FOREWORD

WHY INTERGENERATIONAL EQUITY

SHUBHA GHOSH*

On November 12–13, 2010, the *Wisconsin Law Review* hosted a symposium on the topic of "Intergenerational Equity and Intellectual Property." The following articles are some of the presentations made by leading scholars working in the field of intellectual property. As an organizer of the Symposium, I present here some thoughts to provide context for the Symposium and following papers.

My goal in organizing the Symposium reflects my broader professional work in intellectual property and specifically an interest in developing a richer language with which to address the normative goals of intellectual property policy. At the surface, intellectual property law promotes progress, incentivizes invention and creation, supports innovation, leads to economic growth and development, and enriches the public domain. Depending on whom you ask, copyright, patent, trade secret, trademark, and related doctrines aid in reaching one or more of these goals. What these goals have in common is some notion of the future. Certainly all law aims to make a better world, but intellectual property has as its objective the dissemination of new products, ideas, services, and technologies that serve present and future generations. With concepts of prior art and public domain, intellectual property serves as a bridge between past and present with the artifacts of the present as tools for the future. With such bold claims, advocates of intellectual property reform in many countries move forward in promoting legal regimes that serve these noble visions. But with all this promise, one is left wondering: what does it mean? What is the future? This Symposium is an attempt to address these questions through the concept of intergenerational equity.

The term "intergenerational equity" is a loaded one, perhaps as vague as references to "progress" or the "future." Equity itself is a controversial word. Equity on what basis? Fairness to whom? To modify the word with intergenerational perhaps narrows its scope but

* Vilas Research Fellow, Professor of Law, Associate Director, Initiatives for Studies in Transformational Entrepreneurship, University of Wisconsin Law School. The author would like to thank the editors of *Wisconsin Law Review*, Pam Hollenhorst of the Institute for Legal Studies, Anne Miner of Insite, and the Kauffman Foundation for their support in making this Symposium possible.

also adds even more controversy. A generation is defined as a period of time over which mores and attitudes are set. It is distinct from other measures of time such as age or cohort. Intergenerational refers to relations across generations and suggests either generations that overlap or those that succeed each other. The term intergenerational equity captures succinctly those obligations across time that intellectual property law attempts to capture and institute. The term frames more precisely, one hopes, the more obscure notions of progress and future that undergird intellectual property policy.

To frame this Symposium, I address two issues in this Introduction. The first issue is the need for some notion of equity as a normative criterion for intellectual property policy. The second is the need to understand equity in intergenerational terms. My goal is to clarify the meaning of intergenerational equity, to explain its potential power, and to raise awareness of its limitations.

I. THE "REVERSE PRECAUTIONARY PRINCIPLE" IN INTELLECTUAL PROPERTY POLICY

Policy makers in the fields of health-and-safety and environmental laws refer to the precautionary principle, which implies that any harm to persons from a new product warrants regulation.[1] The problem with the precautionary principle is that it leads to overregulation and immoderate response to perceived risks. I propose that intellectual property policy is subject to its cousin the "reverse precautionary principle," the view that any benefit from a new product warrants the creation of an intellectual property right that permits the appropriation of that benefit by someone in a position to commercially exploit that benefit. As evidence for this reverse precautionary principle, I point to the creation of new intellectual property rights in the past fifteen years as well as the expansion of existing rights. The appeal of the reverse precautionary principle is in part psychological and in part cultural. New things ought to be encouraged, and optimism, sometimes inflated, supports the appeal of the new. Solutions to current problems require new viewpoints and solutions. Furthermore, the exploitation of new ventures requires property rights for their dissemination and exploitation. This principle does not welcome the new simply for its own sake, but as a result of faith in progress and the modern. Like the precautionary principle, its cousin leads to too many laws and too many regulations, but of the intellectual property variety.

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1. *See* Cass Sunstein, *Irreversible and Catastrophic*, 91 CORNELL L. REV. 841, 846 (2006) (defining the precautionary principle and identifying variants).

The reverse precautionary principle is reflected in traditional policy debates. Normative foundations for intellectual property typically take two forms, one grounded in utilitarianism and one grounded in personality or moral-rights theories.[2] Utilitarian theories focus on the benefits of invention and creation and support intellectual property rights that balance the interests of innovators with those of users. Personality or moral-rights theories focus on inventions and creations as embodiments of their creators' personalities. Under this second normative framework, intellectual property law serves to protect the dignity interests of authors as embodied in their work in order to promote an authentic public realm in which such works can circulate and serve their communicative and informative functions. Both of these normative foundations can lead to the reverse precautionary principle because each spring from a common belief in progress and newness. Each normative foundation, despite their different emphases, falls under a broader category of consequentialism, which assesses the desirability of policy based on its consequences.[3] For utilitarianism, the consequences are the benefits and costs of intellectual property rights. For moral-rights theories, the consequences are the effects of intellectual property rights on the dignity of the creator or inventor. Both normative foundations, often presented as a dichotomy, share a consequentialist outlook that is biased towards the recognition of strong intellectual property rights.

My goal is not to argue against consequentialism. I take for granted that consequences are important for legal policy. But if one accepts the binary terms of traditional intellectual policy debates as just two strands of a more overarching framework of consequentialism, then one might accept the notion that perhaps we need to understand consequences more broadly in our assessment of intellectual property policy. This case for a broader assessment of consequences is strengthened by the reverse precautionary principle. Utilitarianism focuses on the uses of the work in promoting progress; moral rights, on the effect on the creator's dignity as embodied in the work. But what is it about a consequentialist approach that makes the effect of intellectual property rights on access the primary concern? Or a consequentialist approach that turns policy makers' attentions to the effect on certain groups in society—the underprivileged, the sick, the destitute? A utilitarian or moral-rights theorist might argue that these concerns are

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2. *See, e.g.*, Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 337–44 (1988) (comparing utilitarian and natural, or moral, rights justifications for intellectual property).

3. *See* AMARTYA SEN, THE IDEA OF JUSTICE 20–21 (2009) (discussing consequentialism).

extraneous to intellectual property or can be accommodated through fair use or other doctrines. But this conclusion assumes that intellectual property law is concerned with some consequences and not others. My point is that a consequentialist approach to intellectual property needs to consider what consequences should be considered, and that question requires us to assess what we mean by progress, the future, and the new.

There is a strong temptation to assess these last three terms solely in terms of wealth maximization, ignoring questions of equity and distribution.[4] But to think solely in terms of wealth maximization adds little to our understanding of what type of progress or future is desirable. By definition, having new products increases wealth, and addressing adverse consequences from innovation is often left to other areas of the law that address health and safety. The reverse precautionary principle derives from the view that innovation necessarily adds to wealth and so should be encouraged. Instead, the structure of intellectual property rights needs to reflect concerns other than wealth because a focus solely on wealth maximization invariably leads to a proliferation of intellectual property rights. Wealth maximization is a blunt tool that offers little guidance to structuring intellectual property rights other than more is better.

Consequences matter for intellectual property rights, but the consequences go beyond the utility of rights, the dignity of creators, or the maximization of wealth. Each alone, or in combination, offers little guidance for intellectual property policy. Instead the choice of intellectual property rules requires choices about how the rewards from an intellectual property regime should be distributed among the various constituencies of creators and users. Understanding this choice necessarily requires a vocabulary through which to understand issues of equity. Equity can be understood in many ways. There are choices about labor; there are choices about industries; there are choices about consumers. Intellectual property policy is much richer than we imagined. One way to develop the language of equity as a guide for policy is through intergenerational terms, which I turn to in the next Part.

4. Stewart E. Sterk, *Intellectualizing Property: The Tenuous Connections Between Land and Copyright*, 83 WASH. U. L.Q. 417, 422–25 (2005) (comparing wealth-maximization justifications for intellectual property with other normative frameworks).

II. GENERATIONS OF FLESH AND OF IMAGINATION

The term intergenerational encompasses two concepts, one that I will refer to as synchronic and the other as diachronic. Synchronic refers to different generations co-existing at one point in time when intellectual property policy is made. Diachronic refers to different generations across different periods of time. One key difference between these two different uses of the word intergenerational is that diachronic consists of generations that may yet to be in existence as well as generations that have passed on. The two concepts are distinct and serve to highlight the different functions of the term intergenerational in helping us to understand the goals of equity.

The word "generation" has many meanings.[5] One is biological to refer to the average length of time between a mother's first offspring to her daughter's first offspring. One is anthropological to refer to a line of descent. One is technological to refer to a version of an invention. I use the word generation in a cultural sense to refer to a group of people alive at some historical moment such as World War II, the introduction of the Pill, 9/11, or the 2008 financial meltdown. This definition is made popular by Tom Brokaw[6] and reflects technological realities as well as other social and economic milestones. This notion of generation can also reflect biological realities, such as death and sickness, events affected by technological developments such as pharmaceuticals and medical devices. The term generation captures, in my mind, a rich array of meanings that implicate the various dimensions of intellectual property law from branded products to copyrighted music to biotechnology patents.

To think of equity in terms of generation requires recognizing both the co-existence of generations, called synchronic above, and the existence of future generations, called diachronic above. Recognizing the co-existence of generations highlights the diversity of viewpoints, experiences, and interests that intellectual property law touches. Constructing intellectual property rules that allow co-existing generations to communicate and build with the awareness of both shared experiences, historic continuity, and lifetime goals and ambitions reflects an interest convergence on which legal reform can be built.[7] Different generations have in common the roles of users and

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5. For a popular definition, see *Generation*, WIKIPEDIA, http://en.wikipedia.org/wiki/Generation (last modified Jan. 16, 2011, 10:05 PM).

6. *See* TOM BROKAW, THE GREATEST GENERATION (1998).

7. For an analysis of the concept of "interest convergence," see Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980). For a discussion in the context of intergenerational equity,

consumers, educators and students, creators and readers. Although I do not want to paint too harmonious a picture of the battles over intellectual property law and policy, the interests that generations share may provide a basis for compromise in specific battles over the scope and structure of intellectual property rights, whether achieved through the legislature or the courts.

The existence of future generations poses a bigger problem for intellectual property policy. While in the area of environmental law consideration of future generations has been a quite powerful force in conservation efforts, appeals to future generations in intellectual property can readily support stronger intellectual property rights in the present, often at the expense of living users and creators who build on existing works. Extensions of the copyright term are justified superficially by benefits for future generations. Heirs, often yet to be born, are the beneficiaries of the efforts of living authors. The corporate entity, in theory infinitely alive, bridges present and future generations and serves as a receptacle for trade secrets, trademarks, copyrights, and patents that are deemed to serve the imagined future. Being conscious of future generations as well as past generations can cure a presentism that assumes that we are in the best of all possible worlds and that things could never be better or different. The danger is that future generations serve as a fiction and lure for present interests. The challenge is to avoid treating future generations as merely a foil for one's current needs and goals. To engage with notions of intergenerational equity, at some level, is to move beyond current conditions and think seriously about how our present cultural and legal choices affect the future landscape.

III. SOME FINAL WORDS OF INTRODUCTION

The brief thoughts in this Introduction are intended as context for the important and wide-ranging papers that follow. My broad goal is to shift how we think about intellectual property law and policy by developing a language for discussing issues of equity broadly and intergenerational equity in particular. But shifts in language more effectively occur through practice and usage. The November 2010, Symposium brought many of these ideas to life. The papers that follow reflect the energy and spirit of the Symposium and serve as a record for future conversations on how intergenerational equity can inform intellectual property policy.

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see NORMAN DANIELS, AM I MY PARENTS' KEEPER?: AN ESSAY ON JUSTICE BETWEEN THE YOUNG AND THE OLD (1988).

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As this Symposium Issue was going to press, I learned of the illness and passing of Keith Aoki, whose article appears in this volume. Shocked as I was to hear the news, I was equally amazed to meet such a generous, thoughtful, and talented person. Keith was a bridge, spanning the gap between thinking like a lawyer and communicating like an artist, between intellectual property and social justice, between senior and junior scholars, between acting like a professional and being a genuine, caring human being. We are honored to publish one of his final publications in a symposium on intergenerational equity, the bridge between the past and the future.