GEORGETOWN UNIVERSITY LAW CENTER

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Dear Wendy:

Thanks for sending me your piece on intellectual property and the restitutionary impulse. As always with your work, I found it fascinating. I'm happy to give you my comments, but I doubt that they will be very useful to you. This is an area I know nothing about, so many of my problems reflect my lack of understanding, rather than any defects in your arguments. With that caveat, and for what it is worth, here are some reactions (many of which, as you will see, are quite trivial):

P4. Do you mean at most, merely a policy? As I remember it, Dworkin puts principles at the top of his hierarchy -- they can be outweighed only by other principles. If the appropriative claim were more than a principle, what would it be?

P8. This is a matter of taste, but your comments on the relation between the growth of protection for intellectual property and the decline of our manufacturing infrastructure are a bit too speculative for me. Also, assuming that you are right about this, the last paragraph doesn't seem to me to refute the argument. Whether or not foreign governments protect American authors, it will be in our interests to provide such protection if our main competitive advantage is in the area of intellectual property and if domestic protection encourages the development of more intellectual property.

P11. Aren't you attacking a strawman when you argue that there must be some limitations put on the restitutionary impulse? As you point out earlier in the paper, our society simply could not survive if all free riding were stopped. No one is proposing that. Thus, the statement that some benefits must be allowed to flow without courts ordering recapture is entirely uncontroversial. The controversial question is which benefits.

pp12-13. I'm unclear as to the distinction you are drawing here. You say that you are approaching the problem from the vantage point of restitution, rather than e.g. Lockean labor theory, corrective justice, etc. But isn't the law of restitution based

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upon some underlying notion such as Lockean labor theory, corrective justice, etc.?

P13. You seem to embrace a kind of positivism here that I find troubling. You say that it is reasonable that the common law has produced results that are acceptable to society. But your very complaint is that the common law of intellectual property is changing. If the common law necessarily reflects what is best, what do you have to complain about?

Pp 18-19. I don't quite grasp the distinction between restitution as a remedy and restitution as an independent cause of action. In the first class of cases, isn't the tort action implicitly premised on the belief that the tortfeasor has unjustly enriched herself at the plaintiff's expense? In the second class of cases, isn't restitution premised on the implicit assumption that some underlying substantive right has been violated (e.g., the right to be paid for one's work when the other party benefits from it and there is a market failure).

Pp 20-21. This strikes me as completely circular. The extent of the risk the benefit-generator takes concerning capture of the benefit depends upon the legal regime. So it won't do to say that the legal regime ought to be determined by whether the benefit-generator knowingly took a risk.

P.25. Here and elsewhere, I don't really understand the arguments from autonomy. Why aren't autonomy claims precisely reciprocal in every case? The homeowner has an autonomy interest in deciding whether or not to paint his home. The painter has an autonomy interest painting the home. I don't see how you can choose between these two interests without some underlying normative theory that is not related to simple autonomy. As you point out later, the main thing that seems to be going on here is a preference for markets -- where the homeowner and painter are in a position to negotiate with each other, we want to force them to do that because they are most capable of determining the value to them of the labor and paint job. Where they are not in a position to negotiate (e.g., the unconscious accident victim treated by the doctor) we want a legal regime that permits prices to be set administratively (through an action for restitution).

Pp26-27. Again, the autonomy argument seems beside the point. Harriet has an autonomy interest in writing her book and being compensated for it. Peter has an autonomy interest in using the book and not paying compensation for it. Without some independent theory, there is no way to choose between these claims.

Also, making the result turn on whether Peter knows about Harriet's interest again introduces circularity: He will know if there is a legal regime that protects Harriet's interest.

Pp27. Isn't the problem here not that things cannot be unlearned, but that we can't avoid learning them in the first place -- or at least that we can't avoid learning them at a reasonable social cost? Surely things would not be better if people were on notice in advance that they would have to pay for all the benefit they received from every book that they read and, so, avoided reading any books.

P30. I'm not sure I understand how the benefactor can make private arrangements for payment if the recipient can simply appropriate the benefit without payment.

Pp30-31. This discussion might benefit from some examples. As phrased in abstract form, I'm not sure I understand it. How is the beneficiary <u>ever</u> harmed if he is merely ordered to give back the benefit that he gained?

P32. I think you mean "if it would cause more harm than it avoided."

Pp35-36. Doesn't this ignore the possibility of avoiding future harm through deterrence?

P36. For reasons outlined above, I don't follow the distinction between independent and restitutionary causes of action.

P37. This is really the same point: I don't see how the appropriative principle <u>can</u> stand alone. It must (it seems to me) be parasitic on some prior determination that the thing being appropriated <u>belongs</u> to the plaintiff -- that is, that the plaintiff has a property interest in the thing being appropriated. And once that is recognized, then the "harm" that comes from the appropriation may simply be the inability to assert sovereignty over one's property.

P 38. I don't agree that the justification for markets rests on autonomy, but explaining why would be a long story.

P 47. I'm not sure I understand why the accident victim hypothetical is different. You say that the nonknowing receipt of benefits in this case leads to restitution because there can be little doubt that the assistance provided a net benefit. But then, why not grant a right of restitution for the unknowing use

of intellectual products in those cases where there can be little doubt that they provide a net benefit?

P49. This argument ignores the moral claim of a creator to control the product of his labor in circumstances where he makes a conscious decision not to enter a particular market. Consider, for example, the claim of a scientist who develops some new process that he does not want used to manufacture weapons or of the film maker who does not want his black and white film colorized. Maybe the claims of these people ought to be rejected, but they have some intuitive appeal, and it seems to me that you need some argument for why they ought to be rejected. Also, what about the person who is not presently in a market but is undecided about whether to enter the market in the future?

P53. There is some confusion here about whether you are talking about individual plaintiffs, or the class of plaintiffs. I take it that even if an individual plaintiff never makes insubstantial use of another's work, and so gains no reciprocal benefit, you would still have an insubstantial use doctrine because of the benefit to the class of plaintiffs. But once the point is reformulated this way, then doesn't it reduce itself to the standard utility-maximizing argument -- i.e., we want the legal regime that in the aggregate creates the most creative product without regard for the "fairness" of individual wealth distribution?

P66. The trouble with this argument is that you treat "duty" -- and the incentives that it creates -- as an all or nothing proposition. But it isn't. It may be that the penalty for failing to do one's "duty" does not yield the optimal incentive to do the work, and that the addition of a right of restitution would.

p 67. From the point of view of autonomy, I don't see how your conclusions follow. Suppose the creator wanted to give the work away, but only to certain people or for certain purposes?

P.68. There's a book I just read called "Legal Secrets" by Kim Scheppele that does a real number on Kronman's thesis.

P69. Your "overhearing" example seems off point. The reason this is not protected is not because it is not deliberate (information from deliberate eavesdropping, I take it would also not be protected) but because it is not creative.

P 69. All this talk about encouraging markets seems in tension with some of the things you say at the end. I understand that you are not advocating the cause of action you describe here in part for this reason. Nonetheless, the description of it begs questions about people who want to create work but are uninterested in markets. Why don't these people have an especially strong moral claim to control their work for the very reason that they have no desire to subject it to markets. Suppose, for example, a person writes an anonymous novel and distributes it to a small group of people. There is no means by which the owner can be located, so it fails your demarcation requirement. But the owner isn't interested in being located because he doesn't want the work more widely distributed and, therefore, doesn't want to sell the work to anyone. Doesn't a person like this have an especially strong claim if the work is then appropriated and widely distributed?

P. 95. Perhaps this is a trivial point, but you've put to one side the situation where a person will not create value if she knows that she cannot control how it is used. The pacifist scientist example comes to mind again.

P. 96. True, West didn't care which paragraph appeared on which page. But why is this the test? It surely deliberately created a page numbering system. On the contractual duty point, when West entered the contract, it presumably took into account its ability to market its page numbers to other users. If it had known that it could not gain this benefit, it might not have been worth doing the work at the contract price offered.

P. 97. I don't see how Mead Data curtails democracy's access to its own law. At most, it curtails our access to West's page numbering system, but Lexis is free to reproduce the content of the decisions. With regard to the page numbering system, I would have thought that allowing West to internalize the benefits produced by its system would produce the right incentives to produce the system. Perhaps you are right that "law" or "access to law" should not be subject to markets. But if this is true, then the problem came when the state chose to privatize its reporting system, rather than publishing the law itself. If the law is a good that ought to be held by the public, then the state should have its own numbering system. If, instead, the state decides to "sell" the law to West, then it would seem to follow from this that West should be allowed to internalize the benefits it realizes from its publication efforts.

P 98. Another sort of argument is that subjecting things to markets changes the nature of the thing itself. There is a difference between love and prostitution. I take it that this is Marx's point about commodification.

P99. Something seems seriously amiss here. You are waxing poetical about Mozart and Galileo. But for God sake, we are talking about a page numbering system! Why can't that be owned?

Pp99-100. I am sympathetic to the notion that certain things should be kept out of markets. But if that is true, shouldn't it apply to the copier as well as to the creator? Mead Data wanted to sell Lexis to people, and part of the value of what it wanted to sell derived from the West page numbering system. Shouldn't the copier be precluded from profiting from market transactions to the extent that the value of the new good is attributable to use of the non-ownable resource?

P 103. Isn't there a problem with destroying the incentive people have to make something a standard. There are advantages to having something that is standard. Your test creates perverse incentives, since the creator loses the appropriative right once it has succeeded in making the creation standard.

P104. If you haven't done so already, you might look at Justice Scalia's opinion in Nollan, where, in the context of real property, he distinguished Monsanto and applied an unconstitutional condition analysis. The Court does not suggest that there was a difference between regular property and intellectual property. Rather, Nollan treats Monsanto as a case involving failure to confer a benefit, and Nollan as a case of inflicting a burden.

P 109. Perhaps this criticism is unfair, but when I got to your conclusion, I was unsure whether you had really done what you set out to do. You say in your conclusion that you have critically examined the moral claim of a creator to the benefits produced by his work. Have you really done that? There are two sorts of arguments that are in conflict here -- a utilitarian argument about maximizing resources and a neo-Kantian argument about ownership and autonomy. It seems to me that most of what you end up doing is showing that neo-Kantian results can't be justified on utilitarian grounds. To which the neo-Kantian replies, of course not -- that's why we're not utilitarians. In order to persuade the neo-Kantian, you either must develop an internal critique (showing that a right to restitution does not really serve to vindicate neo-Kantian rights) or you must engage in some sort of metaethical inquiry (demonstrating that we should all be

utilitarians rather than neo-Kantians). I'm not sure that you have done either of these things.

I guess that's all. As I said at the beginning, I am virtually certain that many of these comments reflect my own lack of understanding, rather than flaws in your argument. Also, I would not want them to obscure my very favorable reaction to the piece. This is obviously an important project that you are working on (I take it a book eventually?) and you are making terrific progress on it. I'm envious.

I'm looking forward to seeing you when you come to Georgetown. Now that you've got me interested in all this, you have a moral obligation to straighten me out about it.

Thanks again for letting me look at your draft.

Regards,

P.S. I'm sending the reprints you requested under separate cover.