1992 draft by Wendy

OUTLINE
First draft 9/26

Filename OUTL9-26.wp2 Printed September 26, 1992

I. Rough overview

A. Goal of the article

B. Methodology to be used

C. Explicating the Gordon theory

D. Explicating the Lockean theory

E. Applying the theory to intellectual property problems

F. Conclusion

II. Goal of the article

A. To show that a rightly conceived natural rights theory of property would contain within it limits that provide some protection for free speech interests.

1. This is important because courts in recent years have refused to pay serious attention to the first amendment, or to the free speech policies that should be operating within intellectual property doctrine itself.

2. If the courts are giving short shrift to free speech because they think creators "deserve" complete exclusion rights, this project will show that creators' desert claims are much weaker than courts seem to think.

B. Breadth of the project: relationship to first amendment analysis

1. My project, if successful, ELIMINATES the NEED FOR the FIRST AMENDMENT IN SOME INSTANCES.

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A.A.L.S. SPEECH
WENDY GORDON

Marshall has also said I can speak as long as I want, so scream when you've had enough. He really did. Alright, I'll limit myself. Let me do this so I can _____. Sorry. The _____ speaker has been talking about _____ as a limit on intellectual property in the states and the first amendment as limits. I agree that both preemption and First Amendment sharply should be limiting on what should be going on in the states, but unfortunately the courts lately have not been agreeing with me quite as much as I would like them to. What I am going to do is give you two quick examples of the kind of thing I think should be preempted and/or barred by the first amendment. Both of them being things which most courts today would not consider to be barred. And then I'll sort of launch into what I'm doing which is the following given that preemption and the first amendment are not doing the job as well as they might. Are there any internal limits to what state intellectual property law should look like. That is, guidelines with the appropriate policies it should be pursued even if there aren't formal limits of the kind imposed by preemption in the first amendment. There's three different strands that I investigate. One the proviso of John Locke with the Lockian Labor Theory. Second, corrective justice in the _____ tradition. Somebody was talking about what

makes horse races earlier. I should say using the horse lingo probably by Aristotle out of Epstein. And the third on tradition to look for these internal limits is law of _____ within the commonlaw and well there is another thing also in tort law but today I promised to limit to just two things. The two things in the Virginia piece corrective justice and the restitutionary tradition within the commonlaw. Well the two examples I am going to give you which I will sort of keep referring back to. One is the Dow Jones(?) case and one is Dilution Law and/or State Commonlaw trademarks which is following the _____ approach to defining confusion. Let me take Dow Jones first. As you probably know the Chicago Board of Trade wanted to create a futures contract in the Dow Jones average. The Dow Jones Company sued on two different grounds. Copyrights trying to prohibit the Chicago Board of Trade from replicating the lists of stocks in the average and commonlaw in its appropriation within the state Court of Illinois. Unfortunately for correct application of the preemption doctor, the copyright judge said in his little footnote. Of course, the average itself isn't protected by copyright law and therefore I am not talking about Dow Jones _____ rights outside the list and the Illinois Court was more than happy to completely ignore the preemption issue completely. What you had is an injunction the use or reference

to the average under state law and in my view both preemption and the first amendment should have barred the case as far as preemption goes I see the Dow Jones average as a potentially derivative work from the admittedly copyrightable list of stocks. Now it may be a derivative work that is too minimal to be entitled to protection in fact I think it would be too minimal, but of course the house report and all the other legislative history tells us that the mere fact is that something is too minimal to be entitled to protection does not bar preemption. And besides we have that awful West case under which you might say that the average might even be a copyrightable derivative work, but that's another story entirely. In any event in my view the Dow Jones case should have been addressed under copyright principles and copyright principles alone. Obviously, that is not exactly what happened. As far as the first amendment goes it seems to me that the Dow Jones average is very much like a public figure. It should be able to be discussed, referenced and used even commercially because after all commercial speech is also protected by the first amendment. So in both grounds I think the Illinois Supreme Court was wrong when it said that the Dow Jones Company was freed to prohibit others from using its average particularly given when the Dow Jones Company was itself unwilling to do a licensing agreement or anything else which

would allow the average to be used _____ contract at all. So there was no competition potential or otherwise between Dow Jones and the people they thought to enjoin. Well that is story number one.

Story number two are suits to enjoin the nonconfusing use of trademarks symbols. Now in the federal side you see things like Boston Hockey (???) happening. That's a case where somebody manufactures team emblems for the people to sew on their children's jackets and that sort of thing. The teams sued under Federal Copyright excuse me Federal Trademark Protection and the response from the defendant's was hey we saved _____ on the labels. These symbols are produced by us, not authorized by, not sponsored by the teams there's no confusion at all. The response from the fifth circuit was to twist the confusion requirement of the _____ to basically read it out of existence. And there was an injunction against the sale of these pure emblems. the trademark as product. that kind of view of the confusion requirement also sometimes shows up in state cases where preemption can play a role. And _____ the state dilution cases don't even pretend sometimes anyway to talk about infusion. So there you have a misappropriation of a symbol. It seems to me clearly although you say clearly when you don't have a whole lot of support. It seems to me that clearly any symbol

that is reduced to a tangible medium of expression is governed by the copyright law and it should be exclusively governed by the copyright law except when you have an element which is truly different in _____ in the cause of action. So where there is confusion I could see legislation or State common law saying thou shall not confuse people through the use of symbols just the same way you are not suppose to _____ people through the use of words but Boston Hockey and the _____ kinds of trademark cases don't hinge on confusion. They hinge on mere copying and appropriation of good will. That's what in part copyright is about and you shouldn't be giving perpetual copyright protection when you have a copyright statute that is both nonperpetual and purports to be preemptive. There's also a first amendment dimension when you use a symbol as the object, but that's I think a lot _____ argue given the trademark cases and the rest so I won't even . . . If I am talking about the _____ trademark cases so that I think is totally lost on my part. Okay so those are the two sort of fact patterns to have in mind. the misappropriation suit the Dow Jones One to prevent the noncompetitive use or reference to its average in a futures contract and the many delusion cases and nonconfusing use of trademark case on the state side which are given protection in symbols regardless of whether the use of the symbol by defendant

creates confusion in the purchaser's mind as to source or sponsorship. so I indicated that I think those cases are wrong under what I believe should be settled principles of positive law but so far I'm losing so I'm looking then for internal limits which might make those cases come out in a way that I think is more appropriate. Also looking for _____ the internal limits and structures of the misappropriation doctrine _____. Just because it is interesting, and its vague it'd be interesting to find out if it makes any sense. So what I'm talking about today as I mentioned will be two strands of for explaining and that is justifying and that is providing a guide to the limitation of intellectual property in the most general sense. The first will be corrective justice the second commonlaw restitution. What a minute. They gave me permission to go on a long time, but not to lose things. Actually it hasn't been that long right? Okay. Alright, now let me do the corrective justice bit first because it sort of works as an introduction to the reasons why I find the commonlaw interesting. Corrective justice is a term of course originated by Aristotle to describe in particular kind of justice in relation. It was justice in transactions following Ernest _____ analysis here. Roughly speaking it was if you hurt me and benefit yourself thereby. You've upset the prior balance between us. I've lost something.

You've gained something. You're in fact twice as different from me than we were before. Because not only have you gained X amount I've lost X amount. Now there's a two X difference between us. Corrective justice mandates that you give me back the same that you took from me that benefited you. You correct the imbalance induced by the wrongful act. Within Aristotle there's no guide to what is or is not "wrongful". So it was not really a _____ of principle of what should be or shouldn't be just. It just told you how to react if there was a wrongful act. Then along came Richard Epstein, well a few things happened in between. Anyway, along comes Richard Epstein who is probably the most well known exponent of a _____ diversion of corrective justice. I'll take Richard in his strict liability toward _____ which of course he changed his views on this a bit several times. His basic argument is your status co-holdings are protected by the law. If somebody harms them by force or fraud or other acts of means. He has violated your entitlements. Therefore should have to pay you for this. Well as a correlative one might argue as far as our area is concerned. When someone takes a benefit from you that is he makes a million copies of something that you put a lot of sweat into creating and sells them. Well, if he takes a benefit from you he should pay you. Again, a sort of corrective justice restore the prior balance

notion with any violation of prior status co-holdings being considered presumedly wrongful. Now there is a lot of problems with that. Two of which I should mention. First is that there is no good reason for assuming that all of our status co-holdings are protected by rights. To use _____ language a lot of our status co-holdings are protected by mere privileges. That means the state is not going to take it away from us, but the state is not going to intervene to protect us if somebody else grabs it. Lots and lots of the things we have are sort of morally arbitrary things we just happened to luck into the law is not going to intervene to take it away from us, but on the other hand we are not entitled in some sense to every benefit that we happen to have at the very moment. And the use of a status quo notion to provide the definition of entitlement is therefore flawed. Secondly, corrective justice as _____ points out involves a doer and a sufferer. You know, you hurt me, so that the defendant is always an active party in the _____ justice _____ and the plaintiff is always a passive party. Which of course sounds pretty much to the normal torts case when somebody runs a pedestrian over. In intellectual property however the plaintiff is not merely a passive party. The plaintiff is someone who usually has chosen to put their intellectual property into the stream of commerce. To use the

Banita Boat's example. They embedded their boat _____ design in a boat and sold it and to some extent they were exposing themselves to the uses of other persons hoping to get a benefit from it from selling the boat. Without _____ risks that might come along with it such as the boat _____ being copied. So you have these two problems with the pure incorrective justice _____ among others. The first being how do you define entitlements and wrongful act if you are not satisfied as Epstein sometimes is with the protection of the status quo as defining their entitlements. And second, how do you deal with the doer/sufferer angle given the intellectual property the plaintiff is not just some passive victim. But rather someone who is chosen a complex series of activities to get a certain king of _____ from the public. Knowingly himself or herself to the risk of copying. In that kind of context it seems to me pure corrective justice does not work, and at that point you search for first a definition of entitlements, but whether or not we have entitlements in our own labor, the work of our minds for example is much disputed. Somebody like Locke would say yes we do provided that our assertion of the entitlement causes no harm to anyone else, but someone like _____ would say no we don't because none of us are entitled to the genetic endowments we happened to have. If you happened to be born a genius and you

happened to be born energetic those are things you are not morally entitled to and we all should have some sort of share in each others abilities. So given that pure philosophy at the moment doesn't seem to reveal a very clear answer to what you are entitled to or not. Search for another source of entitlement _____ and behold the commonlaw was sitting there to be examined. Now, the basic commonlaw approach to labor seems to be that no one was entitled to take your labor from you by compelling you at least not since slavery was repealed, but the commonlaw was much less willing to embrace a principle that says if you voluntarily labor and somebody benefits you should be able to get payment from them when you've neglected to get a contractual promise from them in the first instance. The area of law which deals with this is the restitution branch notice even to _____ or volunteer doctor. That is, somebody comes along does something beneficial for you. They paint your house or they give you access to some creative work you've done. You benefit. You have now a painted house or you've got a work which you have started to copy. Then this person demands payment. Pay me for the house paint even though I didn't check with you in advance before I painted. Pay me for the copies you've made. Even though you and I have never contractually entered to any kind of agreement which would obligate you to pay. Or obviously

where I am getting at is that it might be useful to look at the commonlaw treatment on the restitution cases to give us a little guidance on perhaps when the court should say yes to a creator's demand for payment from someone with whom he hasn't contractually dealt. The restitution cases therefore might give us a little hint to how a strong entitlement we should have in the products of our labor which we've already voluntarily invested our labor in. It's not a case of compelled labor but there might be a qualified entitlement. The restitution cases are also useful in another way because of doer/sufferer component of corrective justice. That is, in restitution cases sometimes the person suing for payment is someone who has . . . wait that is not the best way to describe it. Let me do it this way. The _____ pair in a restitution _____ and volunteer cases involve an active defendant and a very passive plaintiff. That is the defendant comes up and paints the house and then demands payment. So first defendant does something then excuse me, plaintiff does something and then plaintiff demands payment. Excuse me I got my parties mixed. So you have a situation there where you have active plaintiffs as you do in intellectual property law. And unlike the tort context if those active plaintiffs who sort of progress to had in _____ benefits on other people without contract are sometimes allowed to be paid for and sometimes

aren't may be the way the courts are _____ those cases might again give us some suggestion for how _____ property plaintiffs who are also active should be able to prevail or not to prevail. So on both of these issues, the sorts of entitlements and the doer/sufferer relationship the restitution cases might provide some _____. Now, I should mention that this is not only presented as an alternative to preemption it will in the end I think also back up the Ralph Brown approach to preemption _____ broad _____ approach because what I am going to be suggesting is that some of the principles that I'll be discussing even though they are drawn commonlaw cases are when applied to intellectual property. They need a kind of national approach and a kind of advance specification that congress can provide much better than anybody else can. So it may be that you _____ my argument that restitution provides useful principles for intellectual property law that not only might be used to encourage a state court to use those guidelines but it might also encourage a preemption analysis to say well if this is what intellectual property should look like and if part of it involves national fact finding of a particular kind of congress is best able to do. Perhaps we should be a little more reluctant to give broad state rights. Let me go into then a little more briefly than I would imagine because it is getting a

long here. Let me go into the principles that I think the restitution suggest relevant. Most broadly they seemed to suggest three things matter. But then I'll _____ a little more narrowly. None of them will be very surprising to anybody in the room. The first is concerned with autonomy. Particularly the passive plaintiffs not excuse me passive defendants not get stuck with having other people's decisions about how they should spend their own money govern their own lives. Like the case of the person who comes home from the vacation finds his house painted. The court makes him pay for this even though he has not agreed. How is he going to handle his budget for the rest of the items. So first you have this concern with autonomy. Second you have a concern with incentives which shouldn't surprise anyone coming from me or anyway. Third, you have a concern with not imposing a net harm on the defendant. A lot of the times when restitution is denied it's because it is hard to tell how much the defendant was really benefited by this thing confirmed on him or her. In addition it can be very difficult to tell whether that benefited defendant would have purchased the thing. Even if you benefited even if you liked the beautiful thing that you see you can't afford to buy everything that you would like to purchase and you can't afford all the things that might benefit you.