



2018

Trademark as a Property Right

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Recommended Citation

Mossoff, Adam (2018) "Trademark as a Property Right," *Kentucky Law Journal*: Vol. 107 : Iss. 1 , Article 2.
Available at: <https://uknowledge.uky.edu/klj/vol107/iss1/2>

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Kentucky Law Journal

VOLUME 107

2018–2019

NUMBER 1

ARTICLES

Trademark as a Property Right

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ABSTRACT

Although trademark is a property right, the conventional wisdom among modern commentators and prominent judges is that it is only a regulatory entitlement that promotes consumer welfare. This Article fills a lacuna in modern trademark theory by identifying how and why nineteenth-century courts first defined trademark as a property right, and how this explains the structure of trademark doctrines today. The key insight is that a trademark is a use-right that is derived from and logically appurtenant to a separate and broader property right owned by a commercial enterprise—goodwill. Trademark thus shares many conceptual and doctrinal similarities to other use-right-based property rights that are appurtenant to larger estates, such as easements and riparian interests. This conceptual thesis is important, because it explains the nature and limits of this property right, such as, among others, why trademarks must be used in the marketplace, why trademarks cannot be separated from a commercial enterprise’s goodwill, and, perhaps most importantly, why trademarks are not full, independent property rights like a fee simple in land or title in a patent. The usufructuary nature of the property interest in a trademark thus clarifies what many scholars and judges view as its doctrinal peculiarities. It is only because trademark rights have been unmoored from their original definition and justification as use-right property interests that judges and scholars today are confused about trademark rights and the nature of the doctrines that define and limit its use in the marketplace.

¹ Professor of Law, Antonin Scalia Law School, George Mason University. For their comments, thank you to Eric R. Claeys, Justine Bonner, Deven Desai, Tomás Gómez-Arostegui, Russ Jacobs, Jeffrey Jones, Brian Lee, Lydia Loren, Mark McKenna, Christopher Newman, Sean O’Connor, Mark Schultz, Ned Snow, and to the participants at the Philosophical Approaches to IP Colloquium, the Property Works in Progress Conference at Boston University School of Law, the “IP in the Trees” Workshop at Lewis & Clark Law School, the IP Scholars Conference at Cardozo Law School, and the Levy Workshop at Antonin Scalia Law School. Research assistance was provided by Christine Cedar, Rebecca Cusey, Esther Koblenz, and Alexander Summerton.

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INTRODUCTION

Trademark is a property right, and yet it is not. Doctrinally, trademark is a property right, and it is often identified as a type of intellectual property.² Theoretically, though, the doctrinal waters have long been muddied. Prominent jurists and commentators argue that trademark is primarily a regulatory entitlement that prevents unfair competition or advances consumer welfare.³ This lack of fit between trademark doctrine and theory is perplexing to scholars today.⁴

Most commentators attempt to resolve this problem by choosing one side of this dichotomy, and they choose the market competition and consumer welfare theory.⁵ They criticize courts and Congress for being too solicitous in providing “property” protections for trademarks.⁶ Current doctrine should be revised and recent changes to trademark law should be repealed, many argue, so that it better fits with the definition and justification of trademark as a regulatory entitlement whose function is to increase social welfare by reducing consumer search costs.⁷ Regardless of

² See, e.g., *K Mart Corp. v. Cartier, Inc.*, 485 U.S. 176, 186 (1988) (identifying trademark as a “private property right”); *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 413 (1916) (“Common-law trade-marks, and the right to their exclusive use, are of course to be classed among property rights”); *The Trade-Mark Cases*, 100 U.S. 82, 92 (1879) (“The right to adopt and use a symbol or a device to distinguish the goods or property made or sold by the person whose mark it is, to the exclusion of use by all other persons, has been long recognized by the common law and the chancery courts of England and of this country It is a property right for the violation of which damages may be recovered in an action at law, and the continued violation of it will be enjoyed by a court of equity”); *PaperCutter, Inc. v. Fay’s Drug Co.*, 900 F.2d 558, 561 (2d Cir. 1990) (“[T]rademarks are often referred to as a form of property, or more specifically as ‘intellectual property’”).

³ See, e.g., *E. I. Du Pont de Nemours Powder Co. v. Masland*, 244 U.S. 100, 102 (1917) (Holmes, J.) (“The word ‘property’ as applied to trade-marks and trade secrets is an unanalyzed expression of certain secondary consequences of the primary fact that the law makes some rudimentary requirements of good faith.”); *Libman Co. v. Vining Indus., Inc.*, 69 F.3d 1360, 1361 (7th Cir. 1995) (Posner, J.) (“A trademark is not a property right, but an identifier”); Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839, 1843 (2007) (describing the conventional wisdom today that “twenty-first century trademark law amounts to little more than industrial policy”).

⁴ See, e.g., Deven R. Desai, *The Chicago School Trap in Trademark: The Co-Evolution of Corporate, Antitrust, and Trademark Law*, 37 CARDOZO L. REV. 551, 553 (2015) (“Dissatisfaction with trademark law has only grown . . . with critics arguing that trademark rights have expanded too far in protecting right holders’ interests, have become property rights, and that trademark law does not regulate competition well.”).

⁵ See, e.g., *Peaceable Planet, Inc. v. Ty, Inc.*, 362 F.3d 986, 990 (7th Cir. 2004) (Posner, J.) (stating that trademark law’s “rationale” is “to promote competition and consumer welfare”); McKenna, *supra* note 3, at 1844 (“It would be difficult to overstate the level of consensus among commentators that the goal of trademark law is—and always has been—to improve the quality of information in the marketplace and thereby reduce consumer search costs.”).

⁶ See, e.g., Irene Calboli, *Trademark Assignment “With Goodwill”: A Concept Whose Time Has Gone*, 57 FLA. L. REV. 771, 778 (2005) (asserting that efforts to expand trademark protection have seen “unprecedented success” in the last twenty years, with courts “increasingly protect[ing] trademarks beyond consumer welfare and adopt[ing] an approach based on property rights”); Desai, *supra* note 4, at 553 (restating widely accepted critique that “trademark rights . . . have become property rights, and that trademark law does not regulate competition well”).

⁷ See, e.g., Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397, 405–11 (1990) (criticizing that trademarks have come to be viewed as similar to “real property and other intellectual property regimes”); Glynn S. Lunney, Jr.,

whether these criticisms are valid, the result of this conventional wisdom is that trademark law is surprisingly under-theorized as a property doctrine. For most commentators, it is enough to assert the “proPERTIZATION” critique as a foil to argue for the unfair competition and consumer welfare theory.

This Article fills this gap in the scholarship. The lacuna in trademark theory was created by the conventional wisdom that trademark law is only a regulation of the marketplace that enhances consumer welfare. Trademark doctrine can be—and should be—defined as a property right. This is not an “academic” or metaphysical argument: lawyers and scholars need to understand both the conceptual and normative content of a theory, because each serves a necessary function in creating legal doctrines and in justifying how these doctrines are applied in legal practice.

The thesis that trademark is a property right is primarily conceptual, but it has both conceptual and normative elements given that it is a legal entitlement. One of the key problems in the current theory-doctrine split in trademark law is that there is confusion about what it means to define a trademark as “property.” This is important, because to understand why trademark is a property right, we must first understand that a “property right” is neither a formal and rarefied right to exclude nor a socially-contingent bundle of distinct rights.⁸ Rather, a property right is a right to use and dispose of a valuable asset.⁹ A property right secures a domain of liberty in using an asset arising from value-creating productive labor. Nineteenth-century courts relied on this property theory to first define trademarks as property rights.¹⁰

This conceptual insight is a necessary predicate to understand the justification for trademark as a property right. If property arises from value-creating, productive labor, this explains why *use of a mark* is fundamental to its initial recognition and ongoing protection in the law. The use of the mark has meaning only by reference to the reputational value created and earned by a commercial enterprise given its productive labors in making and selling wares in the marketplace. The law identifies this value as *goodwill*, and it is often characterized as a property right itself.¹¹ Since goodwill comprises the ongoing commercial activities by a business in using and disposing of its wares in the marketplace, then the property right that derives from and secures this value also requires its ongoing use in the marketplace. Thus, trademark law secures the exclusive use and enjoyment of a mark as representative of the exclusive use and enjoyment of the underlying property right in the goodwill in the commercial enterprise.

The perspective of trademark as comprising a *use-right* is necessary to recognize why trademarks are property rights and what is the nature of this property right. The

Trademark Monopolies, 48 EMORY L.J. 367, 391–410 (1999) (critiquing modern evolution of legal protections for trade dress).

⁸ See generally Eric R. Claeys, *Property 101: Is Property a Thing or a Bundle?*, 32 SEATTLE UNIV. L. REV. 617 (2009) (reviewing THOMAS W. MERRILL & HENRY E. SMITH, *PROPERTY: PRINCIPLES AND POLICIES* (2007)); Adam Mossoff, *What is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371 (2003).

⁹ See *infra* Part III.

¹⁰ See *infra* Part III–IV.

¹¹ See *infra* Part III.

conceptual and logical relationship between a trademark and the goodwill it inheres in is similar to that of other use-right property doctrines, such as riparian rights in water or an easement appurtenant in a fee simple. In all such use-right legal regimes, courts separately secure a specific use-right as an independent property right with attributes that comprise a property right, such as exclusivity and alienability, among others.¹² But these property rights have their existence only by inhering in a more fundamental property right—a trademark in the goodwill of a commercial enterprise, a riparian interest in water appurtenant to land, or an easement appurtenant to a fee simple.

This theoretical insight is evident in earlier court decisions, if one is sensitive to the conceptual and normative structure of their arguments. In the famous Supreme Court decision in 1916 in *Hanover Star Milling Co. v. Metcalf*, for example, Justice Mahlon Pitney recounts hoary doctrine that a trademark is a “property right,” but he acknowledges that it is a special type of property because it is “*appurtenant* to an established business or trade in connection with which the mark is used.”¹³ In this instance, replace “business” with “estate” and “mark” with “right of way” or “waterway,” and Justice Pitney could just as easily be talking about an easement appurtenant or a riparian interest. In sum, Justice Pitney is describing a fundamental conceptual relationship between two property rights—a trademark and the company that has created goodwill in the marketplace. This is not a gloss on his opinion, because Justice Pitney further states that this is exactly what he means: “In short, the trade-mark is treated as merely a protection for the good-will, and not the subject of property except in connection with an existing business.”¹⁴

In the nineteenth-century, courts first conceptualized a commercial enterprise’s reputational value as “goodwill,” and they secured it in part via a use-right or what earlier common law courts identified as a usufruct—the trademark.¹⁵ The property theory used by courts at the time, or at least the property theory that justifies this legal act, is that property rights arise from and secure the acquisition, use, and disposal of a valued asset.¹⁶ This conceptual insight as to why trademarks are property rights is only possible if one first understands that property rights comprise the exclusive rights to assets created and used by their owners. In the case of a trademark, it is a company’s productive labors in the marketplace in the manufacture and sale of a product or service that creates reputational value in that company.

This Article explains why trademark is a property right similar to other use-right property doctrines, such as easements appurtenant or riparian rights. First, it details the theoretical vacuum in contemporary trademark scholarship; in fact, there is no article that explains why or how trademark is a property right similar in its conceptual and doctrinal structure to other use-right property doctrines. Second, it explains the property theory applied by nineteenth-century courts in securing goodwill and

¹² See *infra* Part V.

¹³ *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 414 (1916) (emphasis added).

¹⁴ *Id.*

¹⁵ See *infra* Parts III–IV.

¹⁶ See *infra* Part IV.

trademarks as property rights—they are use-rights arising from a commercial enterprise creating and selling wares in the marketplace. Third, and finally, it shows how fundamental trademark doctrines are structured according to this property theory, as trademark shares many similar conceptual features with other use-right doctrines, such as riparian rights and easements appurtenant. It bears emphasizing that this Article's thesis is not a reductionist account of all trademark doctrines, as trademark law overlaps in both doctrine and policy with unfair competition law.¹⁷ Nonetheless, as will be clear in the final part, a complete understanding of trademark law as a property right comprising a use-right explains some of the core legal doctrines in this important field of intellectual property law.

I. PRELIMINARIES: DO WE NEED A PROPERTY THEORY OF TRADEMARK RIGHTS?

This Article describes how trademarks can be defined and justified as property rights. It does so by reference both to an historical property theory and to specific legal doctrines that evidence how this property theory was built into the structure of trademark law today. But its thesis is conceptual; it is neither intellectual history nor a description of doctrinal evolution.

The need for a reconceptualization and justification of trademark as a property right is pressing, because it has long been unmoored from the property theory that first justified its evolution into a property right in the nineteenth-century.¹⁸ This is the theory that property rights refer to the exclusive rights to use, enjoy, and dispose of valued assets, which is a property theory based in a long tradition in philosophy and law reaching back to the Roman Law.¹⁹ In the seventeenth and eighteenth centuries, this property theory was a key part of the socio-political theory of natural rights philosophy,²⁰ and since this time, it has been associated with this philosophy. Thus, for ease of reference and with a nod to its most famous and influential philosopher, I refer to it as the “Lockean property theory.”²¹

Following the legal realist revolution in American jurisprudence at the turn of the twentieth-century, Lockean property theory has been largely forgotten among

¹⁷ See *infra* notes 39–40, 94 and accompanying text.

¹⁸ State legislatures began to enact trademark statutes starting in the 1840s. Beverly W. Pattishall, *The Lanham Trademark Act—Its Impact Over Four Decades*, 76 TRADEMARK REP. 193, 193 (1986). It is in the Antebellum Era that the common law and equity courts begin to explicitly secure a commercial enterprise's goodwill and its attendant use of trademarks. See, e.g., FRANCIS H. UPTON, A TREATISE ON THE LAW OF TRADE MARKS, WITH A DIGEST AND REVIEW OF THE ENGLISH AND AMERICAN AUTHORITIES 13–14 (1860) (stating that “[i]t is now, therefore, the well established doctrine, that the exclusive property of the manufacturer, or merchant, in his trademarks, is of that nature and character”); *infra* note 51 (discussing foundational 1810 decision of *Crutwell v. Lye*).

¹⁹ See 2 WILLIAM BLACKSTONE, COMMENTARIES *4 (noting that the idea that the root of property is found in the use of assets reaches back to “Cicero, who compares the world to a great theatre, which is common to the public, and yet the place which any man has taken is for the time his own”); Mossoff, *supra* note 8, at 391–92 (discussing primacy of use-rights in property theory since Roman Law).

²⁰ See Mossoff, *supra* note 8, at 379–90.

²¹ See Adam Mossoff, *The Use and Abuse of IP at the Birth of the Administrative State*, 157 U. PA. L. REV. 2001, 2006 (2009) (adopting “Lockean property theory” appellation for same reason).

scholars and sidelined in legal doctrine.²² For those who do write about or refer today to Lockean property theory, it is often clouded by the legal realist critique that it is unduly abstract and “formalistic,”²³ and by the closely-related Progressive political critique that it is an “ideology” that masks power relationships in society.²⁴ These legal and political critiques have been conventional wisdom for generations of legal scholars and lawyers. As the saying goes, “we are all realists now,”²⁵ and the “we” here means “most legal elites.”

This is not to say that there have not been some recent attempts at explaining how a trademark is a property right, at least in the intellectual history of this legal doctrine. Two articles have attempted to do so, but the problem is that this scholarship reflects the legal realist tenor of our times. This is unsurprising, if only because intellectual property rights, especially trademarks, played a key role in the legal realists’ reconceptualization of property rights generally within American jurisprudence.²⁶ As a result, these two intellectual histories fail to fully describe the original justifying property theory and how it is built into the structure of trademark doctrines.

First, in *Hunting Goodwill: A History of the Concept of Goodwill in Trademark Law*, Robert Bone provides both an intellectual history of trademark law and a theoretical argument in favor of the unfair competition theory of trademark.²⁷ But the intellectual history appears to fall prey to what Larry Kramer describes as “law office history”—the use of historical materials to advance a particular policy goal.²⁸ In this case, the historical research serves Bone’s normative thesis that trademark law should be conceived of and justified by the unfair competition theory, and thus his use of historical materials supports his pleading this (modern) case. For example, Bone claims to describe in one section of *Hunting Goodwill* the view of trademark law as securing a property right in goodwill that was first developed by “nineteenth

²² See *id.* at 2004–05.

²³ See, e.g., Robert G. Bone, *Hunting Goodwill: A History of the Concept of Goodwill in Trademark Law*, 86 B.U. L. REV. 547, 562 (2006) (“During the late nineteenth century, the prevailing property theory was formalistic: it assumed that the concept of ‘property’ had an inherent meaning from which legal rights could be derived.”).

²⁴ See, e.g., Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 816–17 (1935) (arguing that Lockean property theory “is simply economic prejudice masquerading in the cloak of legal logic” because legal protections for property rights “create and distribute a new source of economic wealth or power”); Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 646 (1988) (“Ideologies are powerful and persistent. Perhaps the most tenacious ideology in the American legal culture is the myth of the free market. . . . [W]here hard work is rewarded and no one has a fixed social status; a world where wealth abounds because the incentives to produce it are unlimited and assured; a world where people get what they want if they are willing to work for it. If people are unhappy, they have only themselves to blame: Wealth and power are there for the taking. Once they have acquired property through honest labor or genius, they are secure in the knowledge that others cannot take their property or damage it (even slightly) against their will and that they can use their property as they see fit.”).

²⁵ Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 467 (1988) (book review).

²⁶ See Mossoff, *supra* note 21, at 2016–18 (discussing Felix Cohen’s use of trademark law to critique Lockean property theory); *infra* Parts III–IV.

²⁷ Bone, *supra* note 23, at 621–22.

²⁸ See Larry D. Kramer, *When Lawyers Do History*, 72 GEO. WASH. L. REV. 387, 389–94, 402–05 (2003).

century courts and commentators,”²⁹ and he briefly details some of the problems he sees in this nineteenth-century theory of goodwill as property. Yet, a surprising number of his supporting sources are twentieth-century cases, with some from the mid-twentieth century.³⁰ These twentieth-century courts he quotes and cites are not themselves describing historical approaches to trademark law and goodwill; rather, they are quoted and cited by Bone as evidence of what “nineteenth-century judges” thought in the “formalistic world of the late nineteenth century.”³¹

Another attempt to explain the role of Lockean property theory in the historical evolution of trademark law is provided by Mark McKenna in *The Normative Foundations of Trademark Law*.³² Unfortunately, this is more of a prolegomena than a fully-developed theoretical account of trademarks as property rights. For example, McKenna very briefly describes Lockean property theory and its normative principle of securing the fruits of productive labors, but he does not explain the key *conceptual* role of *use-rights* within Lockean property theory.³³ Thus, while avoiding the vice of law office history, McKenna misses this fundamental conceptual insight. This then leads him astray, as he mistakenly concludes that under Lockean property theory a trademark is not a property right.³⁴ Despite his own commitment to the legal realist conventional wisdom of today,³⁵ McKenna rightly summarizes how nineteenth-century judges and commentators justified trademarks in the early industrial revolution according to a normative principle of securing to owners the fruits of their productive labors.³⁶ Yet, he does not provide a complete, theoretical account of Lockean property theory as applied in trademark law. This is likely due to his misunderstanding of a Lockean property theory in both its conceptual and normative elements, as both are necessary to understand how this theory is applied in legal doctrines.³⁷

These two intellectual histories by Bone and McKenna—the only two examples in modern scholarship that address in any detail a property theory of trademark law—confirm the necessity for explaining anew why trademark is a property right. There is no extant article that provides a complete explanation of both the conceptual and normative premises at work in Lockean property theory as applied to trademark law. Both are necessary to explain and justify the longstanding legal status of trademark as a type of intellectual property right.

²⁹ Bone, *supra* note 23, at 569.

³⁰ *Id.* at 567–72. For example, Bone cites to cases from 1916, 1919, 1936, 1944 and 1958. *Id.* at 570–71.

³¹ *Id.* at 572.

³² See McKenna, *supra* note 3, at 1873–95.

³³ See *id.* at 1875–76.

³⁴ See *supra* note 3 and accompanying text (describing McKenna’s conclusion that a trademark is not a property right).

³⁵ See, e.g., Mark A. Lemley & Mark P. McKenna, *Owning Mark(et)s*, 109 MICH. L. REV. 137, 181–84 (2010) (asserting a legal–realist–style critique of a strawman version of a “natural rights argument” for trademark law, and then concluding that natural rights theory is both conceptually incoherent and normatively arbitrary).

³⁶ *Id.* at 181.

³⁷ See *id.* at 181–84.

Although this Article uses historical case law as its primary evidence for its thesis, it is neither doctrinal history nor intellectual history. There are too many historical accidents in the development of Anglo-American political and legal institutions over the span of several centuries,³⁸ such as the division between law and equity courts and their respective differences in doctrines and remedies, to infer from the evolution of trademark doctrines a single theory at work in court opinions spanning these centuries.³⁹ In addition to the influence of historically contingent institutions on legal doctrines, legal concepts also evolved over time, such as “goodwill” and its definition as a property right starting in the nineteenth-century.⁴⁰ Theoretical reductionism regarding historical accounts of Anglo-American legal doctrines that span many centuries that discover a single theory at work in a doctrine like trademark law is simply unwarranted.⁴¹

Moreover, the concept of goodwill is broader than trademark law, and it is a key legal right implicated in unfair competition law as well.⁴² Unfair competition cases governing the use of source signifiers on goods, reaches back hundreds of years and predates the framing of trademarks as use-right property interests in the nineteenth-century.⁴³ Thus, for instance, a New York court stated in all seriousness in 1857 that “[t]he law of trade marks is of recent origin, and may be comprehended in the proposition that a dealer has a property in his trade-mark.”⁴⁴ The legal rules governing the use of product signifiers by commercial enterprises were certainly not new in the mid-nineteenth century. But this court’s claim is predicated on the Lockean property theory that was first brought to bear in trademark law in the Antebellum Era; accordingly, it is a true claim insofar as courts were now adjudicating trademarks as property rights, conceptually and normatively.

In sum, this Article’s thesis is theoretical, and it primarily details the conceptual claim in Lockean property theory only because scholars focus all too often on normative principles, and thus misunderstand the nature and function of Lockean property theory within legal doctrine. As noted, McKenna details only the

³⁸ See Beverly W. Pattishall, *Two Hundred Years of American Trademark Law*, 68 TRADEMARK REP. 121, 121 (1978) (“The history of trademarks extends for at least four thousand years, but that of trademark law, hardly four hundred.”).

³⁹ For a summary of how antiquarian trademark cases developed in the English law and equity courts see McKenna, *supra* note 3, at 1852–58. McKenna, like many others, tries to infer a single normative principle from these decisions. *Id.* at 1857–58. Whether this is historically correct is beyond the focus of this Article.

⁴⁰ See Bone, *supra* note 23, at 568–72.

⁴¹ This Article does not offer a Lockean version of the positive economic analysis of the historical evolution of trademark law. For such an account see William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J. L. & ECON. 265, 265–66 (1987) (“Our overall conclusion is that trademark law, like tort law in general (trademark law is part of the branch of tort law known as unfair competition), can best be explained on the hypothesis that the law is trying to promote economic efficiency.”).

⁴² See *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418, 428 (2003) (“Traditional trademark infringement law is a part of the broader law of unfair competition . . . that has its sources in English common law . . .”).

⁴³ See *id.*

⁴⁴ *Clark v. Clark*, 25 Barb. 76, 80 (N.Y. Gen. Term 1857).

labor-desert normative principle as it was used by nineteenth-century courts in trademark law, as evidenced by the title of his article, *The Normative Foundations of Trademark Law*.⁴⁵ This is understandable because of the primacy on normative policy analysis in legal scholarship today,⁴⁶ which is itself an outgrowth of the legal realists' critique of legal formalism.⁴⁷ But this is only half the story. Lawyers and scholars need to understand both the conceptual and normative content of a theory; each serves a necessary function in how courts structure the conceptual content of legal doctrines and justify how these doctrines apply to remedy the infringement of legal rights.⁴⁸ The historical cases and commentary discussed here are only the evidence of how Lockean property theory served this role in conceptually defining and structurally determining the limits of its doctrines.⁴⁹

Lastly, in explaining that trademarks are property rights, this Article does not justify Lockean property theory itself or respond to the critiques of it by the legal realists and Progressives. This is beyond the scope of this Article's thesis, and it has been addressed in other articles.⁵⁰ The claim here is more narrow and modest: trademark is a property right because it is an exclusive use-right derived from and sustained by a broader property right in a commercial enterprise's goodwill. The rest of this Article explains the conceptual property theory that nineteenth-century courts first used in defining trademarks as property rights and in creating foundational trademark doctrines that remain good law to this day.

II. GOODWILL AS PROPERTY

Goodwill is an abstract legal concept that is fundamental in trademark law. In this regard, it is similar to other abstract legal concepts that are foundational in other fields of law, such as negligence in tort law, the "meeting of the minds" in contract law, nonobviousness in patent law, and privacy in constitutional law, to name but a few. In all of these and innumerable other legal doctrines, these abstract, foundational

⁴⁵ See McKenna, *supra* note 3, at 1875–76.

⁴⁶ See, e.g., Adam Mossoff, *Exclusion and Exclusive Use in Patent Law*, 22 HARV. J. L. & TECH. 321, 322–24, 370–77 (2009) (describing the primary focus on normative analysis in modern patent scholarship and identifying why conceptual analysis is equally important).

⁴⁷ See, e.g., Cohen, *supra* note 24, at 847–49.

⁴⁸ See generally Eric R. Clacys, *The Conceptual Relation Between IP Rights and Infringement Remedies*, 22 GEO. MASON. L. REV. 825 (2014) (detailing conceptual property theory and how it functions in the doctrinal definition and legal protection of patents as property rights).

⁴⁹ To flip Justice Oliver Wendell Holmes's famous aphorism, we are interested here in a volume of logic, not a page of history. *N.Y. Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (stating that "a page of history is worth a volume of logic").

⁵⁰ See, e.g., Eric R. Clacys, *Jefferson Meets Coase: Land-Use Torts, Law and Economics, and Natural Property Rights*, 85 NOTRE DAME L. REV. 1379 (2010) (explaining, among other things, how natural law principles are determinative in legal doctrine); Adam Mossoff, *Saving Locke from Marx: The Labor Theory of Value in Intellectual Property Theory*, 29 SOC. PHIL. & POL'Y 283 (2012) (explaining how Locke's labor of value serves his natural law ideal of a flourishing life); Mossoff, *supra* note 21 (explaining how legal realists and Progressives attacked a strawman in critiquing Lockean property theory).

concepts apply in a broad range of contexts given the underlying purpose of the legal doctrine.

As a legal concept, “goodwill” first evolved in the early nineteenth-century during the explosive growth in manufacturing and in commerce during the nascent Industrial Revolution.⁵¹ As an abstract legal concept, there is understandable variation throughout the case law and treatises as to its meaning, given that it applies in a variety of commercial and legal contexts.⁵² Still, the concept has long had some key characteristics that make it an obvious candidate for defining it as the foundational property interest in which inheres a derivative use-right property interest in a trademark.⁵³

These characteristics have existed from the first usage of this concept in the law, as evidenced in an oft-cited definition of goodwill in Justice Joseph Story’s 1841 treatise on partnerships:

[G]ood-will may be properly enough described to be the advantage or benefit, which is acquired by an establishment, beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement, which it receives from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances, or necessities, or even from ancient partialities, or prejudices.⁵⁴

⁵¹ See Bone, *supra* note 23, at 561 n.63. The English court decision in *Crutwell v. Lye* (1810) 34 Eng. Rep. 129; 17 Ves. Jun. 334, (Ch.), is often cited as the progenitor of the idea that trademarks are derivative rights of the property interest in goodwill. The Crutwell court’s statement that “good-will” is “nothing more than the probability, that the old customers will resort to the old place,” *id.* at 346, is the legal equivalent in trademark doctrine of the face that launched a thousand ships.

⁵² See, e.g., *Metro. Nat. Bank of N.Y. v. St. Louis Dispatch Co.*, 149 U.S. 436, 446 (1893) (“Undoubtedly, good will is in many cases a valuable thing, although there is difficulty in deciding accurately what is included under the term.”); cf. Note, *An Inquiry into the Nature of Goodwill*, 53 COLUM. L. REV. 660, 665 (1953) (“Quite often the phenomenon is described on different levels of abstraction.”).

⁵³ Many legal realists and modern (post–realist) scholars who are critical of the theory that trademark is a property right that inheres in goodwill engage in a subtle equivocation in critiquing this theory. They first posit that this theory is highly abstract and uses excessively formalized legal concepts that are indeterminate in application, such as “property,” but they then dismiss any evidence of contextual applications of it as the theory allegedly contradicting itself. See, e.g., Bone, *supra* note 23, at 567–68, 584–89 (positing this critique himself and describing specific realist arguments for it); Frank I. Schechter, *Fog and Fiction in Trade-Mark Protection*, 36 COLUM. L. REV. 60, 64–65 (1936) (stating that trademark is only a “functional concept” and that “[n]othing is to be gained . . . by describing the trade-mark as ‘property’”); Kenneth J. Vandeveldt, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325, 345 (1980) (“By creating limited property [in a trademark], the courts essentially robbed the term ‘property’ of its meaning.”); cf. Eric R. Clacys, *Virtue and Rights in American Property Law*, 94 CORNELL L. REV. 889, 892–901 (2009) (referring to this as the “deontology trap” set by utilitarian-oriented legal theorists in critiquing natural rights theory).

⁵⁴ JOSEPH STORY, COMMENTARIES ON THE LAW OF PARTNERSHIPS § 99 (1841).

Surprisingly, this definition of goodwill, which is referred to by courts today as “notable” and as an “oft-quoted definition,”⁵⁵ is almost non-existent in modern scholars’ writings on trademark.⁵⁶

Justice Story’s early definition makes clear the desiderata of “goodwill” and why it became a foundational legal concept in trademark law. It has two subjects: the commercial enterprise and its customers. It has one object: the reputational value in the commercial enterprise arising from its productive labors in selling its wares in the marketplace.⁵⁷ The goodwill is created and sustained by the *use* of physical assets by a commercial enterprise, but it is not the same thing as these physical assets.⁵⁸ It is the *reputational value* created by the productive labor of the commercial enterprise in the use of its physical resources, and this value is sometimes identified as a type of property itself.⁵⁹ Thus, *use-rights* comprise the content of this legal concept—it is the exercise of these use-rights that create it and sustain it, because goodwill is the value arising from a business’ ongoing *commercial activities*.⁶⁰

⁵⁵ See *Newark Morning Ledger Co. v. United States*, 507 U.S. 546, 555 (1993) (quoting Justice Story’s definition from his *Partnerships* treatise and referring to it as “Justice Story’s notable description of ‘goodwill’”); *Metropolitan Nat. Bank*, 149 U.S. at 446 (quoting same); *In re Corrugated Paper Corp.*, 185 B.R. 667, 670 (Bankr. D. Mass. 1995) (quoting same and referring to it as “the best-known definition of goodwill”); *Deseret Mgmt. Corp. v. United States*, 112 Fed. Cl. 438, 448 (2013) (quoting same and referring to it as an “oft-quoted definition”).

⁵⁶ An exception that proves the rule is *Calboli*, *supra* note 6, at 805 n.186, but this is merely in a footnote in a section in which *Calboli* argues that “the idea of goodwill continues to remain vague and uncertain and it is still unclear how the concept of goodwill should be interpreted in the context of trademark law.” *Id.* at 808.

⁵⁷ *Chittenden v. Witbeck*, 15 N.W. 526, 534 (Mich. 1883) (stating that “good-will” is “the favor the [business] has won from the public” and that “[t]his [goodwill] is, no doubt, of great value”); *Patridge v. Menck*, 2 Barb. Ch. 101, 103 (N.Y. Ch. 1847) (“[T]he complainant has a valuable interest in the good will of his trade or business.”).

⁵⁸ See *Chittenden*, 15 N.W. at 534 (stating that “good-will . . . attached itself . . . to the property” of the business).

⁵⁹ See, e.g., *Washburn v. Nat’l Wall-Paper Co.*, 81 F. 17, 20 (2d Cir. 1897) (“That [goodwill] is property is abundantly settled by authority, and, indeed, is not disputed. That in some cases it may be very valuable property is manifest.”); *Avery & Sons v. Meikle & Co.*, 81 Ky. 73, 86–87 (Ky. 1883) (“When a workman or manufacturer has, by skill, care, and fidelity, manufactured a good article, it becomes of the utmost importance to him that its origin and ownership should be known, . . . and his reputation is thereby built up, it is to him the most valuable of property rights.”); *Peabody v. Norfolk*, 98 Mass. 452, 457 (1868) (“If a man establishes a business and makes it valuable by his skill and attention, the good will of that business is recognized by the law as property.”); *Bininger v. Clark*, 60 Barb. 113, 115 (N.Y. Gen. Term 1870) (“The good will of a business firm is an important part of its property, and will be protected by a court of equity . . .”); *Patridge*, 2 Barb. Ch. at 103 (stating that the complainant “is entitled to protection against any other person who attempts to pirate upon the good will of the complainant’s friends, or customers, or of the patrons of his trade or business”); *Williams v. Wilson*, 4 Sand. Ch. 379, 380 (N.Y. Ch. 1846) (“It is manifest that the principal value of the establishment in which these gentlemen were partners, consisted in the *good will* attached to it. . . . It belongs equally to them all, and is an important and valuable interest, which the law recognizes and will protect.”).

⁶⁰ See *Washburn*, 81 F. at 20 (“The individual who has created [goodwill] by *years of hard work and fair business dealing* usually experiences no difficulty in finding men willing to pay him for it If good will be a ‘parasite,’ it is a ‘parasite’ of the *business* from which it sprung, not of the mere machinery by which that business was conducted.”) (emphasis added).

Some intellectual histories acknowledge that goodwill did rise to prominence in trademark doctrine in the nineteenth century. It is hard not to miss this omnipresent fact. As Francis Upton explains in his famous 1860 treatise on trademark law: “An unlawful encroachment upon the *good will* of a business, is sometimes the essence of the wrong involved in the violation of a trade mark.”⁶¹

But thus far, no one has explained *why* this happened beyond identifying the normative principles at work in Lockean property theory, such as the idea that one should reap the fruits of one’s productive labors. Nor has anyone explained how this Lockean normative principle was nested within a concept of property that was defined, in essence, as exclusive use-rights. McKenna comes closest of any scholar today, but he misses the mark by focusing solely on the normative principle of Lockean property theory that productive, value-creating labor is the source and justification for property.⁶² By missing the key *conceptual* insight of Lockean property theory that the essence of property is an exclusive use-right,⁶³ he fails to recognize how a trademark was (and is) a property right—a usufruct in a commercial enterprise that is both conceptually and normatively similar to other use-right property doctrines like an easement appurtenant or a riparian interest.⁶⁴

In understanding why goodwill is property and trademarks are property rights that inhere in this goodwill, the conceptual insight about the nature of the property interest is perhaps even more important than understanding the normative principle of productive labor at work in the doctrine. Without understanding the *property concept* within Lockean property theory, it can appear that courts deploying Lockean property theory in legal doctrines are deducing specific conclusions from a highly abstract moral principle that property-owners should be secured in the fruits of their productive labors.⁶⁵ In essence, it looks like a syllogism with a major premise and a conclusion, but it is missing the all-important minor premise. The insight that the essential conceptual content of “property” is the *exclusive use* of a valued asset is the key to understanding how and why both goodwill and trademarks are property rights.

Beyond the confines of trademark law, the rights of use, enjoyment and disposition provided a conceptual framework for early American courts in which they applied the normative principle that the law should secure to a property-owner the fruits of one’s labors.⁶⁶ As the Pennsylvania Supreme Court observed in 1823,

⁶¹ UPTON, *supra* note 18, at 59.

⁶² See McKenna, *supra* note 3, at 1875–77.

⁶³ See *id.* at 1882–84.

⁶⁴ See *id.*

⁶⁵ See *supra* note 53 (describing modern scholars who make this critique).

⁶⁶ See, e.g., *Vanhome’s Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 310 (C.C.D. Pa. 1795) (“No man would become a member of a community, in which he could not enjoy the fruits of his honest labour and industry.”); *Hawes v. Gage*, 11 F. Cas. 867, 867 (C.C.N.D.N.Y. 1871) (No. 6237) (noting that a patent is “property” because it secures for an inventor the right to “enjoy the fruits of his invention”); *Clark Patent Steam & Fire Regulator Co. v. Copeland*, 5 F. Cas. 987, 988 (C.C.S.D.N.Y. 1862) (No. 2866) (“Congress has wisely provided by law that inventors shall exclusively enjoy, for a limited season, the fruits of their inventions.”); *Amoskeag Mfg. Co. v. Spear*, 2 Sand. 599, 606 (N.Y. Super. Ct. 1849) (explaining that if a plaintiff is denied an injunction in a trademark infringement case, “the [trademark] owner is robbed of the fruits of the reputation that he had successfully labored to earn”).

“property, without the power of use and disposition, is an empty sound.”⁶⁷ This was the dominant conception of property of the day, as evidenced by the fact that this statement matches perfectly a similar statement in the famous 1769 English copyright case, *Millar v. Taylor*, in which Justice Ashton stated that “[p]roperty, without the use, is an empty sound.”⁶⁸ As Justice Ashton further explained with numerous citations to the natural rights philosophers, Locke, Samuel Pufendorf, and Hugo Grotius: “For ‘to have property’ of any thing, and ‘to have the sole right of using and disposing of it,’ are the same thing: they are equipollent expressions.”⁶⁹ Citations to Pufendorf, Grotius, and other natural rights philosophers and scholars were par for the course in Anglo-American court opinions.⁷⁰

By the eighteenth and early nineteenth centuries, the formal definition of property as constituting the rights of use, enjoyment, and disposition of valued assets was firmly established in political and legal doctrines.⁷¹ Thus, as nineteenth-century courts were wont to do, they would frequently define property in these terms: “Property is the exclusive right of possessing, enjoying, and disposing of a thing.”⁷² In *Wynehamer v. People* in 1856, for instance, the court stated as a basic legal fact of property law: “Property is the right of any person to possess, use, enjoy and dispose of a thing.”⁷³ It is key to recognize that the object of this definition is not the thing itself, but rather the actions one takes with respect to it and the value arising therefrom. As the *Wynehamer* court explained: “A man may be deprived of his property in a chattel, therefore, without its being seized or physically destroyed, or taken from his possession.”⁷⁴ Later in the nineteenth-century, a Colorado court restated this same conceptual point: “Property, in its broader and more appropriate sense, is not alone the chattel or the land itself, but the right to freely possess, use, and alienate the same.”⁷⁵ A few years later, the Court of Appeals of New York similarly pointed out that the “capability for enjoyment and adaptability to some use

⁶⁷ *In re Flintham’s Appeal*, 11 Serg. & Rawle 16, 24 (Pa. 1824) (Duncan, J.).

⁶⁸ *Millar v. Taylor* (1769) 98 Eng. Rep. 201, 220; 4 Burr. 2303, 2338.

⁶⁹ *Id.*

⁷⁰ See Mossoff, *supra* note 8, at 404–07.

⁷¹ See 1 WILLIAM BLACKSTONE, COMMENTARIES *138 (“The third absolute right . . . is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions . . .”); JOHN LOCKE, TWO TREATISES OF GOVERNMENT 350 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) (claiming that people enter into civil society “for the mutual *Preservation* of their Lives, Liberties and Estates, which I call by the general Name, *Property*”); see also James Madison, *Property*, NAT’L GAZETTE, Mar. 29, 1792 (claiming that a person has “property in the free use of his faculties and free choice of the objects on which to employ them”).

⁷² *McKeon v. Bisbee*, 9 Cal. 137, 142 (1858); see also *Vanhome’s Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 310 (C.C.D. Pa. 1795) (“[T]he right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man.”); *Eaton v. B. C. & M. R. R.*, 51 N.H. 504, 511 (1872) (“Property is the right of any person to possess, use, enjoy, and dispose of a thing.” (quoting *Wynehamer v. People*, 13 N.Y. 378, 433 (1856))).

⁷³ *Wynehamer*, 13 N.Y. at 433.

⁷⁴ *Id.*

⁷⁵ *City of Denver v. Bayer*, 2 P. 6, 6–7 (Colo. 1883).

are essential characteristics and attributes without which property cannot be conceived.”⁷⁶

The definition of property as the exclusive rights of use, enjoyment and disposition is essential to the normative claim in Lockean property theory that property arises from value-creating, productive labor.⁷⁷ Given that property arises from productive labor, which is the source of the values that comprise a flourishing human life,⁷⁸ then the rights to create and use these values must comprise the right to property. This is what Locke meant when he said that people seek protection of their “Lives, Liberties and Estates, which I call by the general Name, *Property*”⁷⁹ because property is the capstone of the freedom to take the actions required to sustain a flourishing life. Locke derived this idea in part from the classical natural law philosophers and from the modern natural rights philosophers, such as Grotius, who also maintained that “liberty in regard to actions is equivalent to *dominium* in material things.”⁸⁰ As Locke explains early in the *Second Treatise*: the world exists for “the Industrious and Rational, (and *Labour* was to be *his Title* to it;) not to the Fancy or Covetousness of the Quarrelsome and Contentious.”⁸¹ The conceptual link in the logical steps from life to liberty to property is the action and use of valued assets in the world. Stephen Buckle writes that, for Locke, “labour is the improving, value-adding activity required by the duty to preserve oneself and others.”⁸²

The right to property, according to Lockean property theory, is the right to exclusive use of the fruits of one’s productive labors. As the New York court explained in *In re Jacobs*, “[p]roperty . . . has no value unless it can be used.”⁸³ Justice David Brewer explained in a speech at Yale Law School that “[p]roperty is as certainly destroyed when the use that which is the subject of property is taken away . . . for that which gives value to property, is its capacity for use.”⁸⁴ For Lockean property theory, the fountainhead of property is not exclusion, as this is

⁷⁶ *In re Application of Jacobs*, 98 N.Y. 98, 105 (1885).

⁷⁷ See STEPHEN BUCKLE, *NATURAL LAW AND THE THEORY OF PROPERTY: GROTIUS TO HUME* 149–90 (1991); Eric R. Claeys, *Productive Use in Acquisition, Accession, and Labour Theory*, in *PHILOSOPHICAL FOUNDATIONS OF PROPERTY LAW* 13–46 (James Penner & Henry E. Smith eds., 2013); Mossoff, *supra* note 50, at 294–307; A. John Simmons, *Makers’ Rights*, 2 J. ETHICS 197, 210 (1998).

⁷⁸ See Mossoff, *supra* note 50, at 294–307 (discussing how Locke broadly defines the values created through productive labor as anything that is useful in a flourishing human life).

⁷⁹ LOCKE, *supra* note 71, at 350. This idea was embraced in the early American Republic; for instance, James Madison explains in a 1792 essay that “property” is sometimes used in a strictly legal sense, referring to “a man’s land, or merchandize, or money[.]” but that this term also has a “larger and juster meaning, [in which] it embraces every thing to which a man may attach a *value* and have a right.” Madison, *supra* note 71, at 515–17. In this larger sense, “a man has a property in his opinions[.]” he has property “in the safety and liberty of his person,” and “he may be equally said to have a property in his rights.” *Id.*

⁸⁰ RICHARD TUCK, *NATURAL RIGHTS THEORIES: THEIR ORIGIN AND DEVELOPMENT* 60 (1979) (translating and quoting Hugo Grotius, *De Jure Praedae*).

⁸¹ LOCKE, *supra* note 71, at 291.

⁸² BUCKLE, *supra* note 77, at 151.

⁸³ *In re Application of Jacobs*, 98 N.Y. 98, 105 (1885).

⁸⁴ D.J. Brewer, Justice, U.S. Supreme Court, *Protection of Private Property from Public Attack*, Address at the Yale Law School Graduation Ceremony (June 23, 1891), in 10 GREEN BAG 2d 495, 503 (2007).

only the formal mechanism by which productive labor, use, and value are secured to their owners. The essence of property is value-creating, productive labor in creating and using valued assets in living a flourishing life free from interference from others. This is why Locke himself endorsed copyright as “property” in 1695,⁸⁵ and why he includes “Invention and Arts” as exemplars of those things that contribute to a flourishing life in his summation of his property theory at the end of Chapter Five (“of Property”) in the *Second Treatise*.⁸⁶ Without both of these conceptual and normative elements—use (action) and productive labor—one cannot properly explain how Lockean property theory justifies the use-rights comprising specific legal doctrines, such as easements and trademarks.

III. TRADEMARK AS A USE-RIGHT PROPERTY DOCTRINE

The key to recognizing trademarks as property rights is to recognize that the conceptual core of “property” in Lockean property theory is the exclusive use of a valued asset. It is this use-right—a usufructuary interest—that refers to the productive labor that creates the valued asset secured to its owner and justifies its continued legal protection. In a commercial enterprise, this productive labor creates and sustains goodwill—the reputation of the company in selling its products and services in the marketplace. Thus, it is little surprise that the property right that inheres in this goodwill comprises a use-right: the trademark.

Many commentators and courts find the property in a trademark to be very peculiar, like trying to force a square peg into a round hole.⁸⁷ This may explain why many scholars conclude that the primary justification for trademark law is outside of property law, such as in consumer welfare or competition policy.⁸⁸ It is true that courts have never defined trademarks as conferring an exclusive title; in fact, courts and commentators historically have noted that the lack of full title in a trademark is what differentiates it from other intellectual property rights, such as patents or copyrights.⁸⁹ As Justice Holmes observed in 1924: “[W]hat new rights does the trade

⁸⁵ JOHN LOCKE: POLITICAL ESSAYS 330–38 (Mark Goldie, ed. 1997); see also Mossoff, *supra* note 50, at 308–11 (discussing this memorandum as evidence of Locke’s recognition that his property theory justifies intellectual property rights).

⁸⁶ LOCKE, *supra* note 71, at 298–99. The full statement is as follows:

Though the things of Nature are given in common, yet Man (by being Master of himself, and Proprietor of his own Person, and the Actions or Labour of it) had still in himself the great Foundation of Property; and that which made up the great part of what he applied to the Support or Comfort of his being, when Invention and Arts had improved the conveniences of Life, was perfectly his own, and did not belong in common to others.

⁸⁷ See, e.g., *TMT N. Am., Inc. v. Magic Touch GmbH*, 124 F.3d 876, 882 (7th Cir. 1997) (“Strictly speaking, however, trademarks are not ordinary property interests.”); *Pirone v. MacMillan, Inc.*, 894 F.2d 579, 581 (2d Cir. 1990) (“A trademark is a very unique type of property.”); *Indus. Rayon Corp. v. Dutchess Underwear Corp.*, 92 F.2d 33, 35 (2d Cir. 1937) (“A trade-mark is not property in the ordinary sense”).

⁸⁸ See *supra* notes 4–8 and accompanying text (describing this conventional wisdom).

⁸⁹ See, e.g., *Del. & Hudson Canal Co. v. Clark*, 80 U.S. 311, 322 (1871) (“Property in a trade-mark, or rather in the use of a trade-mark or name, has very little analogy to that which exists in copyrights, or

mark confer? It does not confer a right to prohibit the use of the word or words. It is not a copyright.”⁹⁰ Justice Holmes was not channeling any contemporaneous legal realist property theory or Felix Cohen’s functionalist trademark jurisprudence.⁹¹ He was restating settled doctrine since the first evolution of trademark as a property right in the early nineteenth-century.⁹² As Justice Holmes rightly understood, nineteenth-century courts had first defined a trademark as a property right that is narrower in scope than full title or a fee simple.⁹³

Unlike a fee simple in land or title in a patent, a trademark is necessarily derived from and attached to another property interest (goodwill), and the trademark cannot be separated from it.⁹⁴ As the Supreme Court observed in 1877: “Everywhere courts of justice proceed upon the ground that a party has a valuable interest in the good-will of his trade, and in the labels or trade-mark which he adopts to enlarge and perpetuate it.”⁹⁵ Since it inheres in but is not the same thing as goodwill, a trademark is more narrow in its scope than goodwill. For example, the property right in goodwill can be “trespassed” in ways that do not implicate a trademark,⁹⁶ such as by actions that constitute only unfair competition and which do not rise to an infringement of a trademark.⁹⁷ Lest we forget, Justice Story’s famous definition of goodwill is in his 1841 treatise on the law of *partnerships*, not trademark law.⁹⁸ As

in patents for inventions.”); *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 56 (2d Cir. 1997) (“A trademark, unlike other intellectual property rights, does not confer a legal monopoly on any good or idea”); *Cong. & Empire Spring Co. v. High Rock Cong. Spring Co.*, 57 Barb. 526, 551 (N.Y. Gen. Term 1867) (“Property in trade-marks, is not property in the words, letters, marks or symbols as things, or as signs of thought, or as productions of the mind, like that of patent or copyright; but simply, and solely property as a means of designating things—the things thus designated being the production of human skill, or industry, whether of the mind, or the hands, or a combination of both; and this property has no existence apart from the thing designated, or separable from its actual use in accomplishing the present and immediate purpose of its being.”); *UPTON*, *supra* note 18, at 14 (“The right of property in trade marks does not partake in any degree of the nature and character of a patent or copyright”).

⁹⁰ *Prestonettes, Inc. v. Coty*, 264 U.S. 359, 368 (1924).

⁹¹ See Cohen, *supra* note 24, at 814–15.

⁹² See *supra* note 18 and accompanying text.

⁹³ See *Avery & Sons v. Meikle & Co.*, 81 Ky. 73, 86 (Ky. 1883) (“There is no abstract right in a trade-mark. It is property only when appropriated *and* used to indicate the origin or ownership of an article or goods.”).

⁹⁴ Twentieth-century courts also recognize this key conceptual point. See, e.g., *Am. Steel Foundries v. Robertson*, 269 U.S. 372, 380 (1926) (“There is no property in a trade-mark apart from the business or trade in connection with which it is employed.”); *Power Test Petrol. Distr., Inc. v. Calcu Gas, Inc.*, 754 F.2d 91, 97 (2d Cir. 1985) (noting that “a trademark epitomizes the goodwill of a business”).

⁹⁵ *McLean v. Fleming*, 96 U.S. 245, 252 (1877).

⁹⁶ See FRANK S. MOORE, *LEGAL PROTECTION OF GOODWILL* 99 (1936) (referring to an infringer of goodwill as a “trespasser upon valuable property . . . just as he would be a trespasser if he wrongfully encroached upon complainant’s land”).

⁹⁷ See, e.g., *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 29 (2003) (identifying that section 43(a) of the Lanham Act “goes beyond trademark protection” in prohibiting “unfair competition,” but also recognizing that this statutory provision “can apply only to certain unfair trade practices prohibited by its text”); *Kellogg Co. v. Nat’l Biscuit Co.*, 305 U.S. 111, 119 (1938) (stating that National Biscuit Company cannot claim “exclusive use of the term shredded wheat but [unfair competition law] merely entitles it to require that [Kellogg Company] use reasonable care to inform the public of the source of its product”).

⁹⁸ See *supra* note 54 and accompanying text.

a use-right property regime inhering in a broader property interest, trademarks cannot be freestanding property rights themselves and any attempt to create or enforce them as such—identified as “trademarks in gross”—are void.⁹⁹

This is undeniable—trademarks secure only a use-right in a word or other signifier of goodwill¹⁰⁰—and yet this has sown much confusion for modern courts and commentators. One reason for this confusion is conceptual. If one believes that the conceptual content of “property” is necessarily a right to exclude, then the absence of absolute, exclusive title in a trademark leads to the conclusion that trademarks are not property. For example, Justice Holmes and Felix Cohen define property as the right to exclude, and thus they logically conclude that a trademark is not property.¹⁰¹ Relatedly, if one (incorrectly) believes that Lockean property theory dogmatically requires in anything identified as “property” a legal title tantamount to exclusive rights in land, then this logically leads to the same conclusion that trademarks and the goodwill they derive from are not properly defined as property rights, as Bone and others have argued.¹⁰²

But a trademark does not have to be an exclusive title on par with a fee simple in real estate, or even the exclusive title in a patent or copyright, in order for it to be a property right. That a trademark comprises at its core a use-right is consistent with and analogous to other use-rights that are legally secured as property doctrines and are justified as such by Lockean property theory. At its conceptual core, a trademark is a use-right—a usufruct.¹⁰³ According to Lockean property theory, use-rights form the core of property rights, and thus a trademark should be no more difficult to define and justify as a property right than other existing usufructuary interests long secured in the law.

Property lawyers are well aware of many use-right property doctrines that are necessarily derived from or attached to an accompanying property right, such as

⁹⁹ See *infra* Section V.A.

¹⁰⁰ See *infra* notes 103–09 and accompanying text.

¹⁰¹ Justice Holmes states that the essence of property is the legal right to be “protected in excluding other people” and an “owner is allowed to exclude all, and is accountable to no one.” O. W. HOLMES, JR., *THE COMMON LAW* 246 (1881). Thus, the absence of a complete right to exclude in both trademarks and trade secrets is why Justice Holmes denies their status as a property right. See *E. I. du Pont de Nemours Powder Co. v. Masland*, 244 U.S. 100, 102 (1917) (“The word ‘property’ as applied to trademarks and trade secrets is an unanalyzed expression of certain secondary consequences of the primary fact that the law makes some rudimentary requirements of good faith.”). Cohen reaches a similar conclusion based in part on his defining property as securing only the right to exclude. See Mossoff, *supra* note 21, at 2010–17 (detailing Cohen’s property theory and its application to trademark law).

¹⁰² See Bone, *supra* note 23, at 585 (“The common law treated goodwill in ways that fit the formalist paradigm of property rules rather poorly. . . . Some [early twentieth-century] jurists [such as Justice Holmes,] even questioned whether the idea of property in goodwill made sense for trademark at all”); Vandeveldt, *supra* note 53, at 345 (“By creating limited property [in a trademark], the courts essentially robbed the term ‘property’ of its meaning.”).

¹⁰³ See, e.g., Mossoff, *supra* note 46, at 333–35 (discussing riparian rights as a use-right property doctrine and comparing to patent rights).

riparian rights¹⁰⁴ and easements appurtenant.¹⁰⁵ Given the widespread confusion about the property status of trademarks, it is clarifying to highlight these similarities between a trademark and other use-right doctrines. Of course, the comparison of a trademark to these other doctrines is simply for the purpose of making clear the conceptual content of the use-right property interest in a trademark. This Article is not arguing that trademarks are identical to easements appurtenant or other use-right property doctrines, which would be no more true than trying to argue that since dogs and platypuses are both animals, they are identical in every respect.¹⁰⁶ Rather, the point is that use-rights are property doctrines, and thus evidence for the proposition that trademark is validly defined in the law as a property doctrine is that it has conceptual similarities to other use-right property doctrines, just as evidence that dogs and platypuses are both animals is that they share some similarities as “animals” (e.g., they have organs, consume food, produce waste product, etc.).

Although trademark law shares conceptual similarities in its doctrinal requirements with all other use-right property doctrines, in order to avoid becoming a lengthy treatise on trademark law writ large, this Article compares only some of these similarities between trademark and one other type of use-right property right interest: an easement appurtenant.

An easement appurtenant—a use-right derived from and attached to a dominant estate that permits use of another servient estate¹⁰⁷—is long recognized in the law as a self-standing property right. Property scholars easily acknowledge this as legal fact: “Easements have always been regarded as a type of property right, even though they convey only delimited use rights.”¹⁰⁸ No one denies that easements are property rights (or at least, almost no one¹⁰⁹), and, *mutatis mutandis*, if easements are property,

¹⁰⁴ THOMAS W. MERRILL & HENRY E. SMITH, *PROPERTY: PRINCIPLES AND POLICIES* 325 (2d. ed. 2012) (“A riparian owner is one whose land abuts the watercourse, and riparian water rights are appurtenant to the land—the rights to the land and the right to use the water from the surface stream form a package that cannot be split up.”); see also Mossoff, *supra* note 46, at 333–35 (discussing the conceptual and doctrinal similarities between riparian and patent rights).

¹⁰⁵ See RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 1.2(1) (2000) (defining an easement as “a nonpossessory right to enter and use land . . . [that] obligates the possessor [of the servient estate] not to interfere with the uses authorized by the easement”).

¹⁰⁶ As with all property interests, the nature of the legal doctrines vary depending upon the differences in the nature of the subject matter of the property interest; whether it is title in chattels or land, a usufruct in a river, a right of way over land or water, a signifier used by a commercial enterprise, or even merely a right to engage in commercial use of land (the “profit” secured at common law). See, e.g., EMORY WASHBURN, *A TREATISE ON THE AMERICAN LAW OF EASEMENTS AND SERVITUDES* 3–4 (2d ed. 1867) (distinguishing an easement from a profit).

¹⁰⁷ RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 1.2(1) (2000).

¹⁰⁸ MERRILL & SMITH, *supra* note 104, at 986. This is a legal fact that has existed since at least the nineteenth-century. See, e.g., *Fitch v. Johnson*, 104 Ill. 111, 121 (1882) (acknowledging that “by the decided weight of authority the doctrine that covenants run with incorporeal as well as corporeal hereditaments is fully established” and thus an easement is always included “with the estate conveyed”).

¹⁰⁹ See MERRILL & SMITH, *supra* note 104, at 983 (“Easements have always been regarded as a type of property right, the exact significance of this appellation (beyond the understanding that easements run with the land) being somewhat unclear.”). This is similar to Justice Holmes’ embrace of the right to exclude as the essential core of property. See generally HOLMES, *supra* note 101. Merrill and Smith’s earlier scholarship embraced this “exclusion conception” of property. See, e.g., Henry E. Smith, *Property*

then trademarks are property as well. In fact, easements evolved as property rights at the same time as trademarks—in the nineteenth-century.¹¹⁰ This may have been an historical accident, but it is also an intriguing coincidence given the dominance in the nineteenth century of Lockean property theory and its central focus on use-rights and productive labor as the essential conceptual and normative features of property rights.¹¹¹

The conceptual similarities between a trademark and an easement appurtenant are striking, especially given the conventional wisdom today that trademarks are not property rights. As noted, it is standard black-letter law that an easement comprises only a use-right: it is “a nonpossessory right to enter and use land . . . and obligates the possessor [of the land] not to interfere with the uses authorized by the easement.”¹¹² In fact, given that an easement appurtenant is a nonpossessory right, it has long been identified by courts as an “incorporeal right”¹¹³—the term used by courts at common law to refer to non-possessory property rights such as use and disposal (confirming that there was a nascent idea of “intellectual property” long before this term came into vogue in the nineteenth century).¹¹⁴

and Property Rules, 79 N.Y.U. L. REV. 1719, 1728 (2004) (“Property gives the right to exclude from a ‘thing,’ good against everyone else.”); Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 754 (1998) (“[P]roperty means the right to exclude others from valued resources, no more and no less.”). Thus, like the effect this had on Justice Holmes in rejecting trademarks as property rights, this has led Merrill and Smith to question whether other use-right doctrines are properly defined as property rights, such as easements. See HOLMES, *supra* note 101. Notably, Smith has since moved away from this “exclusion conception” of property, but Merrill has not. See Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1700–13 (2012) (defending a “modular theory of property”).

¹¹⁰ See JESSE DUKEMINIER ET AL., PROPERTY 764 (9th ed. 2018).

¹¹¹ See *supra* notes 67–77 and accompanying text.

¹¹² RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 1.2(1) (2000); see also BARLOW BURKE, ANN M. BURKHART & R.H. HELMHOLZ, FUNDAMENTALS OF PROPERTY LAW 595 (3d ed. 2010) (“An easement is a nonpossessory interest in the land of another person or legal entity.”); JOSEPH WILLIAM SINGER, PROPERTY 199 (5th ed. 2017) (“An easement is a use less than full possession or occupation. Generally, easements encompass only . . . the right to use the property for specific purposes.”).

¹¹³ LEONARD A. JONES, A TREATISE ON THE LAW OF EASEMENTS IN CONTINUATION OF THE AUTHOR’S TREATISE ON THE LAW OF REAL PROPERTY 16–17 (1898) (“Only incorporeal rights pass as appurtenant to land or under the description of ‘appurtenances.’ Land cannot pass as appurtenant, nor can the actual and exclusive possession of land pass as appurtenant, for such possession does not differ in effect from a title in fee.”); *id.* at 11 (“An easement is not a right to the soil of the land or to any corporeal interest in it.”); see also *Tinicum Fishing Co. v. Carter*, 61 Pa. 21, 29 (Pa. 1869) (referring to “an incorporeal easement on the land of the riparian owner” as one type of “incorporeal hereditaments”); EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 121b–122a (London, W. Clarke & Sons 1817) (1628) (explaining that “incorporeall [sic]” interests are necessarily “appurtenant” to corporeal interests); WASHBURN *supra* note 106, at 37–38 (identifying an easement appurtenant as “an incorporeal hereditament”).

¹¹⁴ See FREDERICK POLLOCK & ROBERT SAMUEL WRIGHT, AN ESSAY ON POSSESSION IN THE COMMON LAW 54 (1888) (“With regard to incorporeal hereditaments, such as a reversion, a remainder, an advowson, the established theory of our authorities is that, although one may have seisin of them by receiving the rent and services, or presenting a clerk to the church, they are not the subjects of livery of seisin; they lie in grant, that is, they can be alienated only by deed.”). The first use of “intellectual property” in the historical legal record is in *Davoll v. Brown*, 7 F. Cas. 197, 199 (C.C.D. Mass. 1845). See Adam Mossoff, *Patents as Constitutional Private Property: The Historical Protection of Patents Under*

Moreover, since an easement appurtenant secures only a use-right and not the complete set of use, possession, and enjoyment rights secured in a fee simple, it is not fully exclusive like a title in fee simple in a parcel of land.¹¹⁵ The easement owner cannot deny access to the land by the owner of the estate over which the easement exists (the “servient estate”).¹¹⁶ The owner of the servient estate still has the full and equal rights of possession, use, and disposal of the servient estate, as long as her use of the portion of the land encumbered by the easement does not conflict with the equal use-right of the easement owner.¹¹⁷ For example, the easement owner cannot sue for trespass if the servient estate owner walks across the easement when it is not being used by the easement owner, even if this physical access by the servient estate owner is unauthorized. But if the servient estate owner directly interferes with the access and use of the easement by its owner, then the easement owner can sue to secure the domain of exclusive use comprising the easement appurtenant.¹¹⁸

To understand how and why nineteenth-century courts first began to secure trademarks as property rights *appurtenant* to the goodwill created by a commercial enterprise, it is necessary to first understand the conceptual point that a use-right can be secured as a property right. Failing to understand this key conceptual point is what led Justice Holmes, Felix Cohen, and later jurists and scholars to misunderstand the statements in nineteenth-century court opinions that there is no “abstract right in a trade-mark.”¹¹⁹ This was not a denial of the legal status of a trademark as a property right; rather, courts and commentators were being conceptually precise in identifying the exact nature of this property right. It is not a possessory estate like a fee simple, but rather a use-right secured to its owner by reference to the goodwill created and sustained by a commercial enterprise.¹²⁰ Thus, by logical necessity, a trademark

the Takings Clause, 87 B.U. L. REV. 689, 719 n.160 (2007) (discussing how the *Davoll* case is the first use of the phrase “intellectual property”).

¹¹⁵ WASHBURN, *supra* note 106, at 43 (stating that an easement “does not give the grantee a right to enjoy the estate itself by exclusive or permanent occupation”).

¹¹⁶ *See supra* note 105 and accompanying text (explaining that the estate owner cannot interfere with the servient estate).

¹¹⁷ *See* WASHBURN, *supra* note 106, at 292 (“So the owner of the soil of a way, whether private or public, may make any and all uses to which the land can be applied, and all profits which can be derived from it consistently with the enjoyment of the easement.”).

¹¹⁸ *See id.* at 662 (“Any one in possession of the premises to which an easement belongs may have an action for an obstruction or disturbance of enjoyment of the same.”). Conversely, expanding or moving an easement is a trespass on the servient estate, because it infringes the underlying possessory and use rights in that estate. *See, e.g.,* Raven Red Ash Coal Co. v. Ball, 39 S.E. 2d 231, 233 (Va. 1946) (stating that it is settled doctrine that “every use of an easement not necessarily included in the grant is a trespass to realty”); *Brown v. Voss*, 715 P.2d 514, 518 (Wash. 1986) (Dore, J., dissenting) (“Misuse of an easement is a trespass.”).

¹¹⁹ *Avery & Sons v. Meikle & Co.*, 81 Ky. 73, 86 (Ky. 1883).

¹²⁰ *See, e.g.,* *Derringer v. Plate*, 29 Cal. 292, 294–95 (Cal. 1865) (“His right to the trade mark accrues to him from its adoption and use for the purpose of designating the particular goods he manufactures or sells, and although it has no value except when so employed, and indeed has no separate abstract existence, but is appurtenant to the goods designated, yet the trade mark is property, and the owner's right of property in it is as complete as that which he possesses in the goods to which he attaches it, and the law protects him in the enjoyment of the one as fully as of the other.”); *UPTON, supra* note 18, at 22 (“[T]he exclusive

exists only “appurtenant” to the property in the valued asset (goodwill).¹²¹ In the 1930s, one court explicitly recognized this conceptual analog between trademarks and easements appurtenant given their shared use-right content: “[T]he owner of a trade-mark . . . cannot have a trade-mark save in connection with his own trade. *To borrow the language of easements, there can be no trade-mark in gross, or except as appurtenant to the business of the owner of the mark.*”¹²²

Today, some courts make this important conceptual identification—a trademark is a use-right property interest that is appurtenant to another larger property right (goodwill)—although it is typically stated in ways that reveal an underlying confusion about use-right property interests. For example, one federal court stated in a 1990 trademark case:

Although trademarks are often referred to as a form of property, or more specifically as “intellectual property,” we recently reaffirmed that “[t]here is no such thing as property in a trade-mark except as a *right appurtenant* to an established business or trade in connection with which the mark is employed.”¹²³

But there is no need for the qualifying “although” at the start of the sentence; as this Part has shown, courts have long recognized that a legal interest defined as a use-right appurtenant to another property right is to classify this legal interest as a property right. As the Supreme Court noted in 1883 without this qualification: “the exclusive right to use a trade-mark with respect to a vendible commodity is rightly called property.”¹²⁴ In sum, identifying a trademark as a use-right that is logically derived from and necessarily attached to a commercial enterprise’s goodwill is similar to identifying a right of way over a parcel of land as a use-right that is logically derived from and necessarily attached to an appurtenant parcel of land. In both cases, the use-right is a property right.

Modern commentators have misunderstood this key conceptual insight, which is a necessary predicate to assessing the nature and justification of trademark law as securing a use-right appurtenant to a broader property interest. For example, in *The Normative Foundations of Trademark Law*, McKenna argues that trademarks are not property rights because, in part, early courts identified goodwill as the property interest at stake in trademark cases.¹²⁵ McKenna states that this “demonstrate[s] that courts did not view trademarks as separable from a producer’s underlying business,” and thus the real legal interest secured by trademark law is the business relationship between a commercial enterprise and its customers, and not in the signifier itself.¹²⁶

right to the trade mark, can exist in him only, who, in some form, and to some extent, possesses an exclusive right in the property to which it is appended.”).

¹²¹ See sources cited *supra* note 128.

¹²² *Englander v. McKesson-Roeber-Kuebler Co.*, 185 A. 917, 919 (N.J. Ch. 1936) (emphasis added).

¹²³ *PaperCutter Inc. v. Fay’s Drug Co.*, 900 F.2d 558, 561 (2d Cir. 1990) (quoting *Pirone v. MacMillan, Inc.*, 894 F.2d 579, 581 (2d Cir. 1990) (quoting *United Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90, 97 (1918))) (emphasis added).

¹²⁴ *Manhattan Medicine Co. v. Wood.*, 108 U.S. 218, 224 (1883).

¹²⁵ See McKenna, *supra* note 2, at 1884.

¹²⁶ *Id.*

This is conceptually incorrect, because there are two legal property interests at work in trademark law—goodwill and the use-right in the trademark that is appurtenant to the goodwill. In fact, if a property right must be “separable” in order to be protected as a property right under the law, then this would mean that easements appurtenant, riparian interests, and other associated use-right doctrines are not property rights, because they are not separable property interests. This conclusion contradicts longstanding and undisputed legal doctrine that says these are property rights, just as a trademark is a property right as well.

It bears emphasizing again that comparing a trademark and an easement appurtenant only highlights the shared conceptual and doctrinal features of these respective use-right property regimes. This comparison is not an identity proposition; as property rights, trademarks are still different in subject matter than easements appurtenant, just as dogs and platypuses are biologically classified as animals but are nonetheless different in their natures. Given the differences in subject matter of the property rights—trademarks refer to goodwill in the use of signifiers in the marketplace and easements are uses that benefit a neighboring estate in land—there are important conceptual differences between these property rights as well. The most obvious difference, of course, is that an easement appurtenant requires a separate estate (the servient tenement) in which the use-right from the dominant tenement exists as a right of way.¹²⁷ Obviously, a commercial enterprise’s use of a signifier as representative of its goodwill in the marketplace does not occur in an equivalent of a servient tenement. But this is of no import for the conceptual thesis here. The comparison simply makes clear the conceptual insight that both property rights—trademarks and easements appurtenant—comprise a use-right that derives from another, larger property interest, and without which this use-right cannot exist.

In sum, modern commentators and jurists have failed to understand that trademarks are property rights because they have not recognized that trademarks secure only a *use-right* that is appurtenant to the goodwill of a commercial enterprise.¹²⁸ This is a necessary *conceptual insight* for understanding how nineteenth-century courts and commentators then applied in early trademark law the normative principle that the law should secure the fruits of productive labors. Just as today, the conceptual definition of property shared among legal elites was usually left as an unstated premise in doctrinal and policy analyses.¹²⁹ For example, Francis

¹²⁷ See *Van Sandt v. Royster*, 83 P.2d 698, 700 (Kan. 1938) (“As an easement is an interest which a person has in land in the possession of another, it necessarily follows that an owner cannot have an easement in his own land.”).

¹²⁸ See, e.g., César Ramirez-Montes, *A Re-Examination of the Original Foundations of Anglo-American Trademark Law*, 14 MARQ. INTELL. PROP. L. REV. 91, 130 (2010) (“[T]here was very little analysis of the foundation of this property right, other than references to those English decisions that supported the property theory and the courts’ own mantras that the defendant was attempting to derive an economic advantage from the claimant’s toil or business goodwill. Essentially, courts treated traders as property owners and targeted infringing uses that interfered with the enjoyment of their property by stealing their trade.”).

¹²⁹ When a court explicitly addresses these conceptual assumptions in an opinion, the case typically becomes a “chestnut” that becomes a mainstay of casebooks and legal scholarship. See, e.g.,

Upton begins the very first treatise on trademark law published in 1860 by invoking the normative principle in Lockean property theory: “A trade mark . . . enable[s] him to secure such profits as result from a reputation for superior skill, industry or enterprise.”¹³⁰ Today, scholars react to statements like this by Upton and other nineteenth-century commentators and courts as if these are merely invocations of the “ghost in the machine”¹³¹ in trademark law—it is nonsensical, rhetorical prattle that provides little real-world meaning or guidance in the law.¹³² But they reach this conclusion only because they miss the key premise in Lockean property theory that was assumed by Upton and most other legal professionals in the nineteenth-century: the *conceptual* definition of a trademark as securing a *use-right*, which is necessary to understanding its classification and protection as a property right.

IV. TRADEMARK DOCTRINES ARE USE-RIGHT PROPERTY REGIMES

Although many legal scholars focus primarily on litigation and on the doctrines that provide remedies in enforcing intellectual property rights against infringers, such as injunctions, the primary doctrinal implications in defining trademarks as property rights is in the legal rules defining their creation and commercialization in the marketplace.¹³³ It is understandable why scholars focus so heavily on litigation: court opinions are the basic material of legal research and writing, as well as the content of law school casebooks. Lawsuits are also the public face of legal doctrines, because few people have access to the licenses and commercial contracts comprising transactions of valuable intellectual property assets. These intellectual property transactions are significant, contributing more than \$6 trillion to the United States’ Gross Domestic Product in 2014.¹³⁴ With their myopic focus on litigation, though, realist-influenced legal scholars like Bone and others argue that Lockean property

Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154, 159–60 (Wis. 1997) (discussing how property secures “the right to exclude”).

¹³⁰ UPTON, *supra* note 18, at 9.

¹³¹ The twentieth-century philosopher Gilbert Ryle first coined the phrase “ghost in the machine” in critiquing what Ryle believed was the inherent absurdity in Rene Descartes’ dualist metaphysics that asserted that the mind is a distinct thing from the body. GILBERT RYLE, *THE CONCEPT OF MIND* 15–16 (1949).

¹³² For a discussion of modern criticisms of nineteenth-century trademark doctrine see *supra* notes 3–7 and accompanying text.

¹³³ The fountainhead of modern Anglo-American property law is securing the right of alienation. This is traced to the Statute of Quia Emptores (1290), which is recognized as having “established a principle of free alienation of land.” DUKEMINIER ET AL., *supra* note 110, at 254. This undermined feudalism, because “the relationship between tenant and lord was [now] basically an economic one.” *Id.* As these first steps in its historical development make clear, the modern legal concept of property is essentially a right to use and dispose of a valued asset.

¹³⁴ ECON. & STAT. ADMIN. & USPTO, *INTELLECTUAL PROPERTY AND THE U.S. ECONOMY: 2016 UPDATE* ii (2016), <https://www.uspto.gov/sites/default/files/documents/IPandtheUSEconomySept2016.pdf> [<https://perma.cc/4CV7-7KUG>] (reporting that “IP-intensive industries accounted for \$6.6 trillion in value added in 2014” to the U.S. Gross Domestic Product).

theory is highly abstract and indeterminate,¹³⁵ but the truth is that when a court or legislature secures a legal interest as a property right, this is most salient in the commercialization doctrines that are essential to securing the rights of use and alienation.¹³⁶

This is not to say that remedies in enforcing a legal right are unimportant,¹³⁷ but there is much that follows from the conceptualization and justification of trademarks as property rights beyond merely the conclusion that a trademark-owner receives “property rule” protection as a remedy for infringement (i.e., an injunction).¹³⁸ As a result of the lack of scholarly interest in understanding how trademarks function in legal and commercial practice as property rights, there is too little scholarly work that identifies the role of property theory in structuring the trademark doctrines that define and limit the creation and commercialization of these legal rights.

This confirms the disjunction between theory and doctrine in trademark law today. In court opinions resolving disputes about trademark rights, property concepts are ubiquitous.¹³⁹ So is property rhetoric.¹⁴⁰ Another obvious doctrinal example of this legal fact is that courts have long secured to trademark owners the right of disposition (alienation).¹⁴¹ This is a fundamental right in Anglo-American property law, and it was well-established doctrine by the nineteenth century that property is alienable—the time trademarks came into their own as property rights.¹⁴² The

¹³⁵ See, e.g., Bone, *supra* note 23, at 567–69; Lemley & McKenna, *supra* note 35, at 181–84.

¹³⁶ See, e.g., Adam Mossoff, *Patents as Commercial Assets in Political, Legal, and Social Context*, 51 TULSA L. REV. 453, 453–65 (2016) (reviewing CHRISTOPHER BEAUCHAMP, *INVENTED BY LAW: ALEXANDER GRAHAM BELL AND THE PATENT THAT CHANGED AMERICA* (2015)) (surveying innovative licensing and commercial practices by nineteenth-century patent owners); Adam Mossoff, *Patent Licensing and Secondary Markets in the Nineteenth Century*, 22 GEO. MASON L. REV. 959 (2015) (same); Mossoff, *supra* note 46, at 349–60 (explaining how assignment and license doctrines in patent law were created by nineteenth-century courts under influence of Lockean property theory’s emphasis on use-rights).

¹³⁷ See generally Claeys, *supra* note 48 (discussing conceptual relationship between IP rights and infringement remedies).

¹³⁸ See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

¹³⁹ See, e.g., *Aycock Eng’g, Inc. v. Airflite, Inc.*, 560 F.3d 1350, 1358–61 (Fed. Cir. 2009) (applying property concept of “open and notorious” in assessing whether use requirement in trademark law was met in this case); *Brookfield Commc’ns, Inc. v. West Coast Entm’t Corp.*, 174 F.3d 1036, 1048–49 (9th Cir. 1999) (discussing property concept of “tacking” and applying it to sequential trademark users); *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1290 (9th Cir. 1992) (discussing and applying property concept of “assignment” to a settlement agreement that required a conveyance of a trademark).

¹⁴⁰ See, e.g., *WarnerVision Entm’t Inc. v. Empire of Carolina, Inc.*, 101 F.3d 259, 262 (2d Cir. 1996) (“[V]ulnerability to pirates is precisely what the [Intent To Use] enactments were designed to eliminate.”); *SK&F Co. v. Premo Pharm. Labs., Inc.*, 625 F.2d 1055, 1067 (3d Cir. 1980) (referring to trademark infringement as “piracy”); *Avery & Sons v. Meikle & Co.*, 81 Ky. 73, 87 (Ky. 1883) (referring to trademark infringement as “piracy”).

¹⁴¹ See, e.g., UPTON, *supra* note 18, at 26 (noting that case law clearly established that “a trade mark may be made the subject of sale and transfer, so as to confer upon the purchaser the rights of the vendor—yet, it must not be supposed that this can be done, apart from a transfer of the right to manufacture or sell the particular merchandise, which it had been used, by the vendor, to designate”).

¹⁴² See *supra* note 133 and accompanying text (noting how legally securing the right of alienation was the progenitor of the entire modern Anglo-American estate system).

conventional wisdom today that trademarks are merely regulatory entitlements serving competition policy or consumer welfare is understandably perplexing when one looks at these myriad property concepts and rhetoric long employed by judges and legislators in innumerable trademark doctrines. This Part thus explains how the structure of some trademark doctrines—both in their protections and limitations—evidence that they are use-right property regimes.

A. *The Prohibition on Creating a Trademark in Gross*

For all use-rights that are necessarily appurtenant to an estate, it is longstanding black-letter law that these usufructuary interests cannot be converted into independent rights divorced from the larger estate in which they inhere. One well-known example in property law is the legal rule prohibiting the owner of an easement appurtenant transmogrifying it into an easement that benefits oneself personally—an “easement in gross.”¹⁴³ Courts and commentators have long recognized that an easement appurtenant benefits a specific estate in land, and thus it “can exist only as it is appurtenant to land. It cannot exist unconnected with the land, to the enjoyment and occupation of which it is incident.”¹⁴⁴ Some commentators refer to an easement appurtenant as a “parasite,” a vivid metaphor for something that cannot live without another entity on which the parasite sustains itself.¹⁴⁵ As a use-right derived from and serving a fee simple, an easement appurtenant can never be transferred or converted into an easement in gross, an independently existing use-right that benefits someone personally.¹⁴⁶ An easement appurtenant is and always shall be connected to the estate from which it derives its existence.¹⁴⁷

As a use-right that is appurtenant to a larger estate—a trademark is necessarily connected to the goodwill created and sustained by a commercial enterprise—a trademark is also a “parasite” that cannot be separated from its host. Justice Sutherland stated this truism in trademark law in 1926: “There is no property in a

¹⁴³ *Moore v. Crose*, 43 Ind. 30, 34 (Ind. 1873) (“A way appendant cannot be turned into one in gross, because it is inseparably united to the land to which it is incident.”); see also *JONES*, *supra* note 113, at 22 (“An appurtenant easement cannot be conveyed by the party entitled to it separate from the land to which it is appurtenant. It can be conveyed only by a conveyance of such land. It inheres in the land and cannot exist separate from it. It cannot be converted into an easement in gross.”).

¹⁴⁴ *JONES*, *supra* note 113, at 4; see also *WASHBURN*, *supra* note 106, at 33 (“[I]f his right to such way result from his ownership of a parcel of land to which it is appendant, he cannot by grant separate the easement from the principal estate to which it is appendant, so as to turn it into a way in gross, in the hands of his grantee.”).

¹⁴⁵ JOHN E. CRIBBET & CORWIN W. JOHNSON, *PRINCIPLES OF THE LAW OF PROPERTY* 375 (3d ed. 1989) (“The easement appurtenant is a parasite attached to its host land, the dominant estate, and it has no life separate from that estate.”).

¹⁴⁶ See *Moore*, 43 Ind. at 34 (“[A] way in gross cannot be granted over to another, because of its being attached to the person.”).

¹⁴⁷ See *Harris v. Elliott*, 35 U.S. 25, 54 (1836) (referring to an easement as “an incident to the principal object . . . the fee of one piece of land”); *Pickerell v. Carson*, 8 Iowa 544, 550 (Iowa 1859) (“Appurtenances signifies something belonging to another thing as principal, and which passes as incident to the principal thing.”).

trade-mark apart from the business or trade in connection with which it is employed.”¹⁴⁸ Courts have frequently stated this conceptual and doctrinal point reaching back to the nineteenth-century.¹⁴⁹

At the birth of modern trademark law in the nineteenth-century, commentators explicitly recognized this basic doctrinal requirement of a use-right derived from and conceptually linked to another larger property interest. As Francis Upton explained in his 1860 treatise:

[A] trade mark may be made the subject of sale and transfer, so as to confer upon the purchaser the rights of the vendor—yet, it must not be supposed that this can be done, apart from a transfer of the right to manufacture or sell the particular merchandise, which it had been used, by the vendor, to designate.¹⁵⁰

Given that both a trademark and an easement appurtenant share this key conceptual characteristic as use-right property interests, the legal rule prohibiting the separation of these use-rights from their underlying estates share the exact same terminology. To convey a trademark without its underlying goodwill is classified by courts as an attempt to create a “trademark in gross.”¹⁵¹ As with easements appurtenant, it is a longstanding legal rule that “[a]ssignments of trademarks in gross are traditionally invalid.”¹⁵² The reason is straightforward: “There is no such thing as property in a trade-mark except as a *right appurtenant* to an established business or trade in connection with which the mark is employed.”¹⁵³ Since “a trade-mark is not ‘a right in gross or at large, like a statutory copyright or a patent for an invention,’” if its owner attempts to convey a trademark to a third party without the accompanying goodwill, the conveyance is void.¹⁵⁴

¹⁴⁸ *Am. Steel Foundries v. Robertson*, 269 U.S. 372, 380 (1926).

¹⁴⁹ *See, e.g., Del. & Hudson Canal Co. v. Clark*, 80 U.S. 311, 323–24 (1871) (noting that “the owner of an original trade-mark has an undoubted right to be protected in the exclusive use of all the marks, forms, forms [sic], or symbols, that were appropriated as designating the true origin or ownership of the article or fabric to which they are affixed; but he has no right to the exclusive use of any words, letters, figures, or symbols, which have no relation to the origin or ownership of the goods” (quoting *Amoskeag Mfg. Co. v. Spear*, 2 Sand. 599 (N.Y. Super. Ct.))); *Caigan v. Plibrico Jointless Firebrick Co.*, 65 F.2d 849, 850 (1st Cir. 1933) (“There is no such thing as property in a trade-mark except as a right appurtenant to an established business or trade in connection with which the mark is employed.” (quoting *United Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90, 97 (1918))); *Avery & Sons v. Meikle & Co.*, 81 Ky. 73, 86 (Ky. 1883) (“There is no abstract right in a trade-mark. It is property only when appropriated *and* used to indicate the origin or ownership of an article or goods.”); *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 414 (1916); *PaperCutter Inc. v. Fay’s Drug Co.*, 900 F.2d 558, 561 (2d Cir. 1990) (identifying twentieth-century courts making this point).

¹⁵⁰ UPTON, *supra* note 18, at 26.

¹⁵¹ *See* 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 18.3 (4th ed. 1992) (“A sale of a trademark divorced from its good will is characterized as an ‘assignment in gross.’”).

¹⁵² *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1289 (9th Cir. 1992).

¹⁵³ *Caigan*, 65 F.2d at 850 (1st Cir. 1933) (emphasis added) (quoting *United Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90, 97 (1918)).

¹⁵⁴ *Id.* (quoting *United Drug*, 248 U.S. at 97).

It is unsurprising that the legal rule prohibiting separating a trademark from its underlying goodwill is linguistically framed in the exact same terms as the same legal rule for easements appurtenant. The reason is that both legal rights constitute the same conceptual content: a use-right inhering in a larger property right (an estate or goodwill). As a federal court explained in 1942 in a case involving the Coca-Cola Company's claim to the "Coke" brand: "[T]rademarks and the right to their exclusive use are property rights, in the sense that the right to one's trade, and the goodwill that follows from it, free from unwarranted interference from others is a property right."¹⁵⁵ Accordingly, a trademark cannot be converted into a trademark in gross, just as an easement appurtenant cannot be converted into an easement in gross. If a trademark is transferred without its goodwill, it is void, just as a parasite dies if separated from its host.

Given the conventional wisdom today that trademarks are an economic regulatory entitlement that serves consumer welfare interests, commentators argue that it is "sterile formalism" to require trademarks be assigned with goodwill.¹⁵⁶ But this charge of formalism is simply evidence of the conceptual blinders imposed by the conventional wisdom, supported by the widely held assumption that the legal realist's critique of Lockean property theory was correct.¹⁵⁷ Recognizing that a trademark is necessarily attached as a property interest to another property interest from which it is derived is no more "sterile formalism" than recognizing that an easement appurtenant is necessarily attached to the estate from which it is derived.¹⁵⁸ As a New York trial court held in 1876 in rejecting an attempt to convey a trademark in gross: "[T]here is no such thing as a trade mark in 'gross,' to use that term by analogy. It must be 'appendant' [sic] of some particular business in which it is actually used upon or in regard to specific articles."¹⁵⁹ To accuse courts of "sterile formalism" in enforcing this rule in trademark law is tantamount to accusing biologists of engaging in "sterile formalism" when they say a parasite dies if separated from its host. The legal rule that use-rights must be legally attached to their larger property interests is simply to acknowledge that to a divorce a use-right from its larger property interest denies this use-right its real-world content and justification as a legal right.¹⁶⁰

B. The Use Requirement in Creating and Sustaining a Trademark

It is a key feature of use-right doctrines that they are legally defined by someone's labors in using something in the world. Under modern federal law, trademark

¹⁵⁵ *Coca-Cola Co. v. Busch*, 44 F. Supp. 405, 407 (E.D. Pa. 1942).

¹⁵⁶ Calboli, *supra* note 6, at 832 (quoting MCCARTHY *supra* note 151, § 18.10).

¹⁵⁷ *See, e.g., id.* at 803 (asserting that "the idea of goodwill-as-property was attacked and debunked by legal realists").

¹⁵⁸ *See also, id.* at 803 & n.174 (quoting Cohen, *supra* note 24, at 815).

¹⁵⁹ *Weston v. Ketcham*, 51 How. Pr. 455, 456 (N.Y. Super. Ct. 1876).

¹⁶⁰ *See* MCCARTHY, *supra* note 151, § 18.3 ("If one obtains a trademark through an assignment in gross, divorced from the good will of the assignor, the assignee obtains the symbol, but not the reality. . . . The continuity of the things symbolized by the mark is broken.").

protection is predicated on the “use in commerce” of a mark, as is liability for an unauthorized use of a trademark.¹⁶¹ But this federal legal requirement serves several different functions, such as justifying the protections provided by a valid federal statute enacted under the Commerce Clause of the Constitution.¹⁶² Historically, trademarks arose at common law.¹⁶³ Then, just as under modern common law trademark, courts recognized and secured a commercial enterprise’s mark “only through actual prior use in commerce.”¹⁶⁴ This primary requirement that a commercial enterprise use a mark in reference to goods or services sold in the marketplace served both a conceptual and normative function in the definition and protection of a trademark as a use-right property interest.

Conceptually, the defining characteristic of a trademark is “use”—it is, in classical parlance, a *usufructuary interest*, or, as we are more wont to say today, it is a *use-right* property interest. A trademark is derived from and has meaning only by reference to its underlying estate—goodwill. Since goodwill itself is a property right arising from the productive, value-creating labors of a commercial enterprise in selling wares and services in the marketplace,¹⁶⁵ the use-right derived from this property right logically references these commercial activities that give it both its meaning and its life (thus the “parasite” metaphor for trademarks discussed earlier¹⁶⁶). As the Supreme Court explained in 1916 in a prosaic summary of nineteenth-century trademark law: “Courts afford redress or relief upon the ground that a party has a valuable interest in the good will of his trade or business, and in the trademarks adopted to maintain and extend it.”¹⁶⁷

Given that a trademark is defined at its core as only a use-right, modern courts and commentators find trademarks to be an odd duck as a property right. Esteemed modern jurists, like Justice Oliver Wendell Holmes, Jr. and Judge Richard A. Posner, conclude from this legal fact that trademark is not even a property right.¹⁶⁸ Many

¹⁶¹ 15 U.S.C. § 1127 (2012) (identifying use as one of the requirements for legally securing a mark); 15 U.S.C. §§ 1114, 1125 (2012) (identifying “use in commerce” as one of the requirements for liability in an unauthorized use of a mark).

¹⁶² See, e.g., *United We Stand Am., Inc. v. United We Stand, Am., N.Y., Inc.*, 128 F.3d 86, 92–93 (2d Cir. 1997) (explaining that the Lanham Act’s prohibition against unauthorized use “in commerce” of a mark is coterminous with “commerce” in the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3).

¹⁶³ See *The Trade-Mark Cases*, 100 U.S. 82, 94 (1879) (“At common law the exclusive right to [a trademark] grows out of its *use*, and not its mere adoption.”).

¹⁶⁴ *Tally-Ho, Inc. v. Coast Community College Dist.*, 889 F.2d 1018, 1022 (11th Cir. 1989); see also *Lawrence Mfg. Co. v. Tenn. Mfg. Co.*, 138 U.S. 537, 548–49 (1891) (“The jurisdiction to restrain the use of a trade-mark rests upon the ground of the plaintiff’s property in it, and of the defendant’s unlawful use thereof.”).

¹⁶⁵ See *supra* notes 58–60 and accompanying text (describing the legal definition of “goodwill”).

¹⁶⁶ See *supra* note 145 and accompanying text; cf. *Washburn v. Nat’l Wall-Paper Co.*, 81 F. 17, 20 (2d Cir. 1897) (Goodwill is “created . . . by years of hard work and fair business dealing If good will be a ‘parasite,’ it is a ‘parasite’ of the *business* from which it sprung, not of the mere machinery by which that business was conducted.”) (emphases added).

¹⁶⁷ *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 412 (1916).

¹⁶⁸ See cases cited *supra* note 3 (quoting from trademark decisions by Justice Holmes and Judge Posner).

modern scholars argue that it is a regulatory entitlement advancing “industrial policy”¹⁶⁹ or predicated on a “social welfare calculus.”¹⁷⁰

Others do not go so far in their skepticism of the property status of trademark rights but they still find trademark to be very strange. In one particularly illustrative example, a federal appellate court in 1990 asserted that a “trademark is a very unique type of property.”¹⁷¹ Its support for this conceptual claim was a quote from the Supreme Court’s 1918 decision in *United Drug Co. v. Theodore Rectanus Co.* that “[t]here is no such thing as property in a trade-mark except as a right appurtenant to an established business or trade in connection with which the mark is employed.”¹⁷² But this is merely a description of hoary trademark law and it is an entirely uncontroversial statement of the nature of a use-right property interest. It is certainly true that a trademark is not the same type of property interest as a patent,¹⁷³ nor is it the same as a fee simple in land, a right to a chattel, like an animal or barrels, a leasehold, a future interest, a right to air, or a right in a cave, to name just a few of the many different types of property.¹⁷⁴ Each is unique from the other, but as a use-right property interest, a trademark is no more “unique” than the easements appurtenant or riparian interests that law students learn about in their first-year Property courses in law school.¹⁷⁵

Recognizing the conceptual content of a trademark right as a use-right property interest is important, because it explains the distinction long recognized by courts and commentators between the nature of the property right secured at common law in a trademark and the complete title secured to an owner of a patent, a copyright, or a fee simple in land. For example, an owner of a fee simple can permit her land to lie fallow, and this non-action by itself does not abrogate the property right.¹⁷⁶ The same is true for a patent.¹⁷⁷ But a trademark is a use-right property interest; it arises from and is sustained by its use in connection with a commercial enterprise’s

¹⁶⁹ McKenna, *supra* note 3, at 1843, 1916.

¹⁷⁰ Lemley & McKenna, *supra* note 35, at 183–89.

¹⁷¹ Pirone v. MacMillan, Inc., 894 F.2d 579, 581 (2d Cir. 1990).

¹⁷² *United Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90, 97 (1918).

¹⁷³ See *supra* notes 89–90 and accompanying text (quoting case law distinguishing trademarks from patents).

¹⁷⁴ See generally MERRILL & SMITH, *supra* note 104 (explaining all these different types of property).

¹⁷⁵ See, e.g., *id.* at 324–26 (explaining riparian and first appropriation doctrines in water law); DUKEMINIER ET AL., PROPERTY 667–740 (explaining easements).

¹⁷⁶ See generally *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154 (Wis. 1997) (affirming trespass liability and damages award for willful trespass of unused farmland).

¹⁷⁷ *Cont’l Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U.S. 405, 429 (1908) (“[E]xclusion may be said to have been of the very essence of the right conferred by the patent, as it is the privilege of any owner of property to use or not use it, without question of motive.”); *E. Bement & Sons v. Nat’l Harrow Co.*, 186 U.S. 70, 90 (1902) (“If [a patentee] see fit, he may reserve to himself the exclusive use of his invention or discovery. If he will neither use his device nor permit others to use it, he has but suppressed his own. . . . His title is exclusive, and so clearly within the constitutional provisions in respect of private property that he is neither bound to use his discovery himself nor permit others to use it.”) (quoting *Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.*, 77 F. 288, 294–95 (6th Cir. 1896)).

goodwill. Thus, as nineteenth-century courts held, “a trade-mark, *when in use*, is property itself.”¹⁷⁸

Modern courts and commentators, lacking the conceptual premise of Lockean property theory that makes it possible to define property entitlements as usufructuary interests, infer from such statements that trademarks were not real or true property. This is an understandable mistake, because of the theoretical lacuna in their understanding of what makes a trademark a property right. It is also an understandable mistake because some early courts spoke in terms that, read out of context, sound as if they support the modern understanding that trademarks are not true property rights. For example, the Supreme Court stated in 1871 that:

Property in a trade-mark, or rather in the use of a trade-mark or name, has very little analogy to that which exists in copyrights, or in patents for inventions. Words in common use, with some exceptions, may be adopted, if, at the time of their adoption, they were not employed to designate the same, or like articles of production. The office of a trade-mark is to point out distinctively the origin, or ownership of the article to which it is affixed; or, in other words, to give notice who was the producer.¹⁷⁹

If one reads or quotes only the first sentence from this 1871 opinion, then one might be justified in concluding that it has long been the law that trademarks are property rights only by linguistic “analogy.” But the rest of the paragraph makes clear that this is not what the Supreme Court meant: the property in a trademark exists “to give notice who was the producer.”¹⁸⁰ To wit, a trademark is a property right appurtenant to the goodwill created by a commercial enterprise—what one nineteenth-century Kentucky court identified as the trademark owner’s “reputation,” which is the “most valuable of property rights” and which “sound policy” demands securing “the fruits of labor to the laborer” from the “grasp of piracy.”¹⁸¹ Without

¹⁷⁸ *Avery & Sons v. Meikle & Co.*, 81 Ky. 73, 91 (Ky. 1883) (emphasis added); see also *The Trade-Mark Cases*, 100 U.S. 82, 94 (1879) (“At common law the exclusive right to [a trademark] grows out of its *use*, and not its mere adoption.”).

¹⁷⁹ *Del. & Hudson Canal Co. v. Clark*, 80 U.S. 311, 322 (1871); see also *Avery*, 81 Ky. at 86 (“There is no abstract right in a trade-mark. It is property only when appropriated *and* used to indicate the origin or ownership of an article or goods. And its real value consists in the confidence and patronage of the public, secured through its instrumentality in acquainting them with the origin and ownership of an article, which thus gains reputation for its superior qualities. Of this reputation its owner cannot be deprived, without his consent”); *The Congress and Empire Spring Co. v. The High Rock Congress Spring Co.*, 57 Barb. 526, 551 (N.Y. Sup. Ct. 1867) (“Property in trade-marks, *is not property* in the words, letters, marks or symbols as things, or as signs of thought, or as productions of the mind, like that of patent or copyright; but simply, and solely property as a means of designating things—the things thus designated being the production of human skill, or industry, whether of the mind, or the hands, or a combination of both; and this property has no existence apart from the thing designated, or separable from its actual use in accomplishing the present and immediate purpose of its being.”).

¹⁸⁰ *Del. & Hudson Canal Co.*, 80 U.S. at 322.

¹⁸¹ *Avery*, 81 Ky. at 86–87 (“Of this reputation its owner cannot be deprived, without his consent When a workman or manufacturer has, by skill, care, and fidelity, manufactured a good article, it becomes of the utmost importance to him that its origin and ownership should be known, and

this productive labor in commercial activity in the marketplace, there is no reputation to create, and thus no property right in goodwill to which the trademark refers. Since a trademark is logically appurtenant to goodwill, then its ongoing commercial use as a signifier in the sale of products or services is the necessary factual predicate for triggering the protection of the legal doctrine that secures this property interest as a use-right.

* * * *

This Article does not provide a fully comprehensive account of every doctrine in trademark law, as this would require a multi-volume treatise. There are many more trademark doctrines that would benefit from further explication as use-right regimes, which would provide a better understanding of the normative policies built into the doctrine's structural design that justifies and limits the trademark right. But such doctrines require their own full-length treatment. For example, the classic spectrum by which courts classify a mark's distinctiveness,¹⁸² which determines a mark's degree of legal protection against alleged infringers,¹⁸³ mirrors conceptually the differing legal protections afforded to different usufructuary interests. An owner of a fanciful and famous mark receives stronger legal protections than an owner of a more descriptive, less famous mark in the same way that a riparian owner receives more robust legal protections than an owner of an easement appurtenant. There are other trademark doctrines that easily reflect its nature as a use-right, such as courts permitting overlapping, non-interfering uses of the same mark by different commercial enterprises working in different markets¹⁸⁴ or permitting the public to use certain words when it does not interfere with the goodwill associated with this mark in another commercial context.¹⁸⁵ These share by conceptual "analogy" similar

the law points out to him what means and how he may appropriate them to indicate this important fact, and when he adopts and uses them, and his reputation is thereby built up, it is to him the most valuable of property rights. Sound policy, which dictates the protection of the public from imposition, the security of the fruits of labor to the laborer, the encouragement of skillful industry, and, above everything, the inculcation of truth and honor in the conduct of trade and commerce, and the requirement that all the contractual relations of life, natural, abstract, and relative, shall be honestly observed, demands that such a reputation so gained should be free from the grasp of piracy, and its infringement accorded the safest and best remedy for redress known to the courts of equity. And this is the law of both principle and authority.").

¹⁸² See *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9–11 (2d Cir. 1976) (describing the famous spectrum of marks as arbitrary/fanciful, suggestive, descriptive with secondary meaning, descriptive, and generic).

¹⁸³ See *id.* at 11–12 (holding the claimed mark "Safari" as used on certain clothing styles to be generic and thus unprotectable).

¹⁸⁴ See *United Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90, 100 (1918) ("[A trademark right] does not extend to a case where the same trade-mark happens to be employed simultaneously by two manufacturers in different markets separate and remote from each other, so that the mark means one thing in one market, an entirely different thing in another.").

¹⁸⁵ See, e.g., 15 U.S.C. § 1115(b)(4) (2012) (providing a defense to trademark infringement when defendant's use "is a use . . . which is descriptive of and used fairly and in good faith only to describe the goods or services of" the trademark owner); *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26, 29 (1st Cir. 1987) ("Trademark rights do not entitle the owner to quash an unauthorized use of the mark by

doctrines that secure equally overlapping interests in servient estates or the overlapping interests of riparian owners in the same stream. In sum, the conceptual definition of a trademark as a property right deserves further exploration and study throughout the myriad doctrines governing the licensing, abandonment, and infringement of trademarks.

CONCLUSION

This Article makes a modest conceptual claim about the nature of a trademark right, filling a surprising gap in the academic literature as well as clarifying confusion by judges today. It explains why a trademark is a property right: the key conceptual insight is that a trademark is a use-right property interest appurtenant to a commercial enterprise's goodwill. As such, trademark law shares many doctrinal similarities to other use-right property regimes, such as easements appurtenant. This is not merely academic theorizing; recognizing that trademarks are a type of use-right property regime clarifies many of the fundamental and longstanding doctrinal requirements in modern trademark law, such as the longstanding prohibition on creating trademarks in gross. Recovering the property right status of trademarks that has been lost in the modern era sheds important light on what is the precise legal interest protected in a trademark and why this legal interest is limited in ways that other intellectual property rights are not.

another who is communicating ideas or expressing points of view.”); *Anti-Monopoly, Inc. v. Gen. Mills Fun Group*, 611 F.2d 296, 301 (9th Cir.1979) (“It is the source-denoting function which trademark laws protect, and nothing more.”).