trespass.

Thus emerged the cybertrespass—or electronic trespass—doctrine. Premised on the idea that the internet is analogous to real space, it allowed individual ownership of internet space and thereupon recognized a regular trespassory (i.e., trespass to land) action against unauthorized interferences (Epstein 2003). The problem with the doctrine was of course the absence of clear

reasons why movable property (chattels) was not a more appropriate analogy for the development of the doctrine, a choice that had an important doctrinal consequence. Whereas trespass to land allowed a landowner to commence an action even without a showing of harm to the land, a successful claim of trespass to chattels necessitated either an ongoing dispossession or proof of actual harm to the physical chattel itself before any relief would ensue. This position, unique to American common law, had emerged in the early twentieth century and was directed at ensuring that minor interferences did not become the subject of civil liability (Balganesh 2006). The court in *eBay* recognized this difference, but did little to convincingly make the case for modeling cybertrespass on one rather than the other. Nevertheless, following *eBay* the doctrine began to develop, with a few courts around the country recognizing it as the basis for an independent action in internet cases.

Epstein played an important role in the *eBay* case, filing an amicus brief to help eBay with its arguments (Epstein 2003, p. 80). Shortly after the decision, he wrote a separate article making the case for a standalone cybertrespass doctrine, modeled more closely on real trespass law than trespass to chattels. In the article, Epstein this time—unlike with misappropriation—openly lauded the virtues of the common law method (Epstein 2003, p. 73):

The common thread in these writings is that the law takes a few steps in one direction or the other and then stops to reassess its progress. In so doing, the path that it takes from here to there may not be the most direct route available. Small incremental decisions make for irregular movements with lots of pitfalls. But in the long haul, sensible patterns emerge that can withstand both the test of history and the demands of reason. The common law method has hidden resources that are all too easily overlooked by scholars who start with some grand claim, such as the economic efficiency of the common law, only thereafter to force and flatten a somewhat fractious case law into this general framework.

To Epstein, cybertrespass as an independent claim made perfect logical sense, and real property was a more preferable analogy for the action since an internet site is “fixed” in nature. The normative rationale for cybertrespass was, in addition, the realization of a pareto efficient allocation of resources for use on the internet.

A few years later, this theory came to be tested by the California Supreme Court in the case of *Intel v. Hamidi* (71 P. 3d 296 [Cal. 2003]). The case presented an interesting set of facts, which are to be appreciated against the backdrop of the technology that existed at the time. The case involved a disgruntled former employee of Intel, Hamidi, who began sending Intel’s employees innumerable emails about the company’s employment practices and conditions. In today’s parlance, Hamidi’s actions would constitute “spamming,” yet at the time there existed no technologically feasible mechanism for a recipient to filter or block these emails. Intel tried various methods to block Hamidi’s messages, but each time Hamidi found a way around each of them. Frustrated by its inability to rely exclusively on self-help, Intel commenced an action for internet trespass against Hamidi. The matter made its way through the courts and eventually reached the California Supreme Court, which closely considered—and rejected—Intel’s trespass claim (*Hamidi*, 71 P.3d at 37-38).

Epstein authored an amicus brief in favor of Intel, advancing the same arguments that he had made in his previous academic writing and suggesting that cybertrespass be modeled on trespass to land rather than chattels, such that it disregard any proof of harm to the asset as a precondition for relief. In a strongly worded opinion for the majority, Chief Justice Werdegar rejected Intel's claim. Calling out Epstein's argument, she proceeded to note how it made little sense to treat websites like land, when they were closer to chattel; and trespass to chattels required a clear showing of harm to the resource for the intrusion to be actionable. Since Intel had failed to demonstrate any harm to its physical servers from Hamidi's emails, a fundamental pre-requisite of the action had not been satisfied. It is noteworthy that the court revealed a marked reluctance to be creative, in the way that Justice Pitney had been in *International News*. Even when presented with the argument that for websites, the law might be adapted to abandon its insistence on physical harm (since the whole idea of "physical" makes little sense on the internet), or that the action might be modeled on land, the court balked. Oversimplifying the argument, the majority noted (*Hamidi*, 71 P.3d at 48):

Since Intel does not claim Hamidi's electronically transmitted messages physically damaged its servers, it could not prove a trespass to land even were we to treat the computers as a type of real property. Some further extension of the conceit would be required, under which the electronic signals Hamidi sent would be recast as tangible intruders, perhaps as tiny messengers rushing through the "hallways" of Intel's computers and bursting out of employees' computers to read them Hamidi's missives. But such fictions promise more confusion than clarity in the law.

In essence, the opinion failed to appreciate that in choosing chattels over land, it too was predicating the action on a fiction of sorts. The contrast with Justice Pitney is stark. Whereas Justice Pitney felt liberated from a dogmatic application of the positive law to the facts, and produced an alternative framework in response, Justice Werdegar's opinion hides behind the cloak of positive law, refusing to acknowledge the malleability of common law principles and failing to fully address the normative bases for its decision. In the end, the court was indeed driven by the (plausible) concern that a full-blown property rights regime on the internet would do harm to internet communications, which it acknowledged only in passing.

Epstein has since been very critical of the Court's opinion and its unwillingness to grapple with the logic of the core common law rules at issue (Epstein 2005). In insisting that the court should have relaxed/abandoned its emphasis on physical harm for the internet, he notes how that rule emerged in the context of "live and let live" situations of reciprocal interaction, which was hardly the case with Hamidi's actions (Epstein 2005, p. 154). What is particularly noteworthy about Epstein's views on the doctrine, *Intel*, and its evolution is his implicit belief that a judicially-tailored solution is indeed the preferred approach.

3. EPSTEIN'S IMPLICIT ASSUMPTIONS

Woven into Epstein's account of common law intellectual property are several important assumptions about the common law, judicial lawmaking, the law's normative goals and related concerns. Given the elegance of his exposition, much of his argument remains persuasive even without these assumptions being individually defended. Nevertheless, unpacking them highlights additional strengths about the working of common law intellectual property that are all too often ignored. This Part identifies and describes four inter-related considerations lurking underneath Epstein's defense of the misappropriation and cybertrespass doctrines.

3.1 Common Law Intellectual Property as Private Law

Common law intellectual property highlights the role that the regime's private law framing plays in the working of the system. Drawn from the common law's need to decide the individual dispute at hand first before engaging in any broader social engineering, both misappropriation and cybertrespass rely on a framework of liability to simulate the working of property's exclusive rights framework. In so doing, they focus on the horizontal relationship between the plaintiff and defendant, a critical component of private law thinking. The plaintiff's rights, in other words, derive from the defendant's actions/wrongdoing despite having an independent analytical existence. (Balganesh 2012).

Interspersed right through Epstein's treatment of both misappropriation and cybertrespass is a core commitment to the private law foundation on which both doctrines are constructed. Despite arguing that the construction of each doctrine was driven by a social utilitarian impulse, Epstein remains willing to have that utilitarian calculus be refracted through the right-duty and liability framework of the common law action at issue. In other words, the horizontal, adjudicative framework of the area is hardly a contingent feature in his account. Instead, it frames the (property or "quasi-property") right at issue in a very particular way.

Consider in this light, Epstein's suggestion that Justice Pitney's framing of the misappropriation doctrine would have benefited from the creation of a clear "necessity" exception, which might have allowed the INS to continue its actions since it had been barred from sending reporters to the war front (Epstein 1992, p. 105). The necessity defense has long been known as an exception to absolute property rights, and understood as injecting a strong relational component into the working of property. In situations where considerations beyond the control of a defendant force/require the defendant to violate the plaintiff's property rights, it immunizes the defendant from liability for the infraction. Epstein appears to treat the banning of INS papers from the warfront by the British and French governments as amounting to an exogenous consideration that the court might have seen as justifying INS's infraction, and immunize it from liability. While it isn't readily apparent that such a commercial necessity is countenanced by the traditional necessity doctrine, originally developed for situations that imperiled life or limb, it nevertheless highlights Epstein's efforts to move the common law (of necessity) forward in this precise direction. In previous work, Epstein has himself been deeply complimentary of the necessity doctrine in property law, and argued that it serves to align property law with a Pareto superior distribution of rights by requiring repeat players in society to "relinquish" some aspect of their rights in return for a long term benefit (Epstein 1990). Necessity, to Epstein, is a core attribute of property's private

law foundations; one that the public law orientation of property could learn from.⁶ In so bringing a strong private law lens to bear on misappropriation, Epstein therefore sees in it the same foundational logic of the common law's other private law areas—which engage in a social utilitarian calculus *through* a private law structure.

The same is true of Epstein's ambitions for cybertrespass, which of course never took shape after the decision in *Intel*. Modeled on trespass to land, the conception of right that he advances in his writing is, in my reading, less about propertizing the internet (as some have argued⁷) and instead about identifying a private "wrong" that the defendant's actions in a case like *Intel* produce.

This of course necessitates asking the broader question, whether Epstein's implicit characterization of common law intellectual property as private law interjects additional values into its functioning. The most prominent of these is "corrective justice," an idea that legal philosophers have long associated with private law, and which Epstein has shown some sympathy towards in his early work.⁸ This is where I suspect Epstein will disagree with my characterization, but in his account of both misappropriation and cybertrespass one detects similarities with his identification of an underlying corrective justice basis in the *prima facie* case of nuisance.

I leave for later and elsewhere, the broader question of whether Epstein's private law account commits him to at least a thin version of corrective justice; but for now suffice it to say that the private law basis of common law intellectual property appears to be doing *some* work in his account. And this alone sets it quite apart from other instrumental accounts of common law (and statutory) intellectual property, which take the underlying normative structure of the institution as wholly contingent.

3.2 The Derivative Nature of Intellectual Property

With the growing specialization of different areas of law, it should come as no surprise that intellectual property law is today seen as a highly technical, specialized area of study on its own. Indeed, such is the degree of specialization that the various sub-fields of intellectual property: patent, copyright and trademark are themselves seen as separate fields. This proclivity towards specialization has only been exacerbated by the extensive amount of legislative and regulatory activity that the second half of the twentieth century has seen in the field, producing a tendency among courts and generalist scholars/lawyers to see intellectual property law as a highly technical field that requires an independent domain of expertise. Common law intellectual property calls this trend into question. The dominant scholarly trend in the field today resists acknowledging the

⁶ As he puts it (Epstein 1990, p. 8): "I would urge that the same model of intellectual development that takes place within private law should provide the proper mode of analysis for the public-law systems that come to supplement or replace the common law."

⁷ The cybertrespass doctrine was met with significant academic criticism from its very origins, most of which was based on the unintended consequences of creating full-blown ownership of intangibles on the internet. See Burk (2000); Hunter (2003); Lemley (2003).

⁸ Corrective justice theorists today draw their account of private law from Kant's philosophy. See Weinrib (2012); Weinrib (1995); Ripstein (2010). While some of Epstein's early work drew from corrective justice, it never directly associated the idea with Kant or his philosophy—while nevertheless adhering to conceptions of autonomy and liberty. See Epstein (1973); Epstein (1974); Epstein (1979); Epstein (1982).

derivative nature of intellectual property and its symbiotic relationship with other areas. Epstein's work on common law intellectual property actively celebrates the connection between traditional common law and intellectual property. Perhaps more so than even those scholars who acknowledge the existence of the connection, Epstein views misappropriation and cybertrespass as premised on a finite set of rather basic rules relating to the ownership and use of assets. In his discussion of misappropriation, for instance, he roots Justice Pitney's entire theory of quasi-property in a plausible account of ownership through first possession and the expenditure of labor, long-known to be a stand alone justification for property. Not only does he identify the connections between what the majority opinion did actually formulate and the common law, but he also notes plausible additional such overlaps that it might have fruitfully deployed.

It is worth noting that this feature of Epstein's work is hardly unique to common law intellectual property and has remained a recurring theme in much of his influential scholarship. His 1995 book *Simple Rules for a Complex World* focused entirely on the idea that many of society's most complex legal problems might find their solutions in five or six basic principles and rules—all of which, unsurprisingly, can be derived from the common law (Epstein 1995).

Acknowledging and identifying a basic interconnectedness between traditional common law principles and intellectual property is more than just about expository elegance. To the contrary, it promises intellectual property thinking tangible analytical benefits. It readily guards against the over-complexification of intellectual property. As a subject that interacts with technology, intellectual property law is prone to complexification which at once both demands specialized knowledge from actors and impedes rapid reform in the area. Identifying the core foundational rules underlying the area bucks both trends. Epstein's push for an ambitious cybertrespass doctrine is illustrative. Relying on ordinary trespass law, it would have allowed for a non-specialized solution to the problem of spam, and in the process involved generalist (state) court judges to build on their expertise in other domains to formulate new rules for the internet. It is worth noting that Epstein's regularly argues that much of modern (statutory and federal) intellectual property law can also be derived from basic common law ideas. Beyond injecting a good degree of simplicity into intellectual property debates, this way of thinking also guards against strong intellectual property exceptionalism, an impulse that Epstein—albeit unwittingly—shares with the current Supreme Court.⁹

3.3 The Merger of Instrumental and Non-Instrumental Concerns

Epstein self-identifies in his writing as an “instrumentalist,” by which I take him to suggest that he believes in the connection between law and social utilitarianism (Epstein 2012). All the same, there is a crucial respect in which Epstein's instrumentalism is very different from the standard law-and-economics literature on the common law. Whereas today's modern

⁹ An observable trend in recent Supreme Court patent and copyright cases appears to be the belief that these areas—technical as they may be—ought to adhere to the same set of background legal and equitable rules and principles in their operation. See *eBay, Inc. v. MercExchange LLC*, (547 U.S. 388 [2006]); *Petrella v. MGM, Inc.*, (134 S. Ct. 1962 [2014]).

instrumentalism exhibits an active hostility towards non-instrumental concerns and values, Epstein is not just sympathetic to them, but readily acknowledges a compatibility between his worldview and the non-instrumental one. Indeed, writing of his own work on tort law and responding to the criticism that his early work had once relied on “corrective justice” as an ideal, while later embracing instrumental thinking he noted (Epstein 2010, p. 3):

Contrary to the received wisdom, I think of corrective justice as operating properly within the larger framework of consequentialist thought. Accordingly, I defend it (at least today) chiefly because of the close correspondence between allowing private rights of action to particular persons and the overall advancement of social welfare. We (as in the royal “We”) allow an action for assault by the victim against the attacker, and we know that the transfer of wealth between these parties will have desirable incentive effects on the ex ante conduct of all parties. The judgment is largely categorical so that we can, for operational purposes, treat this as a hard edged rule. This approach has the desirable characteristic of allowing decisions in individual cases without forcing the lawyers and judges to recapitulate the arguments that show the positive alignment between private rights of action under a corrective justice theory and overall social welfare.

This observation is worth unpacking further. We see Epstein acknowledging a basic compatibility between corrective justice ideals (understood in principally deontological terms) and consequentialist/utilitarian considerations. The two have long been seen as both incompatible and incommensurable, and yet Epstein suggests that his formulation enables them to co-exist.¹⁰ Understanding how he theorizes this compatibility reveals that it emerges more from his method of analysis and reasoning than from any abstract solution to the incommensurability concern—much of which extends to his discussion of common law intellectual property.

The key lies in his observation that the “correspondence” of the two emerges from a “positive alignment” between corrective justice and social welfare. By the term positive, I understand him to be suggesting that the correspondence is descriptive, rather than normative. This is an important (and obvious) concession, but one that explains a lot. As scholars have shown, Epstein’s work blending corrective justice with utilitarian considerations partakes of a method of addressing the question of incommensurability known as “conceptual sequencing”.¹¹ It entails acknowledging the co-existence of instrumental and non-instrumental variables within a larger regime, but as either (a) operating in different parts and being allowed into the regime at different intervals, or (b) entailing one playing a descriptive role and the other normative, or vice-versa.

Epstein’s work can be seen as representing both approaches. In the above quoted observation, he is aligning himself with (b) and claiming that his work is descriptive of a corrective justice reality, which is normatively deployed towards consequential ends. Yet, in other work he

¹⁰ The incommensurability between efficiency-based utilitarian accounts and corrective justice driven deontological ones is the subject of a vast amount of academic literature. For a sample see: Chapman (2013); Chapman (2008); Sunstein (1993).

¹¹ The most well-developed account of conceptual sequencing in the legal literature is Chapman (2008). Chapman uses Epstein’s well-known nuisance law piece (Epstein 1979) as an exemplar of his theory.

employs the fundamentally defeasible structure of common law claims and doctrine to admit both instrumental and non-instrumental considerations into the functioning of a regime. We see the same approach at work in Epstein's treatment of common law intellectual property.

As noted previously, Justice Pitney's formulation of the misappropriation doctrine had clear moral overtones in it. His deployment of the phrase "reaping without sowing" as well as his focus on the wrongfulness of free-riding have caused some to claim that the opinion was motivated in some significant part by moral ideals. Even the Second Circuit, as recently as a few years ago, noted this ambiguity in the Court's opinion but chose to sideline it through the use of copyright preemption principles. While Epstein's account of the case does not deny the existence of this moral undercurrent in the opinion, it recasts the normative impulse of the decision in utilitarian terms. All the same, it recognizes that aspects of the Court's logic—especially its reliance on first possession and labor as justificatory bases for property rights—originate in non-utilitarian considerations. To the extent then, that non-utilitarian concerns are permitted into his analysis they partake of the descriptive/normative conceptual sequencing described earlier.

In his work on cybertrespass, we see Epstein sequencing the introduction of normative variables through the defeasible structure of the action. The underlying ownership interest (right) at issue is seen to emanate from—and be premised on—owner autonomy, whether it be land or chattel. From that basic model though, the contours of the claim begin to reveal strong utilitarian ideals, ranging from the efficient allocation of resources to the creation of a workable equilibrium of "live and let live" among repeat actors. In Epstein's own terms (from his analysis of nuisance law), the model appears to be a corrective justice driven entitlement/right that is shaped by strongly utilitarian constraints.

Epstein's willingness to acknowledge (and at times embrace) the existence of non-instrumental variables in his overall utilitarian calculus is an important lesson that all discussions of intellectual property law would do well to recognize. While utilitarian thinking is today the dominant approach to thinking about intellectual property, moral/deontological considerations are often underplayed and ignored, even within the interstices of the overall utilitarian framework out of fear that it will take the regime and its analysis in unfavorable directions. These accounts would do well to acknowledge the normative pluralism of the common law. In his account of cybertrespass, Epstein is thus critical of accounts that deny this reality, and in criticizing one of his colleagues notes that "[t]he common law method has hidden resources that are all too easily overlooked by scholars who start with some grand claim, such as the economic efficiency of the common law, only thereafter to force and flatten a somewhat fractious case law into this general framework" (Epstein 2003, p. 73).

3.4 Judicial Lawmaking

Endorsing the "common law method" involves acknowledging the well-known reality that the common law is judge-made law, and that judges occupy a central place in developing and adapting legal rules in an incremental manner over time—with or without guidance from the legislature. As noted previously, much of the modern discomfort with the common law originates in the belief that unelected judges lack the democratic legitimacy needed to engage in lawmaking, and that the ex post nature of their enterprise imbues the legal system with a degree of uncertainty

and unpredictability that is worthy of being avoided. To a large extent, this discomfort tracks the private law/public law divide, in so far as the common law is fundamentally composed of private law areas, while divided lawmaking and legislative activity is commonly treated as the subject of public law.

In recognizing the strengths of common law intellectual property, and at times its superiority over statutory intellectual property, Epstein must be seen as embracing the judicial role in intellectual property formulation. Indeed, Justice Brandeis's entire diatribe against the majority's opinion in *International News* was about institutional competence, and the perils of having courts engage in a social welfare analysis. Epstein notes the hypocrisy of the Brandeis dissent, given that Brandeis had prior to the case co-authored an important article on privacy law, which extolled the common law development of the area by courts.¹²

Judicial lawmaking has its obvious strengths—especially for intellectual property—a reality that Epstein's work on common law intellectual property readily reveals. *First*, it allows the law to proceed nimbly, given the unpredictable nature and speed of socio-technological change. The misappropriation doctrine is a good example. The developments that spawned the action came about rather suddenly, and Congress—after a period of consideration—had decided not to pass a statute creating property rights in news. For Congress to have considered an intermediate (i.e., unfair competition) option would have taken years given the sheer novelty of such an option, which would have produced a protracted debate;¹³ in contrast to the speed with which Justice Pitney's formulation went to work. *Second*, it allows for experimentation and change. Lawmaking in an area of rapid socio-technological change involves the recurring obsolescence of well-crafted rules and principles. Some rules will be unquestionably wrong and require rolling back, while others will require modification and updating over time. Judicial lawmaking offers intellectual property law an opportunity to experiment with different rules over time, learn from any mistakes, and eventually settle on a rule that works the best—in contrast with one-size-for-all legislative interventions that require complex workarounds. Epstein's ambitious cybertrespass model may or may not have worked to control all forms of unlawful interferences on the internet that we see today. Nevertheless, as we wait for the perfect legislative/regulatory response to a wider category, the system runs the risk of letting a variety of unclassified harms go without redress, letting the perfect become the enemy of the good. *Third*, and related to something before, judicial lawmaking allows judges—as generalists—to carry over important insights about the judicial process and legal system more generally, into intellectual property. To a degree (and here I am not sure Epstein

¹² As Epstein (1992, p. 116) observes: “The great irony is that Brandeis, whose seminal article on privacy celebrated the capacity of the common law to grow in response to new issues, was willing to dump the issue of the creation of property rights in news back into the lap of Congress, which had failed to pass such a statute a few years before INS was decided.” In prior work, Brandeis and a co-author had authored an influential article on privacy that extolled the common law method of rule development for the area. See Warren and Brandeis (1890).

¹³ Legislative reform of intellectual property has historically taken an extended period of time. The most recent overhaul to the Patent Act—the America Invents Act of 2011—was the result of nearly six years of debate in Congress. (Matal 2011). The last major reform of the Copyright Act, which resulted in the Copyright Act of 1976 took a whole 21 years to succeed (Litman 1987). Contrast this with the speed with which the *International News* case concluded: the original district court opinion was decided on March 29, 1917, the Second Circuit decided the first appeal on June 21, 1917, while Justice Pitney handed down his opinion for the Supreme Court on December 23, 1918. From start to finish—through three rounds—the case took well under two years.

will agree with me), it involves a good amount of faith in judicial craftsmanship and wisdom, as well as a belief in the ability of courts to address complex issues using the right set of tools and analogies. Some of the criticism of common law intellectual property has emanated from a concern with the ability of courts to choose appropriate common law analogies to use in their construction of doctrine, (see Baird 1983), I think Epstein would see this criticism as off-mark, given the ubiquity of analogical rule development in the common law; a task that courts have been required to develop and deploy for centuries now.

The emphasis on judicial lawmaking is of course strongest for common law intellectual property. Yet as a model, it carries over in significant degree to other forms of (statutory) intellectual property as well. There, the concern is about coordinating the roles of courts and legislators as lawmakers, and while courts should (and do) take a secondary position in the overall lawmaking equation, the same strengths of the common law process and method ought to be seen as worthy of application to what is a putatively interpretive exercise.

4. CONCLUSION

As a creative polymath, few areas of the law have escaped Richard Epstein's scrutiny. While each area has of course required its own set of nuanced arguments, Epstein's interventions have been routinely characterized by an emphasis on *simplicity* and *coherence*, values that may be traced back to the fundamentals of the common law, rooted as it is Roman law ideas and concepts. Intellectual property scholarship and jurisprudence have unfortunately proceeded in just the opposite direction over the last few decades, under the garb of technological complexity and the need for heightened expertise. Epstein's writing on common law intellectual property highlights the virtues of bucking this trend and recognizing the value in looking to the old when in the pursuit of the new. Legal scholarship and thinking would benefit from more Epsteinian thinking of this kind, grounded as it is in the fundamental "genius" that is the analytical structure of the common law.¹⁴

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¹⁴ The phrase "genius of the common law" is drawn from Sir Frederick Pollock's account of the common law. See Pollock (1912).

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